**IN THE SUPREME COURT OF FLORIDA**

**CASE NO. SC00-253**

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**JOHN C. MARQUARD,**

**Appellant,**

**v.**

**STATE OF FLORIDA,**

**Appellee.**

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**ON APPEAL FROM THE CIRCUIT COURT**
**OF THE SEVENTH JUDICIAL CIRCUIT,**
**IN AND FOR ST. JOHNS COUNTY, STATE OF FLORIDA**

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# INITIAL BRIEF OF THE APPELLANT

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## PRELIMINARY STATEMENT

This is the appeal of the circuit court's denial of Mr. Marquard's motion for post-conviction relief which was brought pursuant to Fla. R. Crim. P. 3.850. The following symbols designate references to the record in this appeal: 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.

## REQUEST FOR ORAL ARGUMENT

Mr. Marquard has been sentenced to death. The resolution of the issues involved in this action will therefore determine whether he lives or dies. This Court has not hesitated to allow oral argument in other capital cases in a similar procedural posture. A full opportunity to air the issues through oral argument would be more than appropriate in this case, given the seriousness of the claims at issue and the stakes involved. Mr. Marquard, through counsel, accordingly urges that the Court permit oral argument.

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## STATEMENT OF THE CASE AND FACTS

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. (MV9, 1465-66, V11, 1780) On February 5, 1993, the circuit 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 (M 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 trial 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, R509). On May 7, 1999, the State filed its response (V3, R577-585).

On May 12, 1999, the trial court issued an order on Mr. Marquard's amended motion to vacate judgment of conviction and sentence (V3, R585-586). The court granted an evidentiary hearing on Claims one and two, which were ineffective assistance of counsel claims. The court held Claims three, four, five, and eight were procedurally barred (V3, R585, 586). The court denied Claims six and seven (V3, R585, 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, R647-656). 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, R657-660).

The court held an evidentiary hearing on Claims one and two on November 16 and 18, 1999 (M V6 and 7, 1078, 1079,1080; V2 and 3, R1-355).

Mariah Harrelson testified she ran a foster home where John Marquard lived when John was 12 or 13 years old (V6, R12). Mrs. Harrelson's foster home was not

a therapeutic foster home and she had no professional training in therapy (V6, R12). Mrs. Harrelson testified John Marquard was a shy, playful, mild mannered child who didn't like to fight and worked and played well with the other children in the home. John was more of a follower than a leader and was not a bully (V6, R13, 14).

Ms. Harrelson met John's mother on a couple of occasions and noticed no closeness between John and his mother (V6, R14). Mrs. Harrelson testified John's father never visited, so John rode a bicycle about 55 miles one night to find his father. Social Services hoped this event would force John's father to become involved in John's life (V6, R15, 16,18). John Marquard's trial attorneys never contacted Ms. Harrelson, but if they had, Mrs. Harrelson would have testified at his trial, as she did at the evidentiary hearing (V6, R18).

Michael Abshire, the codefendant in this case, testified at the evidentiary hearing that he knew John Marquard well since late 1988 or early 1989 (V6, R21). Abshire and John were roommates in 1990, and from that time, they were pretty much inseparable (V6, R22). They used the drug ephedrine, which is speed and is used as the base for crank or crystal meth, daily (V6, R22, 26). During the week, Abshire and John used beer, ephedrine and marijuana (V6, R22, 24). On the weekends, Abshire and John took LSD, Sinequan, marijuana, and whatever was available (V6, R24). Marquard drank a fifth of Canadian Mist and Abshire drank a fifth of tequila, which

John also drank mixed with beer (V6, R24). They smoked marijuana like cigarettes (V6, R26). They did not sleep during these weekend binges, which lasted from Thursday until Sunday night (V6, R25). John lost his job because he was high every Friday (V6, R28). John and Abshire lost days due to blackouts caused by their routine weekend binges (V6, R28, 29). With the exception of a few intervening months, this alcohol and drug consumption continued from March of 1990, until they arrived in Florida in June of 1991 (V6, R29).

On the day of the murder, John and Abshire looked for jobs (V6, R31). While looking for work, they took ephedrine (V6, R40). After 5 p.m., they drank tequila and beer in the motel room (V6, R32). After dark, Abshire and John went to a bar called Scarlett O'Hara's (V6, R32). There they each drank two long neck beers (V6, R32). Abshire had a date, and he separated from John for about an hour. Abshire does not know what alcohol or drugs John consumed during that time (V6, R32). Abshire's date didn't work out, so he and John went to the Tradewinds bar (V6, R33). There they drank one pint of beer every ten or fifteen minutes until the band quit (V6, R52). They also took ephedrine all night (V6, R33, 34). When they returned to the motel, they might have drank more alcohol and smoked marijuana (V6, R34).

The night of the murder, John drove because he always drove when they drank (V6. R44). Abshire did not pay attention to his driving (V6, R44, 54). While in the

woods, Abshire saw John stab the victim, but he did not see him cut the victim's throat or an actual throat injury (V6, R45). Abshire testified he thought the victim was alive and hurting, so Abshire chopped her neck as hard as he could (V6, R35, 36).

Prior to coming to Florida, Abshire met John's mother. John and his mother fought every time she was drunk (V6, R37). John's mother drank alcohol excessively, smoked, and looked like a person dying of AIDS (V6, R38). One night John's mother tried to have sex with Abshire while John was in the next room (V6, R53).

Abshire testified that at the time of John's trial, Abshire knew he was going to death row and felt like John deserved to die (V6, R50). Mr. Marquard's attorneys never contacted Abshire about testifying at Marquard's trial (V6, R50).

Eric Wallen testified at the evidentiary hearing that he met John Marquard through Father Baker (V6, R56). Marquard didn't have a place to stay, so he lived with Eric and his family in Saint Augustine for a year or year and a half (V6, R56). John was about 17 and Eric was about 15 (V6, R57). Eric's family was very close and John seemed unprepared for a family environment (V6, R58, 59). John was withdrawn and spaced out at times (V6, R59).

During the year and a half Eric and John used drugs and alcohol daily (V6, R57). They used any drugs they could find, including marijuana, alcohol, PCP, prescription drugs, and LSD (V6, R57, 63). Eric and John would pass out and could

not remember what happened for days before (V6, R62). Eric easily led John to criminal activity (V6, R60). John was not violent, dodged fights, and did not retaliate when hit (V6, R65, 66).

Eric also knew Abshire and described Abshire as an explosive person (V6, R61). While at prison, Eric saw Abshire almost attack a person with a shovel because he stole Abshire's produce from his row of the prison garden (V6, R61). Abshire was easily angered (V6, R67). Abshire guarded his friendships and would go into a rage if he felt someone invaded on his friendships (V6, R64, 65). Abshire does not think before reacting violently (V6, R65).

Trial counsel never contacted Eric Wallen, but if they had, he would have testified as he did at the evidentiary hearing (V6, R69).

John's oldest sister, Becky Marquard Hicks, testified at the evidentiary hearing. She is six years older than John and lived in the same house with John until she was about 12 years old (V6, R73, 74). Their mother claimed she was a witch, threatening the children with spells (V6, R84, 85). When John was about five years old, their father worked 9 to 5 while their alcoholic mother drank at home (V6, R76). Their mother was violent and physically abusive when drunk (V6, R76, 77). Their mother never hugged the children or showed them affection (V6, R90). Becky never saw John's father hug him (V6, R90). After an extremely violent fight between Becky and

their mother, John's father, Roger Marquard, took the girls and left John with his mother (V6, R78, 79).

Three years later, when Becky was fifteen, she spent a couple of months with her mother and John (V6, R80). Their mother did not work and started drinking in the morning and drank all day long until she passed out (V6, R81). John was nine or ten years old that summer, and his mother would take him to bars. Their mother used marijuana, cocaine, and hash in front of them (V6, R82). That summer, ten-year-old John overdosed on quaaludes and his mother did not know and could not help because she was passed out at home (V6, R84).

John's trial attorneys never contacted Becky for John's trial; but had counsel contacted her, she would have testified on John's behalf as she did at the evidentiary hearing (V6, R91).

Trial counsel Gary Wood testified at the evidentiary hearing. He and co-counsel Howard Pearl worked for the Public Defender's Office when they represented John Marquard (V6, R102). Although Mr. Wood had extensive trial experience, this was his first capital case before a jury (V6, R105). Howard Pearl, who died before the evidentiary hearing, tried the penalty phase (V6, R106). Wood left the Public Defender's Office and began working as a prosecutor in July of 1994 (V6, R106, 107). Wood was still working with the State Attorney's office at the time of the

evidentiary hearing, but he testified it did not affect his testimony at the hearing (V6, R107, 108).

In preparation for trial, Wood spoke to John's mother on the telephone (V6, R110, 111). Wood did not recall ever talking to John's father (V6, R109). Although they had an investigator, Wood did the investigation on the case (V6, R113). Wood traveled to Clearwater to take depositions of some state witnesses, but he did not recall developing any defense witnesses (V6, R113). Wood did recall trying to contact Father Baker, but he was not successful (V6, R113). Wood never contacted John's sisters, Amy or Becky (V6, R113). Nor did Wood contact Eric Walen (V6, R114). Wood did know that John lived in St. Johns County prior to the murder (V6, R114, 115). Wood also learned that Father Baker had made living arrangements for John, but Wood never made contact with Father Baker to learn where John lived when he was in St. Augustine (V6, R115, 116).

Wood conducted the jury voir dire in this case (V6, R116). Wood thought he remembered trying to rehabilitate Mr. Robinson, an African-American juror, but said that the transcripts would best reflect what occurred (V6, R117, 143).

Wood did not try to impeach Abshire with his deposition statement that nobody could get between him and John (V6, R118). Wood did not try to call Hobart Harrison or David Blanks to impeach Abshire's testimony (V6, R118, 119). Wood said that

Harrison is not a consistent person in his demeanor or his testimony because Harrison lied to authorities when he was first arrested on his own case (V6, R119). Wood said he would not call either of these two witnesses in phase one of the trial because they both involved Mr. Marquard in the killing (V6, R120). Wood testified he did not present Harrison or Blanks in phase two because they had credibility problems, even though the state presented Abshire who had similar credibility problems (V6, R120, 21). Wood and Pearl never talked to Harrison to prepare him as a witness at trial (V6, R121).

Wood and Pearl represented Harrison on his second degree murder conviction (V6, R122). Wood and Pearl did not file a motion to withdraw due to conflict because Harrison did not become a state witness until after Harrison's case was completed, Harrison talked more about Abshire than he did about John, and the state did not present Harrison in John's case (V6, R122). Wood and Pearl did not feel that Harrison could have been used in mitigation to lessen John's culpability (V6, R122, 123).

Wood contacted no witnesses to try to develop John's history of drug and alcohol use (V6, R129). Wood did not object to the prosecutor bringing a skeleton into the courtroom and dressing it in the victim's shirt because he did not think the objection would be well founded (V6, R129, 130). Wood did not object to the introduction of the victim's bones because he did not think it would be well founded

(V6, R130).

Counsel presented Dr. Krop as the sole witness at penalty phase. Wood testified their strategy was to assign Dr. Krop the responsibility of preparing mitigation for the penalty phase of the trial (V6, R144). Wood did not independently find witnesses for Dr. Krop because Dr. Krop had been doing this sort of work for years (V6, R156). Wood provided documents to Dr. Krop, but he did not verify any of the information contained in those documents (V6, R156).

Hobart Harrison testified at John Marquard's evidentiary hearing that, had counsel contacted him, he would have testified at John Marquard's trial that Abshire told him that Abshire killed the victim (V7, R161, 162). Wood and Pearl also represented Harrison and Wood attended Harrison's deposition in this case (V7, R165). Harrison testified at Abshire's trial that Abshire told him that Abshire cut the victim's head off and left a piece of skin to hold it on (V7, R163).

At the evidentiary hearing, the court accepted Dr. Amiel as an expert in the field of psychiatry (V7, R169-172). Dr. Amiel indicated that, based on information provided by John Marquard and the records, John's impulse control may have been mildly impaired (V7, R182, 183). John has no memory of the actual incident (V7, R183). Dr. Amiel opined that John suffered a psychogenic amnestic period during which he could not recall what happened (V7, R183). Dr. Amiel testified that John

was genetically predisposed to alcohol abuse. John suffered chronic depression which induced alcohol use as a form of self medication (V7, R188, 191).

At the evidentiary hearing, the court accepted Dr. Crown as an expert in the field of clinical and forensic psychology and neuropsychology (V7, R196-199). Dr. Crown administered a number of tests that Dr. Krop, who was hired for trial, failed to administer (V7, R199, 200). Dr. Krop did not give tests that would look at the possibility of brain damage caused by alcohol, drugs, and fetal alcohol effects (V7, R205). Dr. Crown chose the tests that addressed the relationship between brain function and behavior. Because Dr. Crown did not have evidence of a lesion or brain tumor, he looked for diffuse developmental patterns of neuropsychological impairment or disfunction and personality functioning (V7, R206). Dr. Crown concluded that John has a significant thought disorder, a significant processing deficit, personality problems of long-standing duration, including schizophrenia, paranoid type, in a subacute stage, and a specific auditory processing defici. (V7, R202, 203).

John's thought disturbance caused him difficulty discerning reality (V7, R207). His thought disturbance, in combination with his auditory deficit, reduced his capacity to reason and exercise sound judgment (V7, R207, 208). Paranoid schizophrenia usually develops in late adolescence or early adulthood, and John's thought disturbance likely developed long before the crimes in this case occurred (V7, R209).

John's symptoms were probably worse at the time of the crime (V7, R209, 210).

The court accepted Cheryl Furtick, as an expert in the field of social work (V7, R221-228). Ms. Furtick did a psychosocial assessment of John which included interviews with witnesses and review of documents (V7, R229). Ms. Furtik testified that Dr. Krop only provided an outline of the deficits John experienced throughout his life, and Dr. Krop did not provide any details of why John was involved in this crime (V7, R237). Dr. Krop did not provide any specific details of John's early childhood, sexual abuse, intensity of emotional cutoff, and intensity of depression that John experienced (V7, R238). Ms. Furtik testified that the state recommended mental health treatment for John when he was ten or eleven years old, but that, through state and parental neglect, John did not receive the help he needed (V7, R238). The state evaluation records Dr. Krop relied upon contained conclusions made about John's behavior, such as he has tendencies of explosive behavior, without including notes of day to day behavior to support such a conclusion.(V7, R239).

Dr. Krop failed to explain to the jury that John was hospitalized for three days and discharged with a deferred diagnosis of explosive personality disorder (V7, R240). Ms. Furtick testified that "deferred" meant there was not enough information to assign that diagnosis to John when he left the hospital, so the hospital diagnosed him with adjustment disorder with emotional features (V7, R240). John was

discharged with no medication, and, within two weeks, he attempted suicide and was admitted to a diagnostic center (V7, R240). John's problems were noted from age 5 in kindergarten, but the diagnoses throughout the years are inconsistent (V7, R240). Dr. Krop failed to explain this in the penalty phase (V7, R240).

The records that Ms. Furtick reviewed revealed numerous systems failures when John was in placements (V7, R247). The trial court denied John Marquard the opportunity to present examples of system failures under the objection that Ms. Furtik was not competent to testify in that area (V7, R247, 248). The trial court denied any proffer (V7, R248).

Ms. Furtik testified that the social support and environment in which John grew up was woefully inadequate (V7, R249). When John was between six and ten years old, he was exposed to a very explicit promiscuous behavior (V7, R249). School records reported that John was sexually abused (V7, R249). In kindergarten, school officials noted that John was restless, agitated, and had attention problems, yet there was no referral (V7, R249). John always looked for approval and acceptance by others but never received it (V7, R249, 250). John's most stable environments, outside of the Department of Corrections, were the boys home and the foster home (V7, R250).

John was referred to mental health services at ten or eleven years old while living at the boys home (V7, R249). The state objected to Furtick's response to the

question where John went after the boys home. Furtick indicated: "He left the boys' home after 18 months and it was recommended that be placed in a specialized treatment home." Without any basis for the objection, the court sustained the objection and struck Furtick's response (V7, R250).

Ms. Furtick would have contacted John's mother, grandfather, grandmother, and sister Amy, all of whom are now dead, had counsel consulted her before trial (V7, R247).

The state called John's father, Roger Marquard, as a witness at the evidentiary hearing (V7, R253). Roger left the country about a month before John was born (V7, R254, 266). Roger testified his wife did not drink when she was pregnant with John, but later admitted he did not know if she drank during the time he left the country prior to John's birth and during John's early childhood (V7, R262, 266, 267).

Roger said that John had a deprived childhood from the time his parents divorced when he was six years old until he lived with Roger about eight years later (V7, R264). Roger separated from his wife because she was an alcoholic and abused their daughters (V7, R268). John witnessed his mother intoxicated and violent (V7, R275). Roger took his daughters but left John with his wife because she did not physically abuse him (V7, R268). Roger's lawyer did not think he could get custody of John, and John and his mother disappeared (V7, R255).

Roger said he couldn't  do anything from the time John was six until he was twelve, when Roger found out where John was (V7, R272).  Roger testified he had court ordered visitation rights (V7 T258). Roger visited John twice when he was in the boys home (V7, R272).

Roger did not know whether John was ever hospitalized for a head injury. Roger did not know if John had blackouts (V7, R262).  Roger indicated John had problems but not a mental defect (V7, R258). When asked if John could think or plan rationally, Roger replied; "He was in a lot of trouble." (V7, R258, 259)

Roger indicated that John was with Roger from the time John was 15 until virtually 19 (V7, R262). However, on cross examination, Roger admitted John was at the state mental hospital for eighteen months while he was 16 and 17 years old (V7, R276). Also, John lived with his sister for some of that time (V7, R276).  Roger said he showed affection to John by trying to guide him and work with him (V7, R262).

Prior to closing arguments at the evidentiary hearing, the trial court granted John Marquard's motion to amend the pleadings to conform to the evidence (V7, R287; V4, R661-663). John 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,R664-722). 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,R723–726).

## SUMMARY OF ARGUMENT

1. Newly discovered evidence that the co-defendant received a life sentence makes Mr. Marquard's death sentence unconstitutionally disproportionate.

2. The court erred in denying Mr. Marquard's claim that the co-defendant's evidentiary hearing testimony was newly discovered evidence and that it would, when combined with evidence of the co-defendant's life sentence, render Mr. Marquard's death sentence unconstitutionally disproportionate.

3. The court erred in holding that counsel's abdication of their duty in the penalty phase and failure to investigate was not ineffective assistance of counsel, Dr. Krop provided competent mental health assistance, and counsel's failure to hire and present a social worker was not ineffective assistance of counsel. The court also erred in not permitting much of the social worker's testimony.

4. The court denied Mr. Marquard a full and fair evidentiary hearing because the court erroneously excluded expert and lay witness testimony and an unavailable witness' prior testimony.

5. Mr. Marquard proved at the evidentiary hearing that he received ineffective assistance of counsel at his 1993 guilt phase proceeding because counsel failed to properly cross examine witnesses, call witnesses that could establish

defense's theory of the case, and  object to the admission of highly inflammatory evidence.

6. Mr. Marquard received ineffective assistance of counsel because counsel failed to object to the state's and the court's comments that unconstitutionally diminished the jury's role in the sentencing process.

7. Counsel was ineffective for not requesting that the handcuffs Mr. Marquard was forced to wear during his penalty phase be removed.

8. Rule 4-3.5(d)(4) of the Rules Regulating the Florida Bar unconstitutionally prevents John Marquard from investigating claims of juror bias and misconduct.

9. Because counsel preformed ineffectively, Mr. Marquard's death sentence is based on five unconstitutional aggravating circumstances, an unconstitutional instruction, and the state introduced and court relied on non-statutory aggravating aggravators.

10. Cumulative error deprived Mr. Marquard of his right to a fair trial and resulted in his death sentence.

## ARGUMENT I

**NEWLY DISCOVERED EVIDENCE ESTABLISHES JOHN MARQUARD'S DEATH SENTENCE IS DISPROPORTIONATE, DISPARATE, AND INVALID IN VIOLATION OF THE EIGHTH AND**

**FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION.**

Though the trial court specifically reserved jurisdiction on "the latest amendment which alleges that the sentence was not proportional", the trial court also denied this claim as it was raised in Claim 3, paragraph 4 of John Marquard's 3.850 motion. The Court denied this claim without an evidentiary hearing

> Claim III is procedurally barred. The Defendant raises allegations on the part of the trial court over defense counsel's objections that were or should have been raised on direct appeal. Therefore, Claim III is denied.

(V3 R585). The court failed to specifically address paragraph four, which was not procedurally barred because it is newly discovered evidence which could not have been raised on direct appeal. Though the record is not clear whether the trial court denied this claim or retained jurisdiction, John Marquard raises it now in accordance with this Court's directives to avoid delay in post conviction proceedings.

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 and the corresponding provision of the Florida Constitution.

In Scott v. Dugger, this Court held that a codefendant's life sentenced 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 Abshire 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 V5, 538-540). The court found no statutory mitigating circumstances and noted four possible non-statutory mitigating circumstances (M 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, inconsistant 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, suggessting 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 aggravating circumstances the court found to have been proven beyond a reasonable doubt in 1993: Abshire was under a sentence of imprisonment, Abshire was previously convicted of a threat or use of violence to some person, the crime was committed while Abshire was engaged in the commission of a robbery or committed for financial gain, the crime was especially heinous, atrocious, or cruel, and the crime was cold, calculated, and premeditated (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 youto 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 reconizable 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 1993, 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 1993, the court found his similar statements "weak, self-serving, inconsistent with the other evidence as to their relationship before and after the murder" (AV3, 485).

The court found one less aggravator and more compelling non-statutory

mitigation in John Marquard's case, so his death sentence is clearly disperate. 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.

## ARGUMENT II

**THE TRIAL COURT ERRED IN DENYING MR. MARQUARD'S CLAIM THAT ABSHIRE'S EVIDENTIARY HEARING TESTIMONY, WHEN CONSIDERED WITH ABSHIRE'S LIFE SENTENCE, DEMANDS MR. MARQUARD'S DEATH SENTENCE BE REDUCED TO LIFE BECAUSE MR. MARQUARD'S DEATH SENTENCE IS ARBITRARY, CAPRICIOUS,**

**DISPROPORTIONATE, DISPARATE, AND INVALID IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS.**

The trial court denied this claim holding

> The Defendant has also filed a motion to Amend Pleadings to conform with the evidence which alleges that the new version of events, testified to by co-defendant Abshire at the evidentiary hearing, is newly discovered evidence and therefore trial counsel was ineffective in failing to discover and introduce this evidence. The Court finds that this is not newly discovered evidence, this is simply the latest version of the events surrounding the homicide which is in direct conflict with Abshire's prior testimony and other evidence presented at the Defendant's trial. Therefore, there is no probability there would have been a different result at trial.

(V5, R734).

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 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 1, 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. Thus, the trial court erred.

Had John Marquard's sentencers heard this newly discovered testimony and known of Abshire's life sentence, John Marquard probably would have also received a life sentence. Jones v. State, 591 So. 2d 911, 915 (Fla. 1991). At the evidentiary

hearing Abshire recanted much of his 1993 testimony which minimized his involvement in the murder as well as his and John Marquard's drug and alcohol use that evening. This newly discovered evidence presented at John Marquard's 1999 evidentiary hearing establishes that John Marquard's death sentence is disproportionate and establishes nonstatutory mitigation of drug and alcohol use the night of the crime.

Abshire testified at John Marquard's November 1999, evidentiary hearing 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, 1126). 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, R36)(*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 (V 6, R 31-34, 51-53). After 8:30 that evening, they left the victim at the motel and went to a bar called Scarlett O'Hara's. (V6,R 31-34, 51-53) There, Abshire watched John drink two longneck beers, and then they separated for about an hour. (V6, R31-34, 51-53) 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, R31-34, 51-53). Throughout that day and evening Abshire and John took great quantities of ephedrine, and they smoked marijuana. (V 6, R31-34, 51-53) 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 rain that late at night. (V6, R44-45, 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, R42).

* * * *

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

A It was definitely Wednesday night.

(V6, R51).

"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 1993 trial testimony.

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, R161)

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, R162).

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.

(V7, R163).

Secondly, 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 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 V 12, 1775, 1779-83, V3, 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."(V6, R50).

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 (V7,R183, 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, 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 disproportionate. 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.2d 969, 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.

## ARGUMENT III

**THE TRIAL COURT ERRED IN DENYING JOHN MARQUARD'S CLAIM THAT COUNSEL WAS INEFFECTIVE AT THE SENTENCING PHASE OF HIS CAPITAL TRIAL, IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS. TRIAL COUNSEL WAS**

**RENDERED INEFFECTIVE BY THE TRIAL COURT'S AND STATE'S ACTIONS.**

**A. The trial court erred in holding that counsel's failure to effectively investigate and present mitigation was not ineffective assistance of counsel.**

In Strickland v. Washington, 466 U.S. 668 (1984), the United States Supreme Court held that counsel has "a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." 466 U.S. at 688. Strickland requires a defendant to plead and demonstrate (1) unreasonable attorney performance, and (2) prejudice. To produce a just result, effective assistance requires an attorney to investigate all reasonable sources of evidence which may be helpful to the defense. Strickland, 466 U.S, at 691. Counsel's strategic choices made after thorough investigation of law and facts relevant to plausible options are not usually ineffective. However, if counsel fails to investigate before adopting a strategy, and that failure results in prejudice to the defendant, counsel's failure is ineffective assistance. No tactical motive can be attributed to an attorney whose omissions are based on ignorance, or on the failure to properly investigate or prepare. Through disinterest, abdication of duties, and conflict of interest, counsel failed to investigate and prepare for John Marquard's penalty phase. John Marquard's death sentence is the resulting prejudice. There is a reasonable probability that the sentencing phase would have resulted in a life recommendation if the evidence discussed below had been presented

to the jury. Strickland, 466 U.S. at 694. A competent penalty phase must be individualized and focused on the particular characteristics of the individual defendant. This did not occur in John Marquard's case. The trial court erred in denying this claim.

The trial court denied Claim II, holding that

> Roger Marquard, the Defendant's Father, testified that the Defendant's mother was not an alcoholic when the Defendant was born and that family life was relatively normal until the Defendant was approximately five years of age. At that time the Defendant's mother became an alcoholic and the parties divorced. The Defendant's sister testified that the mother was abusive to her, but never to the Defendant. The Defendant's second sister, Amy, is deceased at this time and trial counsel cannot be faulted for failing to call her during the sentencing phase. The evidence is clear that if Amy had been called as a witness, she would have had to testify concerning the Defendant's conviction for molesting her child. No evidence was presented of any information which would have presented mitigating circumstances in the penalty phase.
>
> Contrary to the allegations in the Motion for Post Conviction Relief, no evidence was presented to show that John Marquard was ever sexually molested either at home or by neighbors. There was no evidence presented at the evidentiary hearing that the Defendant's mother ever abused him, either physically or mentally. The Defendant never provided trial counsel with the names of any witnesses in mitigation. Trial counsel cannot be faulted for failing to call witnesses whose names are not disclosed by the Defendant.

(V5, R733) The trial court erred.

At the evidentiary hearing, Roger Marquard testified for the state that John's mother did not use alcohol and drugs while she was pregnant, but then admitted that he left the country for ten months during the last part of her pregnancy and remained away until John was seven or eight months old (V7, R254, 262). Roger Marquard admitted he could not know whether his wife abused alcohol and drugs during that time (V7, R267). Roger then admitted he left the country for another six months when John was one year old and did not know if his wife abused alcohol and drugs during that time (V7, R273-74). Roger claimed they were a happy, normal family until, suddenly, he noticed that his wife could drink a glass of vodka like it was water and instantly became a violent alcoholic (V7, R 274-75). Roger left his wife "because of her drinking and her abusive ways towards the girls", but left John with his drunk and violent wife (V7, R268).

Roger testified that after he and his wife separated, his wife disappeared with John. Roger claimed that, though he looked and hired a lawyer, he could not find them and had no contact with John until John was twelve years old (V7, R269-70, 272). However, fifteen year old Becky Marquard, who lived with Roger, managed to find and live with her mother for a summer when John was ten years old. Roger claimed he found John only after John was placed in a boys home, where he made the valiant effort to visit John twice (V7, R271, 272). Roger testified he lost track of John

after he left the boy's home (V7, R257).

After the boy's home, John lived in Marriah Harrelson's foster home. John's mother rarely visited, and during those occasions, Mrs. Harrelson observed no physical or emotional closeness (V6, R14-15). At the evidentiary hearing, Mrs. Harrelson testified that John's father never contacted him while he was there, so John ran away and rode a bicycle 55 miles to his father's house (V6, R15-16). Mrs. Harrelson testified:

> [T]he social workers were real gleeful over him doing that, because they felt, well, this was going to force an issue that had really troubled John for a long time. John spoke of it many times and he was expecting his father to contact him at any time. And Social Services were just thrilled that he did this and that way maybe it would force he and his father to do something together and maybe it could take a lot of his frustration away from him.

(V6, R16).

Roger testified he never hugged John or told John that he loved him after John was twelve or thirteen years old because "[H]e didn't seem like he wanted it." (V7, R274). Clearly, he did not attempt to remedy the abuse inflicted by John's mother after Roger abandoned him. Counsel failed to contact Eric Wallen, who was in the Saint John County Jail and prison before and during John Marquard's trial. A priest arranged for John to live with Eric Wallen's family for one and a half years after John ran away to Saint Augustine, Florida. John was seventeen years old and Eric was

fifteen years old when they met (V6, R56-57). Eric testified that John was withdrawn and dissociative at times and was overwhelmed whenever Eric's mother displayed any warmth, tenderness, or hugged John (V6, R59). John loved the affection and tried to return her kindness by helping with the house (V6, R62). Roger never gave John affection, though he desperately needed and wanted it.

Roger testified that John "was with me from the time he was 15 until the time he was virtually 19" (V7, R262). On cross examination however, Roger admitted John was in the state mental hospital for 18 months of that time, and that John also lived with his sister Amy during that time (V7, R276-77). Eric Wallen testified that John lived with him for one and a half years while John was 17 and 18 years old (V 6, R56-57). This is consistent with Dr. Krop's trial testimony that, after John was released from the state mental hospital, he lived on his own (M V10, 1631). Before that, John lived with his father for only two years (M V10, 1630).

Roger Marquard's testimony at the evidentiary hearing consisted of half-truths and lies. The trial court wrongly denied this claim because he believed Roger testified "the Defendant's mother was not an alcoholic when the Defendant was born and that family life was relatively normal until the Defendant was approximately five years of age." (V5, R733) On cross examination, Roger was forced to admit that he did not know if his wife abused drugs and alcohol during the sixteen months he left the

country while his wife was pregnant with John and during John's early childhood (V7, R254, 262, 267, 273-74). From the time he abandoned John with his violent alcoholic wife, Roger spent only two years with John. (M V 10, 1630) His contrived testimony of half-truths was obviously related to allay his own guilty conscious. Roger's testimony established additional non-statutory mitigators that the court failed to address: Roger abandoned John to a woman he knew was a violent, neglectful, and abusive alcoholic, and he never hugged John or expressed affection.

The trial court erred in denying this claim because "[T]he Defendant's sister testified that the mother was abusive to her, but never to the Defendant. There was no evidence presented at the evidentiary hearing that the Defendant's mother ever abused him, either physically or mentally." (V5, R733) Becky Hicks, John's sister, testified only that she could not remember her mother physically abusing John, but her testimony revealed specific instances of mental and emotional abuse and neglect (V6, 93).

John's mother thought she was a witch and threatened her children with spells (V6, R85). When John was five years old, his alcoholic mother drank every day until she passed out (V6, R78). "As long as she was asleep, she was okay. If she was awake, we walked on eggshells around her." (V6, R76). During this time John was home alone with his mother all day while his sisters attended school. Because John's

mother spent the days either drunk or passed out, Becky Hicks attempted to take care of John and his sister Amy after school, as well as the cooking and laundry. At all times they feared disturbing their mother. "When she was on the couch, we tried to stayed [sic.] out in the yard. We didn't want to wake her up." (V6, R77-78). John saw his mother hit, slap and violently drag his sister by her hair (V6, R77-79). After an extremely violent fight, John's father left and took John's sisters with him.

Becky testified she next saw John when she lived with John and his mother during the summer John was ten years old. At that time, John's mother did not work and they lived in a dilapidated one-bedroom apartment (V6, R80). Becky slept on a couch and John slept with his mother in the bedroom (V6, R80). John's mother drank constantly that summer and passed out almost every night (V6, R80). She took John to bars with her every day (V6, R82). That summer, Becky and John also saw their mother smoke marijuana and hash and snort cocaine (V6, R82-83). Becky was fifteen years old and worked the midnight to 8:00 am shift at a restaurant (V6, R84). At three o'clock one morning, ten-year-old John stumbled into the restaurant, not able to walk. Becky's boss called an ambulance that took John to the hospital. At ten years old, John overdosed on quaaludes, and his mother was too drunk to notice or help. (V6, R84) John's mother was passed out in the run down old apartment, so his grandparents picked him up at the hospital and returned him to his mother (V6, R84).

Clearly, the trial court erred. Perhaps the trial court overlooked the neglect that was both mental and physical abuse. Becky Hicks, who could remember only one year and a summer living with John and their mother, testified that John's mother physically and mentally abused him by neglecting him all day and night while she drank until she passed out, violently beating his sisters in front of him, taking him to bars every day, using marijuana, hash, and cocaine in front of him, living in squalor, and threatening him with spells and magic. She neglected and abused John to the extent that when he was ten years old and overdosed on quaaludes, she was too drunk or unconscious to help him. Becky Hicks' uncontroverted testimony proved that John's mother did physically and mentally abuse John. The trial court erred.

The trial court erred in holding that counsel was not ineffective for not contacting John's sister, Amy. The court held, "[T]he Defendant's second sister, Amy, is deceased at this time and trial counsel cannot be faulted for failing to call her during the sentencing phase. The evidence is clear that if Amy had been called as a witness, she would have had to testify concerning the Defendant's conviction for molesting her child." (V5, R733) At the evidentiary hearing, Becky Hicks testified that after John served time for that conviction, he lived with his sister Amy and her daughter. During that time, there was no strain, conflict, or change in their relationship, and Amy left John to babysit for the girl (V6, R96-97). Had counsel

contacted Amy, she could have explained the circumstances of the conviction and negated any effect it had on the jury, who heard of the conviction even though counsel absolutely failed to contact Amy. Moreover, Amy probably could have provided valuable mitigating evidence. Because she died in 1995 and counsel never contacted her, that mitigation is lost.

The court erred in holding that counsel's failure to contact any witnesses to develop John Marquard's fourteen year history of lethal substance abuse was not ineffective assistance of counsel(V6, R 129). The court noted that evidence that John Marquard has a "history of drug and alcohol abuse" was "entered into evidence pursuant to testimony of Dr. Krop" (V5, R730). Dr. Krop's testimony regarding John's drug and alcohol abuse consisted of, "he started drinking, as I indicated earlier, at a very early age, and also started using drugs. And from his history, certainly, I would have to say that he has a history of drug and alcohol abuse." (M V 10, 1632). This statement, consisting of one and a half sentences, could not and did not express the severity of John's drug abuse which began at the age of ten years old.

This Court has held that failure to prepare and present evidence of chronic substance abuse can constitute ineffective assistance of counsel. Heiney v. State, 620 So.2d 171 (Fla. 1993); *See also*, People v. Wright, 488 N.E.2d 973 (Ill. 1986). In Ross v. State, this Court held that a defendant's past drinking problems, among other

things, were "collectively a significant mitigating factor". Ross v. State, 474 So.2d 1170, 1174 (Fla. 1985). Unrebutted evidence that the defendant's "reasoning abilities were substantially impaired by his addiction to hard drugs" is "significantly compelling" mitigation. Songer v. State, 544 So.2d 1010, 1011 (Fla. 1989). Becky Hicks testified she saw John overdose on quaaludes when he was ten years old (V6, R84). Eric Wallen testified that during the year and a half that John lived with Eric Wallen, Eric and John used drugs and alcohol every day (V6, R57). They used any substance they could get, including alcohol, marijuana, PCP, LSD, and any available prescription drugs (V6, R57). Often John passed out or could not remember the previous evening after using and mixing drugs (V6, R62). This evidence was uncontroverted and mitigating under Florida law, and counsel deficiently failed to investigate and present it.

The court erred in holding, "[T]he Defendant never provided trial counsel with the names of any witnesses in mitigation. Trial counsel cannot be faulted for failing to call witnesses whose names are not disclosed by the Defendant." (V5, R733) Counsel called John's mother once and could have asked her for her daughters' phone numbers. The man counsel assigned to formulate the penalty phase strategy, Dr. Krop, called John's mother and father and could have asked them for their daughter's phone numbers (V6, R144); (M V 10, 1621). The state provided counsel with Amy

Marquard's address on October 13, 1992 (M V 2, 383). Counsel knew of Father Baker because counsel testified he once tried to "get ahold of" him (V6, R113). Had counsel tried to contact Father Baker more than once, he probably would have reached him. Because Father Baker arranged for John to live with Eric Wallen's family, counsel could have learned of Eric Wallen from Father Baker (V6, R56-57). At that time, Mr. Wallen was incarcerated, and counsel could have easily found him (V6, R70). Counsel also could have asked John Marquard where he lived during the year and a half he spent in Saint Augustine (V6, R56-57). Counsel could have contacted Marriah Harrelson by reading John's North Carolina institutional records that the state attorney acquired and gave to counsel (V6, R110). These witnesses were not so elusive that only John Marquard knew they existed. Counsel knew John had two sisters, but counsel simply neglected to contact them (V6, R113). Counsel could have found Marriah Harrelson by reading the records they had, and counsel could have found Eric Wallen with a couple of questions. Counsel offered no strategic explanation for not contacting these witnesses, counsel just deficiently failed to investigate for the penalty phase (V6, R144). Thus, counsel should be faulted for failing to even contact these witnesses, and the trial court erred.

The court's order failed to address many other issues in Claim II, stating only that "No evidence was presented of any information which would have presented

mitigating circumstances in the penalty phase." (V5, R733).

Counsel failed to investigate John Marquard's background and present the abundant mitigation it offered. When deciding whether counsel's failure to investigate constitutes ineffective assistance of counsel, this Court must determine whether, "reasonable professional judgments support the limitations on investigation." Strickland, 466 U.S. at 691. "An attorney has a duty to conduct a reasonable investigation." Middleton v. Dugger, 849 F.2d 491, 493 (11th Cir. 1988). "Where it is apparent from evidence concerning the crime itself, from conversation with the defendant, or from other readily available sources of information, that the defendant has some mental or other condition that would likely qualify as a mitigating factor, the failure to investigate will be ineffective assistance." Hall v. Washington, 106 F.3d 742 (7th Cir. 1997).

At the evidentiary hearing, trial attorney Gary Wood testified that, although Howard Pearl was primarily responsible for developing the strategy and conducting the penalty phase, he did the investigation (V6, R108, 113). Counsel described the penalty phase strategy.

> Mr. Marquard had a very unstable childhood, the various things that – from his childhood needed to be developed and mentioned. He had a long history of drug abuse of a number of different types of drugs, cocaine, barbiturates, LSD, marijuana, certainly alcohol, which began in his eight- to ten-year range, eight- to ten-year-old range, and

> had gone out – gone on throughout his young life up until the time of the murder.
>
> He had been in foster homes, he had been in a transient situation, his parents were divorced. He had an alcoholic mother, an abusive mother. He was not close or did not have a close relationship with his parents, at least as I recall him expressing it to me and through Dr. Krop's evaluation.

(V6, R108-109). Counsel's entire investigation, however, consisted of reviewing records the State Attorney's office acquired, one telephone call to John Marquard's mother, and an unsuccessful attempt to call Father Baker (V6, R109-111, 113, 116). Counsel could not remember instructing investigators to conduct any investigation (V 6, R110, 113).

Rather than actually speaking to people who knew and lived with John Marquard, counsel testified that, in order to present John Marquard's "very unstable childhood . . . long history of drug abuse of a number of different types of drugs, cocaine, barbiturates, LSD, marijuana, certainly alcohol, which began in his eight- to ten-year range . . . foster homes. . . transient situation. . . alcoholic mother. . . abusive mother", counsel's strategy was to forward the records the State Attorney procured to Dr. Krop (V6, R108-109, 134-135, 159). In fact, counsel testified he and Pearl abdicated their duty of preparing the penalty phase to Dr. Krop. "Dr. Krop was, for lack of a better phrase, in charge of preparing the mitigation defense or preparation for phase two." (V6, R144). Though Dr. Krop was in charge of the penalty phase

defense strategy and investigation, counsel did not assign any investigators to help him (V7, R155).

In Robinson v. State, this Court noted that Howard Pearl's decision to rely solely on Dr. Krop's testimony for a penalty phase proceeding was questionable. Robinson v. State, 707 So.2d 688, 697 (Fla. 1998). Noting that Pearl displayed suspect judgment in not "closing the loop" with investigating possible mitigation", this Court held Pearl's decision to rely solely on Dr. Krop was not ineffective assistance of counsel because "[T]he trial court could have concluded that Pearl was not ineffective for not opening the door to this potentially devastating rebuttal evidence." Robinson, 707So.2d at 697. John Marquard's situation was vastly different. The only potential "devastating rebuttal evidence" that could have reached the jury in John Marquard's case reached the jury through the man counsel assigned all responsibility for the penalty phase, Dr. Krop. On cross-examination, Dr. Krop told the jury that John Marquard was convicted of indecent liberties with a child in 1988 (M V 10, 1673). Had counsel contacted John Marquard's sisters, counsel and Dr. Krop would have learned the circumstances of that conviction. The victim of the 1988 conviction was John's niece. Her mother, Amy, died in 1995, so collateral counsel did not have the opportunity to speak with her (V6, R71). At the evidentiary hearing, John's other sister, Becky Hicks, testified that after John served time for that

conviction, he lived with his sister Amy and her daughter. During that time, there was no strain, conflict, or change in their relationship, and Amy left John to babysit for the girl (V6, R96-97). Had counsel contacted Amy, counsel could have negated any harm from Dr. Krop's testimony of John's conviction for taking indecent liberties with her daughter and explained why it did not affect their relationship.

Counsel's deficient failure to contact John Marquard's family and friends resulted in counsel's failure to present vital mitigation. Instead, Dr. Krop quickly relayed to the jury, "in a nutshell what occurred when John was a child" (M V 10, 1627). Counsel failed to contact John's sisters and friends, who could explain the trauma and fear that a mere review of dry records lacked.

The court also failed to address counsel's deficient failure to present evidence of Abshire's jealous, dominating, and extremely violent nature. Counsel deficiently failed to investigate and present Abshire's confession to Hobart Harrison. (V6, R22) Abshire admitted to Harrison that he killed the victim because she was intruding in his relationship with John and because John could not kill her. (A V 9, 1409-11) Counsel failed to contrast that evidence with evidence of John Marquard's passive non-violent nature.

Counsel deficiently failed to contact Marriah Harrelson and Eric Wallen who could testify that John Marquard was not a violent person. John lived with Marriah

Harrelson when he was twelve and thirteen years old (V6, R12). Mrs. Harrelson described John as a mild-mannered, shy child who got along with all the other children in the house (V6, R13-14). He avoided fights and followed and acquiesced to more aggressive children (V6, R14, 20). Eric Wallen testified that though he was younger than John, he could easily lead John into criminal activity (V6, R59). John yielded to aggressive behavior and dodged fights (V6, R65).

Counsel deficiently failed to present evidence of Abshire's violent and jealous nature. Eric Wallen met Michael Abshire in the county jail before John Marquard's trial and spent time with him at Tomoka State Prison (V6, R70). Mr. Wallen observed Abshire to be a very violent and explosive person (V6, R61-62). His violent nature was not that which Mr. Wallen observed in the average inmate. "[W]hen he goes into a rage, he don't -- I've seen a lot of people in prison get into fights and stuff like that. And there's people that know how to fight that keep their head and their wits about them and then there's people that just a red veil comes down, they don't think, they just violently react. And that's the type of person Mike is." (V6, R65). Eric saw Abshire almost kill a man over watermelons (V6, R62). Eric described Abshire as a very jealous person:

> Well when he found somebody that he was friends with, he got along with, that tried to help him with his problems or whatever, he could just relate with it, it was like he didn't want anybody coming in between that, you know, because he'd feel left out. You know, there's times at

> Tomoka where we were friends and we would work out together and other people would come along, you know, and want to talk about simple little things like, you know, sporting events or, you know, what was going on in the compound or whatever, and he would get like – he would get bothered by that. He would get upset by that. It was like other people were invading on his friendship.

(V6, R65). Had counsel presented this evidence and questioned Abshire about his deposition statement that nobody could get between him and John Marquard, the jury probably would have known that Abshire is a violently jealous man.

Counsel failed to contact and present Hobart Harrison, who the state presented at Abshire's trial. Mr. Harrison was Abshire's cell mate at St. John County Jail, and Abshire confessed to him.

> A **He said he cut her head off and left a piece of skin to hold it on.**
>
> 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)(*emphasis added*). Harrison's deposition, which counsel attended,

revealed that Abshire killed the victim, in large part, because she encroached upon his friendship with John. **"[H]e said if John ever brung another bitch home, he'd show that (the victim's head) to them and she was coming between them."** (A V 9, 1411)(*emphasis added*).

This testimony would have been very valuable mitigation because it shows that Abshire killed the victim because he resented her intrusion on his friendship with John. This gives Abshire a motive. Because Ashire was bigger than John, older than John, more educated than John and a violent and aggressive person, the jury could have easily concluded Abshire forced John to be involved in this crime. Moreover, this testimony shows that John Marquard is less culpable. John did not kill the victim, Abshire did. This testimony also established the mitigating circumstance that John could not actually kill the victim.

At the evidentiary hearing, counsel testified he "never would have" presented Harrison.

> . . . . I wouldn't have called them in phase two either, for the same reason. I mean, we've got two convicted killers there who have credibility problems of their own.
>
> * * * *
>
> . . . . . the primary problem with Mr. Harrison is that – and Mr. Pearl felt the same way in our strategy sessions that was discussed, that Harrison was uncontrollable. We could not guarantee that he would be somebody who we could rely on as our own witness.

> Mr. Harrison was very upset about his present predicament of getting what he felt was an unusually long sentence for hacking or stabbing a prostitute in Hawthorne. So, I just never would have used Mr. Harrison.

(V6, R119-121).

The record reveals that Howard Pearl represented John Marquard as early as December 17, 1991 (M V1, 21). Both he and Gary Wood represented Mr. Harrison, who was sentenced on July 16, 1992 (V6, R104); (A V 9, 1421). Mr. Harrison wrote the state attorney about John Marquard and Michael Abshire on July 7, 1992 (A V 9, 1422-23). As early as July 31, 1992, counsel knew the state was preparing Mr. Harrison's testimony (M V1, 166-67). Counsel attended Mr. Harrison's deposition on August 12, 1992 (A V 9, 1422). At a minimum, counsel knew that Mr. Harrison had information about this case fifteen days after Mr. Harrison was sentenced. On August 12, 1992, they knew that Mr. Harrison had information which would impeach Abshire--the only witness to testify about John Marquard's actions during the murder, the reasons for the murder, and counsel knew that Abshire, not John Marquard, actually killed the victim.

Counsel's justification for not calling Mr. Harrison because he was a convicted killer is ludicrous in this case. The state presented Mr. Harrison's testimony less than four months earlier in their case against Abshire (A V9, 1352-1425). Because the state presented Mr. Harrison in its case against Abshire, his testimony had an aspect of

reliability despite his prior convictions. Counsel could have corroborated Mr. Harrison's testimony with David Blanks (V6, R 119-20). Moreover, Mr. Harrison was not involved in this case, and he made no deals with the state and had no motive to lie (A V 9, 1421-22).

Counsel's explanation that Mr. Harrison was uncontrollable and "very upset about his present predicament of getting what he felt was an unusually long sentence for hacking or stabbing a prostitute" was the result of a conflict of interest (V 1, 121). Mr. Wood and Mr. Pearl represented Mr. Harrison on that charge (V 1, 104). If counsel chose not to present Mr. Harrison's testimony or even talk with him about testifying because they felt they could not control him because he was upset with their representation, or they felt he was particularly dishonest based on something they learned while representing him, they should have withdrawn from John Marquard's case. Rule 4-1.7 Rules Regulating the Florida Bar. In representing John Marquard, counsel had the duty to avoid limitations on their independent professional judgment. Rule 4-1.7(b) of the Rules Regulating the Florida Bar mandates that "[A] lawyer shall not represent a client if the lawyer's exercise of independent professional judgment in the representation of that client may be materially limited by the lawyer's responsibilities to another client". Rule 4-1.7(b) Rules Regulating the Florida Bar. Because counsel based their decision not to talk with Mr. Harrison or present his

testimony on information and animosity from their representation of Mr. Harrison, counsel faced a conflict of interest which limited their independent professional judgment.

Counsel attempted to explain that it was not conflict of interest.

> Q You said you were familiar with Mr. Harrison because you had represented him?
>
> A Yes.
>
> Q Why did you not file a motion to withdraw due to a conflict when Mr. Harrison was listed as a State witness?
>
> A Mr. Harrison did not become a state witness until long after this case was over with. He had contacted police I think prior to sentencing in his own case, but he was not listed, nor did he develop, nor was he named as a potential State witness until much later.
>
> . . . . I do recall discussing with Mr. Pearl that there was no conflict between Mr. Harrison and Mr. Marquard's case in the sense that – and I'm trying to remember who provided this information to us – that Mr. Harrison was not going to be used as a State witness in Mr. Marquard's case. Mr. Harrison's information primarily, in terms of physical motions, talked more about Mr. Abshire that he did with Mr. Marquard.

(V6, R122). In fact, counsel concurrently represented both John Marquard and Mr. Harrison. The state provided counsel a copy of Mr. Harrison's statement on June 12, 1992 (M V 1, 96). Mr. Harrison wrote the state attorney about John Marquard and Michael Abshire on July 7, 1992, nine days before Mr. Harrison was sentenced on the

charge in which counsel represented him (A V 9, 1422-23). Thus, counsel should have known of the possible conflict at that time. At the very latest, counsel knew that Mr. Harrison had exculpatory, mitigating, and impeachment evidence fifteen days after Mr. Harrison was sentenced, because counsel knew the state was preparing Mr. Harrison's testimony on July 31, 1992 (M V 1, 166-67).

Comment to Rule 4-1.7 states

> A possible conflict does not itself preclude representation. The critical questions are the likelihood that a conflict will eventuate and, if it does, **whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client**.

Comment to Rule 4-1.7(*emphasis added*). Counsel's fear of calling Mr. Harrison, based on their prior representation of him, materially interfered with their judgement and foreclosed presentation of Mr. Harrison's exculpatory mitigating evidence. Because of this, counsel was deficient for not withdrawing from John Marquard's case. If counsel who had not represented Mr. Harrison represented John Marquard, the jury would have heard this valuable mitigating evidence which was bolstered by the state's use of it three and a half months earlier.

Counsel made the decision not to present Mr. Harrison's testimony without ever speaking with Mr. Harrison about testifying in this case and personally judging his

credibility as he related this particular story.

Q Did you talk to Mr. Harrison and prepare his trial testimony?

A You – mean he was never called as the state's witness.

Q Did you prepare him as your witness?

A No.

Q Did you prepare him?

A No, didn't want to.

Q Did Mr. Pearl?

A To my knowledge, no.

(V6, R122). Mr. Harrison's prior convictions do not justify counsel's failure to even talk with Mr. Harrison or investigate the circumstances of his testimony to determine whether Mr. Harrison's testimony was reliable.

Counsel's deficient failure to present this information prejudiced John Marquard. This evidence established mitigation that John Marquard could not kill the victim. Had counsel presented this evidence, the jury probably would have disbelieved Abshire's testimony that John Marquard planned and actually killed the victim. The jury would be less likely to believe Abshire, who was awaiting sentencing for the same charges, than Mr. Harrison, Eric Wallen, and Marriah Harrelson, who were completely uninvolved in this case. If Mr. Harrison chose not to cooperate, counsel could have had

him declared an unavailable witness and presented his prior testimony in Abshire's trial. Fla. Stat. §§ 90.803 (22); 90.804(2)(a). This evidence, combined with evidence that Abshire was convicted of assault with a deadly weapon with intent to kill for beating a man he did not know with a brick, probably would have resulted in a life recommendation for John Marquard (A V11, 1622-28).

In a capital case, the test for determining whether counsel's deficient performance prejudiced the defendant is whether there is a reasonable probability that, absent the errors, the sentencer would have concluded that the balance of aggravating and mitigating circumstances did not warrant death. Strickland, 466 U.S. at 695. A reasonable probability is one which undermines confidence in the outcome of the sentencing. Strickland, 466 U.S. at 694. Had counsel investigated, they could have presented this mitigation: Roger Marquard abandoned John to a woman he knew was a violent, neglectful, and abusive alcoholic, and he never hugged John or expressed affection; John's mother physically and mentally abused him by neglecting him all day and night while she drank until she passed out, violently beating his sisters in front of him, taking him to bars every day, using marijuana, hash, and cocaine in front of him, living in squalor, and threatening him with spells and magic; the details of John Marquard's fourteen year history of lethal substance abuse; Abshire's jealous, dominating, and extremely violent nature; John Marquard's passive non-violent nature;

Abshire killed the victim because he resented her intrusion in his friendship with John; John Marquard is less culpable than Abshire; and John could not actually kill the victim. Because Abshire's testimony was the only evidence that John Marquard planned and killed the victim, and this mitigating evidence refutes that testimony, the jury probably would have ignored Abshire's testimony, considered the mitigation, and recommended a life sentence for John Marquard.

**B. The trial court erred in holding that Dr. Krop provided effective mental health assistance.**

The trial court erred in denying this claim because, "The testimony of the expert witnesses at the evidentiary hearing shows that neither had any substantial criticisms of Dr. Krop's work, and, in fact, neither could point to any specific failure which would have been material to this case." (V5, R733-34) In fact, Dr. Crown testified that Dr. Krop failed to conduct the tests required to connect John Marquard's personality problems to his behavior. This, in conjunction with the testimony that would have reached the jury had counsel performed effectively and the newly discovered evidence presented at the evidentiary hearing, probably would have resulted in a life sentence.

Due process requires competent mental health assistance to ensure fundamental fairness and reliability in the adversarial process. Ake v. Oklahoma, 470 U.S. 68 (1985). John Marquard did not receive a professionally adequate mental health

evaluation, and hence, a fundamentally fair sentencing, in light of the mitigation which should have been presented. "The State must, at a minimum, assure the defendant access to a competent psychiatrist who will conduct an **appropriate** examination and assist in evaluation, preparation, and presentation of the defense." Ake v. Oklahoma, 470 U.S. at 83. Dr. Krop did not give John Marquard competent mental health assistance because he did not perform an appropriate evaluation. Dr. Krop simply diagnosed John Marquard's personality and failed to perform the tests needed to connect John Marquard's mental illnesses to the events of the crime.

Dr. Barry Crown evaluated John Marquard on January 3, 1997. During that evaluation, Dr. Crown performed vital tests that Dr. Krop failed to perform. Dr. Crown tested John Marquard for more diffuse matters of brain disfunction and impairment, especially the effects of alcohol and substance use on the brain, including fetal alcohol effects (V7, R205). Unlike Dr Krop, who simply diagnosed a personality disorder, Dr. Crown chose those tests to discern the relationship between John Marquard's brain function and his behavior (V7, R206). He looked "objectively at personality functioning because I hadn't seen it anywhere in the record" (V7, R206). The tests Dr. Crown gave, which Dr. Krop failed to give, revealed a pattern of paranoid schizophrenia in a subacute stage (V7, R207). Dr. Crown's review of John's records revealed that "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, R207). The tests Dr. Crown gave also revealed that John is not able to properly process information and has great trouble with abstract reasoning (V7, R201-202). John Marquard also suffers an auditory processing deficit in noises and spoken words, "if someone were to say – and this is a very gross example, 'Don't do that', he might not hear the 'don't'. He might just hear 'do that'." (V7, R203). This brain impairment is consistent with fetal alcohol effects, the long-term effects of fetal alcohol syndrome (V7, R205). Dr. Crown found this caused John difficulties in "discerning what was real and what was not real and also a great deal of suspiciousness concurrent with that . . in combination with his auditory processing deficit and in combination with his difficulty in dealing with language-based critical thinking, it would certainly reduce his capacity to reason and to exercise sound judgment, particularly when he was under pressure." (V7, R207) "He has difficulty figuring things out. Because of that, when prompted based on the situation he's in, he's more likely to act impulsively. He certainly has a history of episodic discontrol or impulsivity." (V7, R213). Dr. Crown examined John Marquard's DOC records and learned that these impairments were not caused by head trauma while in DOC custody (V7, R205).

Ms. Furtik, who the court accepted as an expert in the field of social work, testified that Dr. Krop only provided an outline of the deficits John experienced throughout his life, and Dr. Krop did not provide any details of why John was involved in this crime (V7, R237). Dr. Krop did not provide any specific details of John's early childhood, sexual abuse, intensity of emotional cutoff, and intensity of depression that John experienced (V7, R238).

Ms. Furtik testified that the state recommended mental health treatment for John when he was ten or eleven years old, but, through state and parental neglect, John did not receive the help he needed (V7, R238). The state evaluation records Dr. Krop relied upon contained conclusions made about John's behavior, such as he has tendencies of explosive behavior, without including notes of day to day behavior to support such a conclusion (V7, R239). John's problems were noted from age five in kindergarten, but the diagnoses throughout the years are inconsistent (V7, R240). Dr. Krop failed to explain this in penalty phase (V7, R240).

Dr. Krop failed to explain to the jury that John was hospitalized for three days and discharged with a deferred diagnosis of explosive personality disorder (V7, R240). Ms. Furtick testified that "deferred" meant there was not enough information to assign that diagnosis to John when he left the hospital, so the hospital diagnosed him with adjustment disorder with emotional features (V7, R240). John was discharged with no

medication. Within two weeks, he attempted suicide and was admitted to a diagnostic center (V7, R240).

Ms. Furtik testified that the social support and environment in which John grew up was woefully inadequate (V7, R249). When John was between six and ten years old, he was exposed to a very explicit promiscuous behavior (V7, R249). School records reported that John was sexually abused (V7, R249). In kindergarten, school officials noted that John was restless, agitated, and had attention problems, yet there was no referral (V7, R249). John always looked for approval and acceptance by others but never received it (V7, R249, 250). John's most stable environments, outside of the Department of Corrections, were the boys home and the foster home (V7, R250). Dr. Krop failed to present this during John Marquard's penalty phase.

Ms. Furtick would have contacted John's mother, grandfather, grandmother, and sister Amy, all of whom are now dead, had counsel consulted her before trial (V7, R247).

Dr. Krop's simple diagnosis of John Marquard's personality provided no information about John Marquard's mental illnesses which contributed to this crime. When asked by John Marquard's own counsel whether anything in addition to his diagnosis of a personality disorder could have influenced John Marquard and lead to this crime, Dr. Krop could think of nothing else and could only mention his diagnosis

of a personality disorder (M V10, 1639). Had Dr. Krop performed a competent mental health evaluation and performed the tests that Dr. Crown performed to connect John Marquard's personality disorders to the crime, he could have provided the valuable mitigation evidence that Dr. Crown presented at John Marquard's evidentiary hearing.

Dr. Krop failed to provide mental health assistance to which John Marquard was entitled because he based his diagnosis on only two telephone calls to John Marquard's self-serving parents. The two telephone calls did not give Dr. Krop the background information needed to corroborate his testimony and provide a basis for his diagnosis. Because Dr. Krop failed to contact John Marquard's sisters, foster mother, and friends with whom John lived for years, Dr. Krop could not adequately explain to the jury John Marquard's background. At trial, Dr. Krop, who was the sole penalty phase witness, offered only what he referred to as a "nutshell" of John's childhood (M V 10, 1627). Dr. Krop testified he "would never superficially or at face value accept what the client tells him, again, particularly in a forensic evaluation", and "I try and obtain as much information as possible to either support or contradict what the client is telling me." (M V10, 1622). However, Dr. Krop contacted only two people. John Marquard's parents divorced when John was five years old, and had little or no contact with each other from that time. Thus, neither could know how the other lived and treated John while he lived with each of them. Only John Marquard's two sisters could know, and

Dr. Krop failed to contact them. After the divorce, John lived with his mother for approximately six years and with his father for less than two. Dr. Krop failed to contact John Marquard's foster mother and roommates who could accurately describe John's childhood suffering, behavior, and drug abuse during the years John did not live with his parents. Because Dr. Krop proclaimed "I try and obtain as much information as possible to either support or contradict what the client is telling me", he admittedly failed to conduct a competent mental health evaluation (M V10, 1622).

John Marquard did not receive appropriate and competent mental health assistance. Dr. Krop failed to contact the people needed to adequately diagnose John Marquard and to perform the tests needed to connect John Marquard's mental illnesses to the circumstances of this crime. Dr. Krop's simple and incomplete diagnosis of a personality disorder was so ineffectual that it was the functional equivalent of no evaluation, and counsel was ineffective for relying on Dr. Krop as the only penalty phase witness. Accordingly, John Marquard's due process right to a fundamentally fair adversarial testing was denied. The trial court erred in denying this subclaim.

## ARGUMENT IV

**MR. MARQUARD WAS DENIED A FULL AND FAIR EVIDENTIARY HEARING IN VIOLATION OF DUE PROCESS AND THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE**

**FLORIDA CONSTITUTION.**

**A. The lower court prevented Mr. Marquard from presenting his case during the postconviction evidentiary hearing by refusing to allow his expert witness to testify.**

The trial court held:

> At the evidentiary hearing, appellate counsel introduced the testimony of a social worker in an attempt to show that trial counsel was ineffective for failing to call such a witness during the penalty phase. The testimony of the social worker was totally based on hearsay and would have been inadmissable. Trial counsel cannot be faulted for failing to hire and call a witness whose testimony would not be relevant or admissible.

(V5, 734) At the evidentiary hearing, the trial court admitted Shirley Furtik, a licensed social worker, as a qualified expert in her field of expertise (V7, 228). In the course of her work as a licensed social worker Ms. Furtik conducted psychosocial assessments (V7, 225-26). In response to the court's question, Ms. Furtik explained that a psychosocial assessment "[L]ooks at psychological factors that impact on individuals, the social which deals with the environment, economics, and the biological, which would include medical, physical, and how all of those may impact how a person performs and grows." (V7, R226). The court then admitted her as an expert (V7, R228).

Florida Rule of Evidence 90.704 defines the basis of expert opinion testimony.

> The facts or data upon which an expert bases an opinion or

> inference may be those perceived by, or made known to, the expert at or before the trial. **If the facts or data are of a type reasonably relied upon by experts in the subject to support the opinion expressed, the facts or data need not be admissible in evidence.**

Florida Evidence Code § 90.704.(*emphasis added*) Florida courts have interpreted this rule to mean that "the hearsay rule poses no obstacle to expert testimony premised, in part, upon tests, records, data, or opinions of another, where such information is of a type reasonably relied upon by experts in the field." Burnham v. State, 497 So.2d 904, 905 (Fla. 2nd DCA 1986); *See also* Bender v. State, 472 So.2d 1370, 1371-72 (Fla. 3rd DCA 1985); Barber v. State, 576 So.2d 825, 831-32 (Fla. 1st DCA 1991). In completing the psychosocial assessment, Ms. Furtik relied on interviews with several people, records, and an interview with John Marquard (V7, R229). Thus, if asked about the basis of her opinions, Ms. Furtik could relate hearsay information from the interviews and records that she relied upon in reaching her opinions. Ms. Furtik's testimony was admissible.

Moreover, Florida Statute 921.141(1) states, "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." Fla. Stat, §921.141(1) (1979). This Court noted, "the exclusionary rules of evidence, including the rule barring use of

hearsay statements are inapplicable in the penalty phase of a capital trial." Garcia v. State, 622 So.2d 1325, 1329 (Fla. 1993). Because Ms. Furtik's testimony was intended to show the mitigation that counsel could have presented at a penalty phase, the court erred in not permitting the hearsay statements at the evidentiary hearing because they would be admissible in a penalty phase.

Ms. Furtik's testimony was relevant to the issue of counsel's effectiveness during the penalty phase. Claim II regarded counsel's failure to effectively investigate and present mitigation during John Marquard's penalty phase (V7, R227-228). Under Florida Rule of Criminal Procedure 921.142(h), "any other factors in the defendant's background that would mitigate against imposition of the death penalty" were relevant. Fla. Stat. § 921.142 (h). If allowed, Ms. Furtik would have testified to her opinions how the circumstances of John Marquard's background caused John to be the person he was at the time of the crime. Thus, Ms. Furtik's testimony was relevant.

Because Ms. Furtik's testimony was both admissible and relevant, the trial court erred in holding that, "Trial counsel cannot be faulted for failing to hire and call a witness whose testimony would not be relevant or admissible." (V5, R734)

Because the trial court erroneously concluded that Ms. Furtik's testimony was neither relevant nor admissible, Ms. Furtik was not able to present John Marquard's background as counsel should have presented it during the penalty phase. The trial

court denied John Marquard the opportunity to proffer testimony Ms. Furtik could offer regarding "things the trial attorney could have presented to the jury to present John's background mitigation as to how he didn't receive the treatment that was recommended for him to receive and how that failed and eventually did not go on." (V7, R248-249). The court sustained the state's hearsay objections, and did not allow Ms. Furtik to testify to her opinions regarding whether John Marquard ever received the treatment the state recommended for him, the institutions in which the state placed John, Mrs. Harrelson's experience with John, and recorded head injuries. (V7, R250-251). Because John was involved with and placed with North Carolina state institutions continuously from the age of ten, the system's recommendations and actions severely impacted John Marquard's life and background (V7, R238). Counsel testified he did not contact anyone involved in the North Carolina system (V6, R110; V 2, 156). When listing his sources, Dr. Krop testified he only contacted John's parents, and did not mention anyone involved with the state of North Carolina (M V 10, 87-88). The record indicates that neither counsel nor Dr. Krop contacted the officials who monitored and controlled John Marquard's life from the age of ten, therefore, neither counsel nor Dr. Krop could testify about the information Ms. Furtik learned when she contacted North Carolina, John's family, and other people who knew John as a child. Ms. Furtik, had the court permitted her testimony, could have

offered valuable mitigation that both counsel and Dr. Krop ignored. The trial court erred in not permitting her testimony because he erroneously concluded it was neither relevant nor admissible.

**B. The lower court prevented Mr. Marquard from presenting his case during the postconviction evidentiary hearing by refusing to permit hearsay testimony.**

The circuit court erred sustaining the state's objections to Becky Hicks' and Marriah Harrelson's hearsay testimony (V6, R12, 13, 14, 89). Florida Statute 921.141(1) states, "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." Fla. Stat, §921.141(1) (1979). This Court noted, "the exclusionary rules of evidence, including the rule barring use of hearsay statements are inapplicable in the penalty phase of a capital trial." Garcia v. State, 622 So.2d 1325, 1329 (Fla. 1993). Because Becky Hicks' and Mrs. Harrelson's testimony was intended to show the mitigation that counsel could have presented at a penalty phase, the court erred in not permitting the hearsay statements at the evidentiary hearing because that testimony would have been admissible in John Marquard's penalty phase.

**C. The court erred in refusing to take judicial notice of Hobart Harrison's prior testimony.**

The circuit court erred in denying the motion to take judicial notice of Mr.

Harrison's testimony from Abshire's trial. Although Harrison testified at the evidentiary hearing, he refused to testify when questioned about his previous testimony at Abshire's trial.

> 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 back into the pat with Mr. Abshire because that's over and done with. I appreciate y'all asking me to come up here and help this man, but like I told you, I done told you once he ain't the one that did it. That's as far as I want to go with it. I would appeciate it if you'd leave me out of this.
>
> Q. Is that what you would have testified to if–
>
> A. There is no "if," sir. It's been nine years. I just want to be left alone. I'm going home soon. Getting out of prison. I just want to be left alone.
>
> If y'all do something to that man, that's on y'all. That's in y'all's hands. I just told you what I know. I was in the cell block with this man here and the only thing he told me was that he had a brother that killed somebody and that's all he could remember. And he kept to himself. He didn't say nothing. He didn't open his mouth. That's all I know about the man. And I know about his partner.

(V7, R163, 164). Because Mr. Harrison would not testify in as much detail as he did in Abshire's trial, counsel asked the court to take judicial notice of Mr. Harrison's testimony in Abshire's trial and asked that a copy of Mr. Harrison's testimony be

introduced into this record. The state objected because "I can't cross-examine that transcript." (V7, R164) The court sustained the objection. The 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). Stano v. State, 473 So.2d 1282, 1286 (Fla.1985).

**D. Conclusion**

Mr. Marquard was denied a full and fair hearing. He is therefore entitled to a new postconviction proceeding to establish his entitlement to relief.

## ARGUMENT V

**THE CIRCUIT JUDGE ERRED IN FINDING THAT MR. MARQUARD'S COUNSEL WAS EFFECTIVE AT THE GUILT PHASE OF THE TRIAL UNDER SIXTH EIGHTH AND FOURTEENTH AMENDMENT STANDARDS. MR. MARQUARD'S COUNSEL FAILED TO PROPERLY QUESTION JURORS, CROSS EXAMINE WITNESSES, CHALLENGE INADMISSIBLE EVIDENCE IN THE GUILT/INOCENCNE PHASE OF THE TRIAL AND CALL WITNESSES TO ESTABLISH A DEFENSE.**

**A. Defense counsel was ineffective for failing to question jurors about their feelings regarding any emotional impact of gruesome evidnece.**

The court found counsel's decision not to question jurors about the potential impacts of graphic pictures and body parts evidence was a strategical decision because counsel did not want to emphasize the photographs of the crime scene and the victim's

bones (V5, R728, 729). This finding is clearly erroneous in light of the testimony presented at the evidentiary hearing.

Counsel testified he felt it would not be good strategy to elaborate on the gruesome details of the murder, because details of the crime could prejudice the entire panel (V6, R146, 147). Thus, counsel's choice was not a strategic decision; it was a mistake. A strategic decision not to prejudice an entire jury panel is made when an attorney decides whether to question a juror in front of other jurors about details known only to that particular juror. This was a different situation. All of the jurors ultimately heard the gruesome details of this crime, and it was imperative for counsel to learn how the gruesome evidence might impact the jurors. A competent attorney would challenge a juror if that juror indicated the gruesome nature of the crime would impact his ability to concentrate on the testimony and be fair and impartial. The only way counsel could have learned if any potential jurors harbored those feelings, was to specifically ask them. Counsel's failure to ask these imperative questions was deficient performance. Had counsel asked these questions, he could have eliminated jurors who probably rendered a guilty verdict and death sentence based , in large part, on the impact of the gruesome evidence. The trial court erred in not granting Mr. Marquard a new trial.

**B. Defense counsel failed to properly litigate the issue of the state's exclusion of juror Robinson.**

Wood had no experience in selecting a death qualified jury. Although Wood attempted to rehabilitate Mr. Robinson, the only African American prospective juror, counsel did not rehabilitate him because he failed to ask about the death penalty (V5, R905, 914, 915).

If Wood had experience and knew the law, he could have asked Mr. Robinson the correct question which he could have framed from the language in Lockhart v. McCree , 476 U.S. 162, 176 (1986):

> It is important to remember that all who oppose the death penalty are subject to removal for cause in capital cases; those who firmly believe that the death penalty is unjust may nevertheless serve as jurors in capital cases as long as they state clearly that they are willing to temporarily set aside their own beliefs in deference to the rule of law.

Effective counsel would have asked Mr. Robinson if he could temporarily aside his beliefs against the death penalty and follow the law. Had counsel asked the correct question and successfully rehabilitated Mr. Robinson, it would have been reversible error for the trial court to exclude Mr. Robinson for cause. Chandler v. State, 442 So. 2d 171, 174 (Fla. 1983). Jurors may not be excluded for cause "simply because they voice objections to the death penalty or express conscientious or religious scruples against its infliction." Witherspoon v. Illinois, 391 U.S. 510, 522 (1968). Counsel's failure to know the law was deficient performance which resulted in the erroneous

exclusion of a juror who may have voted for a lesser degree of murder or a life sentence. The court erred.

**C. Defense counsel was ineffective for failing to impeach witnesses with prior sworn statements and failing to call witnesses who could testify to facts inconsistent with the state's theory of the crime.**

The circuit court erred in ruling that counsel's failure to impeach Abshire was not ineffective assistance (V5, 729-30).

Counsel failed to use Abshire's deposition statement that nobody could get between him and John to impeach Abshire (V6, R118). This was deficient performance because Abshire's statement provided motive for Abshire to kill the victim.

Counsel failed to call Hobart Harrison and David Blanks as witnesses to establish that Michael Abshire inflicted the fatal wound. Counsel indicated both he and Pearl learned from previously representing Harrison that he was not consistent in his demeanor and testimony. Counsel also represented Blanks and did not consider him consistent in his own case. Even though the state called Harrison as a witness to testify in Abshire's trial, giving Harrison's testimony credibility, counsel let his prior representation of Harrison influence his decision of whether to call Harrison as a witness in John Marquard's trial. Counsel felt that Harrison was uncontrollable because he was upset about his own criminal charges, but counsel could not know

this, because he never tried to prepare Harrison to testify in John Marquard's case (V6, R121). Counsel faced a conflict of interest and should have moved to withdraw from the case. Counsel's former representation of Harrison and Blanks prevented them from making objective decisions on calling these two witnesses. Counsel also indicated he did not call these two witnesses because they did not exonerate John Marquard. However, in closing, counsel argued that Abshire did the actual killing (M V9, 1399). Thus, it was deficient performance not to call Blanks and Harrison, the only two witnesses available to establish his theory of defense.

**D. The trial court erred in failing to rule on the issue that counsel was ineffective for failing to object to the introduction of the victim's bones, not objecting to the bones going into the jury room during deliberations, and not objecting to the introduction of the crime scene video.**

Counsel failed to object to the introduction of the bones (M V6, 981, 982). The jury saw the highly prejudicial bones twice during testimony (M V6, 981, 982; V8, 1282-86). Counsel explained that he failed to object because he did not know of any legal basis upon which to base an objection (V6, R130). Thus, counsel failed to know Florida Statute 90.403, which prohibits the introduction of evidence in which the prejudicial impact outweighs any probative value. The introduction of the victim's body parts prejudicially impacted any possible probative value. The state could have used less prejudicial photographs. Welty v. State, 402 So. 2d 1159 (Fla. 1981); Bush v. State, 461 So. 2d 936, 939-940(Fla 1984) cert. denied, 475 U.S. 1031, 106 S. CT.

1237, 89 L.ED.2d 345 (1986).

Counsel performed deficiently by failing to argue the introduction of the victim's bones is so shocking it defeats the value of their relevance. No evidence shown to the jury could be more shocking than the victim's body parts. This was not harmless error because the impact of the victim's bones probably induced the jury to return a verdict of first degree murder rather than  not guilty or guilty of a lesser offense. *See* State v. DiGuilio, 491 So. 2d 1129 (Fla 1986).

Defense counsel performed deficiently by failing to object to the introduction of the video of the crime scene which depicted the victim's scattered bones (M V6, 986). This was highly prejudicial and irrelevant because there was no testimony that John Marquard scattered the bones.  In a similar situation, this Court held that photographs of the victim's body should not have been shown to the jury.  Czuback v. State, 570 So. 2d 925 (Fla. 1990). In Czuback prejudicial and gruesome photographs of the victim's body, which decomposed for at least a week before found, were shown to the jury.  As in Czuback, the video of the crime scene had little or no relevance to the case. The crime scene video did not establish identity of the victim, did not reveal wounds probative of the cause of death, and did not show the body as it was left at the time of the crime. Accordingly, the circuit court erred in holding that the crime scene video was relevant to the case.

Trial counsel deficiently failed to cross examine Dr. Maples regarding whether the damage to the bones could have occurred post mortem. Counsel testified he recalled eliciting that the medical examiners could not determine which wounds occurred first and he thought he asked the medical examiners if they could determine whether the wounds were inflicted pre or post-mortem. Thus, counsel realized this was important testimony and his failure to elicit it was deficient performance and not trial strategy. The trial record reflects that counsel failed to ask whether the doctors could not determine if the wounds were inflicted pre-mortem or post-mortem (M V6, 1014-1018; V8, 1291, 1292).

**E. Conclusion**

Cumulatively, counsel's deficient performance deprived Mr. Marquard of effective assistance of counsel and was not harmless error because the prejudicial impact of counsel's deficient performance probably caused the jury to return a verdict of guilty of first degree murder instead of not guilty or guilty of a lesser offense. State v. DiGuilio 491 So. 2d at 1129 (Fla 1986). Had Mr. Marquard received effective assistance of counsel, the jury probably would have returned a verdict of not guilty or guilty of a lesser included offense. Mr. Marquard is entitled to relief.

## ARGUMENT VI

## THE TRIAL COURT ERRED IN SUMMARILY DENYING MR. MARQUARD'S INEFFECTIVE

**ASSISTANCE OF COUNSEL CLAIM THAT HIS ATTORNEY FAILED TO OBJECT TO THE PROSECUTOR'S COMMENTS AND THE JUDGES DETRIMENTAL BEHAVIOR IN VIOLATION OF THE FOURTH, FIFTH , SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.**

The trial court denied an evidentiary hearing on this issue claiming it was procedurally barred. Trial counsel ineffectively failed to object to the prosecutor diminishing the jury's role by asking them if they could be part of the legal machinery that imposed the death penalty (M V4, 777, 864). Because trial counsel failed to object, appellate counsel could not raise this issue on direct appeal. Castor v. State, 365 So. 2d 701 (1978). Thus, it was properly raised in John Marquard's 3.850 motion.

By asking the jurors if they could be part of the legal machinery to impose the death penalty, the prosecutor minimized the jury's role and dehumanized the death penalty process. This error was compounded when the trial court informed the jury that the final decision on punishment is the judge's responsibility (M V6, 1770). The court failed to instruct the jury that its recommendation carried great weight and would only be overridden in circumstances where no reasonable person could disagree. Tedder v. State, 322 So. 2d 908, 910 (Fla 1975). Under Florida's capital sentencing statute, the jury has the primary responsibility for sentencing. Its decision is entitled to great weight. McCampbell v. State, 421 So. 2d 1072 (Fla. 1982);

Espinosa v. Florida, 112 S. Ct. 2926 (1992). The suggestion and instructions that a capital sentencing judge has the sole responsibility for the imposition of sentence, or is free to impose whatever sentence the judge deems appropriate, is inaccurate. Mr. Marquard's jury was led to believe that its verdict meant very little and that the judge was free to impose whatever sentence he wished. The court erred in denying this claim without an evidentiary hearing.

## ARGUMENT VII

**THE TRIAL COURT ERRED IN SUMMARILY DENYING MR. MARQUARD'S CLAIM THAT HIS RIGHTS UNDER THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION WERE VIOLATED WHEN THE JURY SAW HIM HANDCUFFED DURING THE TRIAL. TRIAL COUNSEL RENDERED PREJUDICIALLY INEFFECTIVE ASSISTANCE FOR NOT REQUESTING THE HANDCUFFS BE REMOVED.**

The trial court summarily denied this claim holding that it should have been raised on direct appeal and was procedurally barred (V3, R585-86).

Mr. Marquard was forced to wear handcuffs during the penalty phase. The jury could see the handcuffs. There is no evidence of this on the face of the record because Mr. Marquard's attorneys did not object. Thus, this issue was not preserved for appeal and was not raised on appeal.

The trial court either should have granted a new penalty phase or, at the

minimum, granted an evidentiary hearing, so Mr. Marquard could establish that the jury viewed him in handcuffs and the resulting prejudice. Shackling is an "inherently prejudicial practice." Holbrook v. Flynn, 475 U.S. 560 (1986); Bello v. State, 547 So.2d 914, 918 (Fla. 1989).

It is impossible to determine how the sight of Mr. Marquard in handcuffs surrounded by uniformed bailiffs affected the jury. Trial counsel performed deficiently by failing to ask the court to poll the jurors to determine the prejudicial effect or to seek a cautionary instruction. Mr. Marquard should be given a new penalty phase or at least an evidentiary hearing on this issue.

## ARGUMENT VIII

**THE TRIAL COURT ERRED IN NOT GRANTING AN EVIDENTIARY HEARING SO MR. MARQUARD COULD PROVE THE RULES PROHIBITING HIS LAWYERS FROM INTERVIEWING JURORS TO DETERMINE IF CONSTITUTIONAL ERROR WAS PRESENT VIOLATES EQUAL PROTECTION PRINCIPLES, THE FIRST, SIXTH, EIGHT AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION AND DENIES MR. MARQUARD ADEQUATE ASSISTANCE OF COUNSEL IN PURSUING HIS POSTCONVICTION REMEDIES.**

The Eighth and Fourteenth Amendments of the United States Constitution and Article I, Section 21 of the Florida Constitution, require that John Marquard receive

a fair trial. However, Rule 4-3.5(d)(4) of the Rules Regulating the Florida Bar[1] prevents John Marquard from determining whether he received a fair trial. John Marquard can only discover jury misconduct through juror interviews. To the extent it precludes undersigned counsel from investigating and presenting jury bias and misconduct that can only be discovered through interviews with jurors, Rule 4-3.5(d)(4) of the Rules Regulating the Florida Bar is unconstitutional. Because the trial court denied John Marquard this opportunity to investigate and present a claim of juror misconduct, the court denied his rights to due process and access to the courts; the reliability and integrity of John Marquard's capital sentence is questionable.

## ARGUMENT IX

**THE TRIAL COURT ERRED IN DENYING AN EVIDENTIARY HEARING SO THAT MR. MARQUARD COULD PROVE HIS DEATH SENTENCE VIOLATES THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO**

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[1]The rule expressly prohibits counsel from directly or indirectly communicating with jurors. The rule states that

> A lawyer shall not . . . after dismissal of the jury in a case with which the lawyer is connected, initiate communication with or cause another to initiate communication with any juror regarding the trial except to determine whether the verdict is subject to legal challenge; provided, a lawyer may not interview jurors for this purpose unless the lawyer has reason to believe that grounds for such challenge may exist.

Rule 4-3.5(d)(4), R. Regulating Fla. Bar.

**THE UNITED STATES CONSTITUTION BECAUSE THE JURY INSTRUCTIONS WERE INACCURATE, VAGUE, OVERBROAD AND FAILED TO GIVE THE JURY PROPER GUIDANCE. TO THE EXTENT COUNSEL FAILED TO OBJECT, MR. MARQUARD RECEIVED PREJUDICIALLY INEFFECTIVE ASSISTANCE OF COUNSEL.**

**A. Introduction of non-statutory aggravators**

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)(*emphasis added*). Counsel deficiently failed to object. The prosecutor continued, "cold, calculated and premeditated? You bet. **And to make it worse, this was somebody who trusted him**." (M V 11, 1735)(*emphasis added*). Counsel deficiently failed to object. 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. Counsel failed to object, and the prosecutor's urging that the jury consider the victim's trust constituted the introduction of an illegal non-statutory aggravator.

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). Counsel deficiently failed to object. This bad character evidence, that John Marquard carried an usual 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 "**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 V 3, 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)(*emphasis added*).

Mr. Marquard is entitled to relief. The 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, this impermissible aggravating factor 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). The court erred in denying this claim.

**B. Cold, calculated, and premeditated jury instruction**

The jury instructions regarding the cold, calculated, and premeditated aggravator did not include this Court's limiting constructions. Thus, this aggravating factor was overbroadly applied, see Godfrey v. Georgia, 446 U.S. 420 (1980); Maynard v. Cartwright, 108 S. Ct. 1853 (1988), failed to genuinely narrow the class of persons eligible for the death sentence, see Zant v. Stephens, 462 U.S. 862, 876 (1983), and did not apply as a matter of law. As a result, John Marquard's death sentence was imposed in violation of the Eighth and Fourteenth Amendments to the United States Constitution.

This Court has adopted several limiting instructions regarding this aggravating factor and has held the instruction given to John Marquard's jury unconstitutionally vague. Jackson v. State, 648 So.2d 85 (Fla. 1994). 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 V 10, 1518). Counsel deficiently failed to request a limiting instruction on this aggravator. As a result, John Marquard's sentencing jury was simply instructed, “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).

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. Id. at 669, n.3. Thus, had counsel specifically

objected to the form of the instruction to preserve this claim for appellate review, John Marquard would have received a new constitutional 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 V, 1430-1431) This Court held that this 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, but counsel deficiently failed to ask for even one. Because counsel failed, John Marquard was sentenced to death based on an unconstitutionally vague aggravator.

The erroneous instruction is presumed to have tainted the jury's recommendation, and in turn, the judge's death sentence. Espinosa, 112 S. Ct. at 2928. This errors were not harmless beyond a reasonable doubt. Had counsel effectively investigated and prepared for John Marquard's penalty phase, counsel would have thoroughly impeached the only witness who testified to John Marquard's actions surrounding the murder and established mitigating circumstances which probably would have resulted in a life recommendation. This erroneous instruction, combined with the other erroneous penalty phase instructions and counsel's ineffective assistance throughout John Marquard's penalty phase, was not harmless. The trial court erred in denying this claim.

**C. Heinous, atrocious, and cruel jury instruction**

John Marquard's jury was vaguely and overbroadly instructed on the "heinous, atrocious and cruel" aggravating factor. The trial court overruled counsel's objection

that the standard instruction is unconstitutionally vague and denied the proposed jury instruction (M V , 1841, 1502, 1505, 1514, 1515). The trial court never instructed the jury that it is required to find that the defendant "intended" to inflict unnecessary torture to the victim. (M V 11, 1771-72) Stein v. State, 632 So. 2d 1361 (Fla. 1994); Santos v. State, 591 So. 2d 160, 163 (Fla. 1991).

This aggravator was not proven beyond a reasonable doubt, and trial counsel failed to adequately challenge the State's case. Counsel's concession that this aggravator existed was prejudicially deficient representation. Counsel did not attempt to rebut the state's witnesses on this aggravating factor. Counsel failed to present Mr. Harrison to impeach Abshire. Abshire's testimony was the only evidence the state offered regarding the victim's pain and suffering and John Marquard's intent. With Abshire's testimony impeached, there would not be sufficient evidence to prove beyond a reasonable doubt that this was a conscienceless or pitiless crime which was unnecessarily torturous to the victim. Brown v. State, 644 So.2d 52, 53-54 (Fla.1994); State v. Dixon, 283 So.2d 1 (Fla.1973). Further, the newly discovered evidence revealed at John Marquard's evidentiary hearing proves that John Marquard was intoxicated at the time. Had counsel presented Mr. Harrison, the jury and judge would know John Marquard did not have the requisite intent to inflict pain because he could not kill the victim. See Porter v. State, 564 So. 2d 1060 (Fla. 1990). The

court gave the jury a vague instruction; defense counsel failed to provide the jury with available impeachment and mitigation evidence to rebut the State's theory, and the jury recommended death. The judge then relied upon the jury's death recommendation and gave it great weight. Espinosa v. Florida, 112 S. Ct. 2926, 2928 (1992).

This error cannot be harmless in light of the other unconstitutional aggravator instructions and counsel's ineffective assistance throughout the penalty phase. The jury applied three overly vague instructions, and counsel failed to present facts to the jury that prove death is not an appropriate sentence. The court considered the jury's recommendation in its sentencing determination. John Marquard's death sentence violates the Eighth Amendment and the trial court erred in denying this claim.

**D. Pecuniary gain instruction**

The jury was given the following instruction regarding the pecuniary gain aggravating factor:

> 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 V 11, 1771).

This instruction violates 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), and the Eighth and Fourteenth Amendments.

The jury instruction failed to give the jury meaningful guidance as to what was necessary to find either aggravating factor present.

The evidence presented by the State did not prove beyond a reasonable doubt that the pecuniary gain or robbery aggravating circumstances apply:

> While it is true that [Mr. Marquard] took [Willet]s' car following the murder, it has not been shown beyond a reasonable doubt that the primary reason for this killing was pecuniary gain ... The record simply does not support the conclusion that [Willets] was murdered for her car.

Scull v. State, 533 So.2d 1137, 1142 (Fla. 1988). Similarly, "the State did not show beyond a reasonable doubt that the murder was committed for pecuniary gain. The [clothing and stereo] could have been taken as an afterthought." Hill v. State, 549 So.2d 179 (Fla. 1989).

The same analysis applies to the robbery aggravator. "[T]he trial court erred in finding that the murder was committed during a robbery. While there is no question that [Mr. Marquard] took [Willets'] [car] after h[er] death, this action was only incidental to the killing, not a primary motive for it. Mr. Marquard already had his own key to the car and full use of the vehicle. [T]here is no indication that taking it after her death was more an afterthought, rather than the solo basis for the murder. This evidence does not satisfy the standard of proof beyond a reasonable doubt on which the finding of an aggravating factor must be based. Parker v. State, 458 So.2d

750, 754 (Fla. 1984). Neither pecuniary gain nor robbery should have been found to be aggravating circumstances. Mr. Marquard's counsel had the necessary information at his disposal to clearly demonstrate this to the jury, but failed to use it.

The trial court found, "She shared with him her money, her property and her body." (M V3, 542) John Marquard had everything he could have wanted from the victim while she was alive; robbery or pecuniary gain was not the primary reason for this killing. The court found an aggravating factor that was invalid because it was not supported by the evidence. This error cannot be deemed harmless beyond a reasonable doubt. The trial court erred in denying this claim.

**E. During the commission of a felony 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 had convicted Mr. Marquard under the theory of felony murder during the guilt phase of the trial.

During the charge conference, counsel objected to the during the commission of a robbery charge with the pecuniary gain instruction (M V10, 1501). The state

attorney answered, “That’s fine. We’re not going to ask for it.” (M V10, 1501). Counsel then offered no further argument (M V10, 1501). However, 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). After the court instructed the jury, counsel renewed all prior objections, but deficiently failed to address this error (M V11, 1778).

The use of “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.

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, and John Marquard thus entered the penalty phase already eligible for the death penalty. Other similarly (or worse) situated petitioners would not be automatically eligible for the death penalty.

The death penalty in this case was not harmless. The jury received unconstitutional instructions regarding three of the four aggravating circumstances. 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.

**F. Shifting the burden of proof during the penalty phase**

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 V11, 1845). This proposed instruction was denied, 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). 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.

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. 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. 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).

This error was not harmless. John Marquard entered the penalty phase with an

automatic aggravating factor. Because counsel was ineffective in the penalty phase, John Marquard's sentencing jury heard a small fraction of the available mitigation. 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. Therefore, John Marquard is entitled to relief in the form of a new sentencing hearing in front of a jury because his sentencing was tainted by improper jury instructions.

## ARGUMENT X

**WHEN VIEWED AS A WHOLE, THE COMBINATION OF PROCEDURAL AND SUBSTANTIVE ERRORS DEPRIVED MR. MARQUARD OF A FUNDAMENTALLY FAIR TRIAL GUARANTEED UNDER THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS, AND THE TRIAL COURT ERRED IN DENYING AN EVIDENTIARY HEARING.**

John Marquard did not receive the fundamentally fair trial to which he was entitled under the Eighth and Fourteenth Amendments. See Heath v. Jones, 941 F.2d 1126 (11th Cir. 1991); Derden v. McNeel, 938 F.2d 605 (5th Cir. 1991). The sheer number and types of errors in John Marquard's penalty phase, when considered as a whole, virtually dictated the sentence of death. The errors have been revealed in this

brief, John Marquard's 3.850 motion, and in his direct appeal. While there are means for addressing each individual error, addressing these errors on an individual basis will not afford adequate safeguards required by the Constitution against an improperly imposed death sentence. Repeated instances of ineffective assistance of counsel and the trial court's numerous errors significantly tainted John Marquard's penalty phase. These errors cannot be harmless. Under Florida case law, the cumulative effect of these errors denied John Marquard his fundamental rights under the Constitution of the United States and the Florida Constitution. State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986); Ray v. State, 403 So. 2d 956 (Fla. 1981); Taylor v. State, 640 So. 2d 1127 (Fla. 1st DCA 1994); Stewart v. State, 622 So. 2d 51 (Fla. 5th DCA 1993); Landry v. State, 620 So. 2d 1099 (Fla. 4th DCA 1993).

## CONCLUSION AND RELIEF SOUGHT

Based on the forgoing, the lower court improperly denied Mr. Marquard's rule 3.850 relief. This Court should order that his convictions and sentences be vacated and remand the cases for a new penalty phase trial, an evidentiary hearing, or for such relief as the Court deems proper.

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing BRIEF OF APPELLANT has been furnished by U.S. Mail to all counsel of record on November 21, 2002.

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