IN THE SUPREME COURT OF FLORIDA

CASE NO. SC00-253

JOHN C. MARQUARD,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

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

REPLY BRIEF OF THE APPELLANT

Peter J. Cannon
Florida Bar No. 0109710
Assistant CCRC-Middle

Leslie Anne Scalley
Florida Bar No. 0174981
Staff Attorney

CAPITAL COLLATERAL REGIONAL
COUNSEL-MIDDLE
3801 Corporex Park Drive
Suite 210
Tampa, Florida 33619
813-740-3544

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

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 AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.

A. Newly discovered evidence .

1. Abshire's change in testimony is newly discovered evidence which the evidentiary hearing court erroneously failed to consider in evaluating John Marquard's disparate sentence.

Appellee asserts that the postconviction court's decision that Abshire's recanted testimony is not newly discovered evidence was a "credibility choice" that the court decided adversely to Mr. Marquard and is supported by the record (AB at 15-17). However, as extensively explained in Mr. Marquard's Supplemental Initial Brief, the postconviction court made absolutely no analysis of or findings of fact regarding Abshire's recanted testimony. Rather, the postconviction court simply summarily dismissed Abshire's testimony without examining all the circumstances as this Court requires.

This court has mandated that circuit courts, in assessing recanted testimony, must "examine all of the circumstances in the case." Robinson v. State, 707 So.2d at

691 (Fla. 1998) (citing State v. Spaziano, 692 So.2d 174, 176 (Fla.1997). Clearly the postconviction court failed to do this in summarily dismissing Abshire's postconviction testimony: "[t]he Court finds that this is not newly discovered evidence, this is simply the latest version of the events surrounding the homicide" (V5, R734). The court failed to analyze or address any circumstances regarding the credibility of Abshire's postconviction testimony and then analyze it to determine whether it was newly discovered evidence. Contrary to the court's cursory statement, Abshire's testimony was credible; it was consistent on cross-examination, independently corroborated by Hobart Harrison's testimony which *the state* presented at Abshire's trial, Mr. Harrison confirmed his testimony in Abshire's trial at the evidentiary hearing, and Abshire recanted other facts which are more consistent with all the circumstances of the offense than his trial testimony (V6, R45); (Appendix A at 1409-10); (V7, R161-2). See Supplemental Initial Brief at 12-15.

Appellee also asserts that the postconviction court's rejection of Abshire's testimony was supported by the record (AB at 17). However, both the post conviction court and Appellee absolutely failed to point out which portions of the record support any conclusion that Abshire's postconviction testimony is not newly discovered evidence (AB at 17). Moreover, Abshire's postconviction testimony, that he chopped the victim's neck while she was alive and inflicted the death blow, is supported by

both John Marquard's and Abshire's trial records. As pointed out in Mr. Marquard's Supplemental Initial Brief, Abshire's postconviction testimony is completely consistent with the evidence presented at Mr. Marquard's trial, except for Abshire's own testimony, in which he asserted that he did not participate in killing the victim (Supplemental Initial Brief at 15-23). Abshire's postconviction testimony is also consistent with the evidence presented at the evidentiary hearing: Eric Wallen's testimony regarding his violent, domineering, and explosive nature, his confession to Hobart Harrison, and his drug and alcohol use the night of the crime. The trial and postconviction records clearly support and corroborate Abshire's postconviction testimony.

Because the postconviction court utterly failed to properly examine all the facts and circumstances. Therefore, this Court can give absolutely no discretion to facts the court failed to find, and should consider the issue de novo, with no discretion given to the court (AB at 16).

2. In light of the newly discovered evidence of Abshire's recanted testimony and Abshire's life sentence, John Marquard's death sentence is disparate in violation of the Eighth and Fourteenth Amendments of the United States Constitution and the corresponding provisions of the Florida Constitution.

Despite Appellee's assertion otherwise, the trial court's conclusion that Mr. Marquard was "the dominant person in this entire course of events" is not supported

by competent and substantial evidence (S V2, 183-84) (AB12-15). "[I]n order to be sustained, the court's findings must be supported by competent, substantial evidence in the record." Gonzalez v. State, No.SC94154, 9 (Fla.2001). Competent evidence is "[e]vidence that is relevant and is of such character (e.g., not unfairly prejudicial or based on hearsay) that the court should receive it." Black's Law Dictionary 576-77 (7th ed. 1999). Substantial evidence is "[e]vidence that a reasonable mind would accept as adequate to support a conclusion; evidence beyond a scintilla." Black's Law Dictionary 580 (7th ed. 1999). As demonstrated in Mr. Marquard's Supplemental Initial Brief, each supposition the court used to support its conclusion is clearly refuted by Abshire's testimony at Mr. Marquard's trial regarding the circumstances leading to the actual murder as well as his evidentiary hearing testimony and therefore, is not supported by competent and substantial evidence (Supplemental Initial Brief at 15-23).

The postconviction court held:

> The defendant, John Marquard, was, in fact, the dominant person in this entire course of events. It was John C. Marquard who made the decision that they should kill Stacey Willetts. John Marquard drove Willetts and Abshire to the wooded area, where they eventually took her life. Marquard took both individuals through the woods to the eventual location, where he caused the death of Stacey Willetts. The defendant, John Marquard, was the individual who had the knife, who cut Stacey Willetts

> throat, and attempted to decapitate her, and who then handed the knife to his co-defendant Michael Abshire, and ordered him to stab the victim. The court finds that Michael Abshire had no intention to kill the victim, and was merely an accomplice. The court further finds that Abshire was acting under the substantial domination and extreme duress from the defendant Marquard.

(S V2, 183-84).

In finding that Mr. Marquard made the decision to kill the victim, the court ignored Abshire's trial testimony that both he and John Marquard made the plans.

> Q. Did you come up with some ideas on how to do this, as well?
>
> A. Yes, sir. **We did**.
>
> Q. Okay. What did you suggest?
>
> A. **Pretty much a basic consensus. I couldn't really say who thought of what particular thing. I mean, it's like a ... a general scenario, you know, go back in the woods somewhere, I mean, because there's a guy we knew who did it exactly that way before – or, I knew. I'm not sure if John knows him**.

(M V7, 1113)(emphasis added). Thus, this finding is refuted by the record.

The postconviction court also erroneously found the fact that Mr. Marquard drove Abshire and the victim to the woods evidenced domination. However, the court overlooked Abshire's trial testimony that he directed Mr. Marquard into the woods:

> John pulled over, and I had the – I got – I got his flashlight, and I had a poncho, so I got out in the rain. He was driving. I was trying to find – make sure he wouldn't get stuck when he pulled in there.

(M V7, 1119-20).

* * *

> Okay. So he pulls in. I'm pretty much guiding him in, you know, with the flashlight, . . . And so the next thing we're looking for is either a turnoff or a road that's going towards the water.

(M V7, 1120).

The postconviction court's finding that John Marquard "took both individuals through the woods to the eventual location" is clearly refuted by the record and supported by no evidence. In fact, Abshire testified at John Marquard's trial that he led the group through the woods.

> Q. Now, you said that you . . . the two of you and Stacey went out into the woods and that I believe you said you had the flashlight?
>
> A. Yes, sir, most of the time.
>
> Q. Okay. **And you were in the lead, then**.
>
> A. **Yes, sir**.
>
> Q. Okay.
> A. **I was at point**.

Q. Or you were on point.

A. Yes, sir.

Q. **Is this typical for you to be on point when you're trekking through the woods with John?**

A. **Usually**.

(M V7, 1210). Abshire also led the way back to the car (M V7, 1214). Thus, this finding is also refuted by the record.

The postconviction court erroneously found that Mr. Marquard gave Abshire his knife, which Abshire used to kill the victim. Abshire testified at trial that he used his own Bowie knife to cut the victim (M V7, 1220).

The court's finding that John Marquard dominated Abshire is also clearly refuted by other evidence in the trial record. At the time of the incident, Abshire weighed 200 pounds and lifted weights (M V7, 1218). Abshire was tough. He carried John's money because, "we figured between the three of us, I'm the least person – if one of us was by ourselves, I was the least person that was going to get mugged." (M V7, 1194). Abshire based the plan to kill the victim on a plan that a friend of his used and carried two knives into the woods (M V7, 1113, 1121). Abshire led John Marquard and the victim into and out of the woods (M V7, 1123-24). Abshire intended to kill the victim (V6, R36) (*See* Appendix A at 1409-10). As well, Abshire controlled the property taken from the victim; he was arrested while driving the

victim's car alone (M V7, 1225). Moreover, Dr. Krop testified at John Marquard's trial that John did not dominate Abshire:

> I would say that the majority of the data suggested that both co-defendants were equally strong in terms of their personality, that it would be unlikely that either one of them could lead the other into engaging in behavior that one person didn't really want to do.

(M V10, 1644).

The court also found that Abshire did not intend to kill the victim and was merely an accomplice. Again, this is specifically refuted by the evidentiary hearing record and Abshire's trial record. Abshire planned the attack with John, guided them into the woods, led the way, used his own knife, and admitted to Hobart Harrison that he killed the victim:

> 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.

(Appendix A at 1409-10)(emphasis added)(MV7, 1113, 1123-24).

The court's findings, "[t]he defendant, John Marquard, was the individual who

had the knife, who cut Stacey Willetts throat, and attempted to decapitate her, and who then handed the knife to his co-defendant Michael Abshire, and ordered him to stab the victim. The court finds that Michael Abshire had no intention to kill the victim, and was merely an accomplice." are also clearly refuted by the evidentiary hearing record. At the evidentiary hearing, Abshire testified that he used his Bowie knife to kill the victim (V6, R36). Abshire testified that he did not know if John Marquard cut the victim's throat:

> Q. But the injuries that were causing her the pain and the suffering were inflicted by Mr. Marquard when he slit her throat and when he stabbed her in the chest, is that not correct?
>
> A. That's what the dude said. I seen him stab her. **I didn't see him cut her throat. Just assumed that.**
>
> Q. **Did you see that her throat was cut?**
>
> A. **No, ma'am. The doctor at my trial said it was.**

(V6, R45)(emphasis added). Abshire also testified that **he** tried to decapitate the victim, attempting to kill her:

> 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, 45)(emphasis added).

Additional evidentiary hearing evidence refutes the court's erroneous conclusion that "John Marquard was, in fact, the dominant person in this entire course of events" (S V2, 183-84). Eric Wallen testified he 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 found Abshire to be a violently deranged person who is extremely jealous and almost killed a man over watermelons. (V6, R61-65). "[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). In contrast, Mr. Wallen described John Marquard as submissive (V6, R65, 66).

This testimony is consistent with Abshire's own testimony and testimony presented at Abshire's trial. In pre-trial deposition, Abshire stated that nobody could get between him and John (V6, R118). At Abshire's trial, Hobart Harrison testified that Abshire told him:

> Q. Did he tell you any details of the attack that led to the death of Stacey Willets?
>
> A. Well, no. He just said that the girl was coming between him and John. . .

(Appendix A at 1410).

* * *

A. **[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**."

(Appendix A at 1411)(emphasis added).

Only Abshire's testimony at John Marquard's trial tends to establish that John Marquard dominated Abshire throughout the entire course of events. Abshire's testimony at John's trial is inherently unreliable; this Court has held that, "accomplice testimony should be relied on with "great caution"". Brown v. State, 721 So.2d 274, 282 (Fla. 1998). At the time of John Marquard's trial, Abshire had been tried, found guilty of first degree murder, and the jury recommended death. However, the trial court delayed sentencing until after Abshire testified at John Marquard's trial. Through his testimony at Mr. Marquard's trial, Abshire hoped to establish mitigation that the court could find justified a life sentence; Abshire could try to establish 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. Enmund v. Florida, 458 U.S. 782 (1982); Tison v. Arizona, 481 U.S. 137 (1987); Fla. Stat. § 921.141(6)(d)(e) (1991). Abshire

also testified at the evidentiary hearing that, at the time of John's trial, he wanted John Marquard to be sentenced to death (V6, R50). "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 this testimony was motivated by self interest and revenge, it is clearly not competent and substantial evidence. Brown, 721 So.2d at 282.

All the evidence in this case, from John Marquard's trial, Michael Abshire's trial, and John Marquard's evidentiary hearing, clearly refute the postconviction court's order and establish that the order is not supported by competent and substantial evidence. Abshire's testimony at John Marquard's trial alone does not establish "[e]vidence that a reasonable mind would accept as adequate to support a conclusion; evidence beyond a scintilla", especially in light of all of the trial and evidentiary hearing testimony that clearly refutes it. Black's Law Dictionary 580 (7th ed. 1999). Brown, 721 So.2d at 282.

Appellee cites cases which clearly do not apply to Mr. Marquard's case to assert that death is not a disparate sentence (AB at 13-15). Though this Court has held that disparate sentences occur only when coperpetrators are convicted of the same offense, Appellee cites Larzelere v. State, 676 So.2d 394 (Fla.1996), Sexton v. State, 775 So.2d 923 (Fla.2000), and Brown v. State, 721 So.2d 274 (Fla.1998), as authority for its contention that John Marquard's death sentence is not unconstitutionally disparate

(AB at 13-14). Kight v. State, 2001 WL40377 *3 (Fla.2001). In Larzelere, Larzelere was convicted of first degree murder while her codefendants were acquitted and given immunity for their testimony. Larzelere, 676 So.2d at 406-7. In Sexton, the actual killer plead guilty to second degree murder, and this Court noted Sexton's death sentence was not disparate because of "dominance of the defendant over his simple-minded son achieved by a lifetime of cruel, insidious and humiliating physical, emotional and sexual abuse". Sexton v. State, 775 So.2d at 936. In Brown, the codefendant, who inflicted only non-fatal injuries, plead guilty to second degree murder. Brown, 271 So.2d at 282.

John Marquard's and Michael Abshire's cases are clearly distinguishable from those Appellee asserts. Both were convicted of first degree murder and, in both cases, the jury recommended a death sentence which the sentencing court imposed. Moreover, the evidence discussed above proves that Abshire is at least as culpable as John Marquard, if not more culpable. Accordingly, John Marquard's death sentence is unconstitutionally disparate. Scott v. Dugger, 604 So. 2d 465, 468 (Fla. 1992); Hazen v. State, 700 So.2d 1207, 1207-8 (Fla. 1997); Puccio v. State, 701 So.2d 858, 862 (Fla. 1997); Scott v. State, 657 So.2d 1129, 1132 (Fla.1995); Slater v. State, 316 So.2d 539, 542 (Fla. 1975).

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. Conflict of Interest.

Appellee claims that Mr. Marquard "attempts to generate a conflict of interest with respect to Harrison", however, the record clearly proves a conflict existed (AB at 21). Counsel represented John Marquard even though their contemporaneous and prior representation of Hobart Harrison materially limited their representation of Mr. Marquard. The record reveals that counsel represented John Marquard as early as December 17, 1991 (M V1, 21). They also represented Mr. Harrison, who was a material witness in the state's case against Michael Abshire. Mr. Harrison was sentenced on charges for which counsel represented him on July 16, 1992 (V6, R104, Appendix A at 1412). Counsel concurrently represented both John Marquard and Mr. Harrison, knowing of a possible conflict of interest. The state provided counsel a copy of Mr. Harrison's statement on June 12, 1992 (M V 1, 96).

The statement, as well as Harrison's deposition and testimony at Abshire's trial, established that Mr. Harrison should have been a material defense witness at Mr.

Marquard's penalty phase. Mr. Harrison testified that Abshire told him that Abshire killed the victim because Mr. Marquard could not do it and because the victim was interfering in his relationship with Mr. Marquard (Appendix A). Though this testimony inculpated both Mr. Marquard and Abshire in the murder, it impeached Abshire's testimony that he did not kill the victim and clearly diminished Mr. Marquard's culpability.

Counsel's conflict of interest materially limited their representation of John Marquard. Though the state considered Mr. Harrison's testimony credible and presented it in Abshire's case, counsel absolutely failed to present this testimony in Mr. Marquard's penalty phase. At the evidentiary hearing, counsel testified that they did not even approach Mr. Harrison about testifying because, based on their prior representation of him, they felt he 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" (V 1, 121). In other words, Mr. Harrison was not happy with their representation of him that resulted in the unusually long sentence (V 1, 104). Because counsel thought that Mr. Harrison would be "uncontrollable" with them because he was angry with their representation, or they felt he was particularly dishonest based on something they learned while representing him, counsel was faced with a conflict of interest and should have withdrawn from John Marquard's case.

Rule 4-1.7 of the Rules Regulating the Florida Bar precludes representation in conflict of interest situations such as this, because the conflict materially interfered with counsel's independent professional judgment in considering alternatives and foreclosed courses of action that reasonably should have been pursued on Mr. Marquard's behalf. Comment to Rule 4-1.7 Rules Regulating the Florida Bar (1993). Counsel who had not represented Mr. Harrison would not have thought he was uncontrollable because he could not have been angry with them. Moreover, conflict-free counsel would not have had any reason to believe Mr. Harrison was not honest, especially because the state presented his testimony against Abshire, four months before John Marquard's trial.

Clearly, counsel's conflict ridden representation prejudiced Mr. Marquard. Mr. Harrison's testimony was crucial to penalty phase. Had the jury heard evidence that John Marquard could not kill the victim, did not try to drown her, did not order Abshire to cut her, and that Abshire, alone, tried to decapitate her, the jury likely would have not believed any of Abshire's devastating trial testimony and probably would have recommended a life sentence.

Though this conflict of interest is not the same "actual conflict" discussed in Cuyler v. Sullivan, 466 U.S. 335 (1980), the effects of this conflict are equally as insidious as those from "actual conflicts". This conflict forced counsel to choose

between alternative courses of action. See McCrae v. State, 510 So.2d 874, 877 n.1 (Fla.1987); citing Stevenson v. Newsome, 774 F.2d 1558, 1562 (11th Cir.1985); Baty v. Salkom, 661 F.2d 391, 395 (5th Cir.1981). In this case, "a lawyer not laboring under the claimed conflict could have employed a different defense strategy and thereby benefitted the defense". McCrae v. State, 510 So.2d at 877 n.1. Because this conflict precluded counsel from presenting this imperative mitigating evidence, it affected the defense and prejudicially denied Mr. Marquard his right to counsel. Id. Accordingly, prejudice should be presumed. Cuyler, 466 U.S. at 349.

Appellee's assertion that counsel's failure to present Harrison's testimony was a reasonable decision is also clearly erroneous (AB at 21). The decision was not reasonable. At the penalty phase, Mr. Marquard had been convicted of a first degree murder involving a decapitation; this fact alone made a death recommendation likely. Mr. Marquard had absolutely nothing to lose by presenting evidence that the only person inculpating him, Abshire, admitted that Abshire killed the victim because Marquard could not do it. This would have impeached the rest of Abshire's prejudicial testimony and, combined with argument that Abshire blamed the entire crime on Mr. Marquard hoping for a life sentence, could only have encouraged the jurors to recommend a life sentence for Mr. Marquard.

B. Failure to investigate and present mitigating evidence.

Contrary to Appellee's suggestion that counsel performed reasonably during John Marquard's penalty phase and that the reasonable assistance did not prejudice Mr. Marquard, counsel's total abdication of their representation of John Marquard during the penalty phase resulted in a complete denial of counsel and prejudice must be presumed (AB at 20-21). In Cronic v. United States, the United States Supreme Court held that:

> If no actual "Assistance" "for" the accused's defense is provided, then the constitutional guarantee has been violated. To hold otherwise "could convert the appointment of counsel into a sham and nothing more than a formal compliance with the Constitution's requirement that an accused be given the assistance of counsel. The Constitution's guarantee of assistance of counsel cannot be satisfied by mere formal appointment.

United States v. Cronic, 466 U.S. 648, 654-55 (1984)(*internal citations omitted*). Mere formal compliance occurred during John Marquard's penalty phase.

At the evidentiary hearing counsel testified that they abandoned their role as counsel and directed a non-lawyer to prepare for the penalty phase defense. "**Dr. Krop was, for lack of a better phrase, in charge of preparing the mitigation defense or preparation for phase two**." (V6, R144). Counsel did not assign any investigators to help Dr. Krop (V7, R155). Thus, counsel, through complete abdication of their duties, completely denied John Marquard counsel at the most

critical stage in his proceedings, the defense for his life. Id. at 659. Dr. Krop was not a trained lawyer and clearly did not have the knowledge or skill to subject the prosecution's case to meaningful adversarial testing.[1] Id. Accordingly, Mr. Marquard was denied his Sixth Amendment rights, making the adversary process presumptively unreliable. Id. No showing of specific prejudice is required. Id.

Alternatively, counsel's failure to investigate and present mitigating evidence was deficient performance which prejudiced John Marquard. Appellee asserts that counsel made a strategic decision to rely solely on Dr. Krop and some mental health records the State Attorney gave to counsel for mitigation (AB at 20).

The United States Supreme Court has mandated that effective assistance of counsel in a capital penalty phase proceeding includes an "obligation to conduct a **thorough** investigation of the defendant's background". Williams v. Taylor, 529 U.S. 362, 376-78 (2000) (emphasis added). Clearly, this did not happen in John Marquard's case. At the evidentiary hearing, counsel Gary Wood testified that he did the investigation for the penalty phase (V6, R108, 110, 113). Wood's investigation, aside from giving the mental health records the State Attorney's office acquired to Dr. Krop, consisted of one telephone call to John Marquard's mother, and one

[1]For example, Dr. Krop likely did not know the legal implication Abshire's inculpatory admission to Hobart Harrison should have had on John Marquard's penalty phase defense.

unsuccessful attempt to telephone Father Baker (V6, R109-111, 113, 116). Because counsel explored no alternatives besides giving records to Dr. Krop and leaving him "in charge of preparing the mitigation defense or preparation for phase two", it was not a reasonable strategic decision (V6, R144). See Williams, 529 U.S. at 396 (the failure to investigate and introduce a mitigation was not justified by a tactical decision to focus one theory of mitigation); Strickland v. Washington, 466 U.S. 688, 690-691 (1984); Rose v. State, 675 So.2d 567, 570-71 (Fla. 1996).

Appellee also claims that counsel's failure to present mitigating evidence did not prejudice Mr. Marquard because it was cumulative to the evidence Dr. Krop presented (AB at 21). Appellee is wrong. Had counsel conducted penalty phase investigation and formulated penalty phase strategy themselves rather than assigning Dr. Krop responsibility for the penalty phase, counsel could have presented John Marquard's family and friends to explain what happened to make him enter foster care at eleven years old, a psychiatric hospital at sixteen years old, and live on the streets at seventeen years old.

Any part of the evidentiary hearing testimony that could be cumulative as to the mere fact that Dr. Krop presented it, would not be cumulative to the *weight* of the mitigation (AB at 21). For example, Dr. Krop told the jury that Mr. Marquard had a long history of drug and alcohol abuse, but Dr. Krop did not tell the jury that, at 10

years old, John Marquard overdosed on quaaludes and his mother was too drunk to notice. Dr. Krop also could not tell the jury that John Marquard learned to abuse drugs and alcohol from his mother; she used illegal drugs in his presence and routinely took him to bars. Any cumulative evidence is made much more weighty by the details in the evidentiary hearing testimony. Both the court and the jury weigh mitigation against aggravation. It is a qualitative analysis, not a quantitative analysis. Counsel's failure to present this mitigation was not a reasonable decision and it prejudiced John Marquard. Had the jury heard this mitigation, in addition to Mr. Harrison's testimony that Abshire decapitated the victim because John Marquard could not kill her, there is a reasonable probability that jurors would have recommended a life sentence.

"[T]he entire postconviction record, viewed as a whole and cumulative of mitigation evidence presented originally, raise[es] a reasonable probability that the result of the sentencing proceeding would have been different if competent counsel had presented and explained the significance of all the available evidence." Williams, 529 U.S. at 399. Had counsel presented this available, admissible, and mitigating evidence, in addition to the evidence they did present, the jury probably would have recommended a life sentence. (V8, 454). Confidence in the outcome is undermined; counsel was ineffective. Id.; Strickland, 466 U.S. at 461.

C. Counsel was ineffective for failing to ensure that John Marquard received

competent mental health assistance as was his right under Ake v. Oklahoma, 470 U.S. 68 (1985).

Appellee argues, "[t]o the extent that Marquard implies that the Rule 3.850 mental state expert testified that he was schizophrenic, that suggestion is not accurate" (AB at 24). In fact, Dr. Crown testified that John Marquard has a thought disorder, but the objective personality test suggested:

> The findings of that test suggested– didn't suggest, but indeed indicated that Mr. Marquard had personality problems of long-standing duration and that amongst those problems were a pattern of schizophrenia, paranoid type, in a subacute stage. And indeed, Mr. Marquard, in reviewing history, certainly indicates that he had 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, 206-7) See also (V7, R211-12, 215).

To the extent Appellee claims that this claim is merely a disagreement with Dr. Krop's evaluation, Appellee is wrong (AB at 24). As outlined in the initial brief, Dr. Krop did not perform an adequate mental health evaluation because 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 (Initial Brief, 61-63) . Counsel was obligated to ensure that John Marquard received the competent

mental health evaluation required by the Fourteenth Amendment. Because counsel, through abdication of their obligations to Dr. Krop, failed to ensure that John Marquard received an appropriate mental health evaluation, counsel was ineffective.

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 court erred in refusing to admit Hobart Harrison's prior testimony.

Appellee asserts that Hobart Harrison's testimony at Abshire's trial was inadmissible hearsay in John Marquard's evidentiary hearing because, "the State did not have a similar motive to develop the testimony at the trial" (AB at 29).[2] In fact, the state's motive at Abshire's trial was to seek justice. Berger v. United States, 295 U.S. 78, 88 (1935). In seeking justice, the state's motive should have been to develop truthful testimony. Thus, the state's motive should have been the same both at Abshire's trial and the evidentiary hearing.

---

[2]Appellee also asserts that the court did not err in not noticing this testimony because Mr. Marquard did not follow the procedure outlined in 90.202. However, the state did not make this objection at the hearing, the state merely contended, "I can't cross-examine that transcript." (V7, R164).

Moreover, a 3.850 is a civil proceeding. Abshire's attorney elicited from Mr. Harrison testimony which inculpated Mr. Marquard (Appendix A). Because Abshire's trial attorney's motive to develop Mr. Harrison's testimony was similar to the state's – challenging Abshire's admissions and inculpating John Marquard – Mr. Harrison's testimony at Abshire's trial was clearly admissible under 90.803(22).

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/INNOCENCE PHASE OF THE TRIAL AND CALL WITNESSES TO ESTABLISH A DEFENSE.

A. 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.

Appellee claims that counsel's decision not to impeach Abshire's testimony with his admission to Mr. Harrison was a strategic decision and not deficient performance (AB at 34). However, merely labeling a decision as strategy does not foreclose ineffective assistance. The United States Supreme Court has mandated that strategic decisions must be reasonable. Strickland, 466 U.S. 688. In this case,

counsel's decision not to present Mr. Harrison's testimony, aside from resulting from an impermissible conflict of interest, was not reasonable.

Abshire testified that John Marquard plotted and planned to kill the victim throughout their travels to Florida, but Abshire protected the victim. He also testified that Mr. Marquard killed the victim by repeatedly stabbing her, trying to drown her, and, finally, decapitating her. Mr. Harrison testified that Abshire told him that Mr. Marquard stabbed the victim but could not kill her. Abshire then killed the victim by trying to decapitate her (Appendix A). At John Marquard's trial, counsel argued in closing that Abshire, not Mr. Marquard, actually killed the victim (M V9, 1399). Not only would Mr. Harrison's testimony have impeached Abshire's testimony that he protected the victim and that Mr. Marquard killed her, it would have provided a foundation for counsel's closing argument. Thus, counsel's decision not to impeach Abshire was not reasonable. Had the jury heard Mr. Harrison's testimony, they probably would have found John Marquard guilty of a lesser included offense or recommended life during the penalty phase. Confidence in the outcome is undermined; counsel was ineffective. Strickland, 466 U.S. at 461.

ARGUMENT AS TO REMAINING CLAIMS

John Marquard relies on argument presented in his initial appeal regarding these issues.

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 imposition of a life sentence, 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 Reply Brief has been has been furnished by United States Mail, first class postage prepaid, to all counsel of record on this _____ day of _____, 2001.

_____

PETER J. CANNON
Florida Bar No. 0109710
Assistant CCRC-Middle

_____

Leslie Anne Scalley
Florida Bar No. 0174981
Staff Attorney

CAPITAL COLLATERAL REGIONAL
COUNSEL-MIDDLE
3801 Corporex Park Drive
Suite 210
Tampa, Florida 33619
813-740-3544

Counsel for Appellant

CERTIFICATE OF COMPLIANCE

I hereby certify that a true copy of the foregoing Reply Petition for Writ of Habeas Corpus, was generated in a Times New Roman, 14 point font, pursuant to Fla. R. App. P. 9.210.

Peter J. Cannon
Florida Bar No. 0109710
Assistant CCRC-Middle

Leslie Anne Scalley
Florida Bar No. 0174981
Staff Attorney

CAPITAL COLLATERAL REGIONAL
COUNSEL-MIDDLE
3801 Corporex Park Drive
Suite 210
Tampa, Florida 33619
813-740-3544

Counsel for Appellant

Copies furnished to:

The Honorable Robert K. Mathis
Circuit Court Judge
St. Johns County Courthouse
4010 Lewis Speedway, Suite 365
St. Augustine, Florida 32095

Kenneth Nunnelley
Assistant Attorney General
Office of the Attorney General
444 Seabreeze Boulevard, Fifth Floor
Daytona Beach, Florida 32118

The Honorable John Tanner
Office of the State Attorney
The Justice Center
251 North Ridgewood Ave., Third Floor
Daytona Beach, Florida 32114

John C. Marquard
DOC# 122995; P1223S
Union Correctional Institution
Post Office Box 221
Raiford, Florida 32083