IN THE SUPREME COURT OF FLORIDA

JOHN MAREK

Appellant,

v. CASE NO. SC09-1080

STATE OF FLORIDA,

Appellee.

_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE SEVENTEENTH JUDICIAL CIRCUIT
IN AND FOR BROWARD COUNTY, STATE OF FLORIDA

ANSWER BRIEF OF THE APPELLEE

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PRELIMINARY STATEMENT

References to the appellant will be to "Marek" or "Appellant". References to the appellee will be to the "State" or "Appellee".

The record on appeal will be referenced as "TR" followed by the appropriate volume and page number. Reference to the State trial court 1988 evidentiary hearing record will be "CH" followed by the appropriate volume and page number. Reference to the State trial court successive, post-conviction May 6-7, 2009, evidentiary hearing record will be "APC" followed by the appropriate volume and page number. Reference to the State trial court successive, post-conviction June 1-2, 2009, evidentiary hearing record will be "PC2" followed by the appropriate volume and page number. References to Marek's initial brief will be to "IB" followed by the appropriate page number. Reference to Marek's postconviction pleadings will be "PC" followed by a date and appropriate page number.

STATEMENT OF THE CASE

a. PROCEDURAL HISTORY

The Florida Supreme Court on direct appeal affirmed Marek's conviction and sentence of death for the first degree murder of Adella Marie Simmons in Marek v. State, 492 So. 2d 1055, 1057-1058 (Fla. 1986).

b. STATEMENT OF THE CASE

Marek was indicted on July 6, 1983, for first degree murder, kidnapping, burglary, sexual battery, and aiding and abetting a sexual battery of Adella Marie Simmons. He was found guilty on June 1, 1984, and on June 5, 1984, at a separate sentencing proceeding, the jury, by a vote of 10-2, recommended a sentence of death. The trial court followed the jury's death recommendation and imposed the death penalty, finding four (4) statutory aggravating circumstances proven beyond a reasonable doubt and no mitigating circumstances applicable.

The Florida Supreme Court affirmed, Marek v. State, 492 So.2d 1055 (Fla. 1986), and no petition for writ of certiorari was filed in the United States Supreme Court.

On October 10, 1988, Marek filed his initial postconviction motion pursuant to Fla.R.Crim.P. 3.850, raising twenty-two (22) claims, and filed his state habeas corpus petition in the Florida Supreme Court October 12, 1988, urging sixteen (16) issues for review, thirteen (13) of which paralleled his Rule

3.850 motion. Judge Kaplan granted an evidentiary hearing as to the ineffectiveness of counsel claim and other matters, and held said hearing on November 3-4, 1988. The trial court denied the post-conviction relief, and the Florida Supreme Court, denied Marek's state habeas and affirmed the denial of his 3.850 motion, in Marek v. Dugger, 547 So.2d 109 (Fla. 1989).

Marek's federal petition for writ of habeas corpus filed in the Southern District of Florida, raised twenty-two (22) claims. Relief was denied in Marek v. Dugger, Case No. 89-6824-Civ-Gonzalez, October 1, 1990. On appeal to the Eleventh Circuit Court of Appeals, Marek abandoned all but five (5) issues on appeal. The court affirmed the denial of federal habeas corpus relief. Marek v. Singletary, 62 F.3d 1295 (11th Cir. 1995).

As to the Point I on appeal to the Eleventh Circuit Court of Appeals, that Court in great detail held at Marek, 62 F. 3d at 1298-1301, that defense counsel Moldof's strategic decisions were reasonable and, alternatively no prejudice occurred.

While pending in the Eleventh Circuit, Marek returned to state court and filed a second successive state rule 3.850 on July 22, 1993. On January 24, 1994, Marek filed a "supplemental motion." In 2001, Marek added additional amended claims, including a "newly discovered evidence claim" that "established his innocence". Specifically, at **Claim IX** p. 98-103 of this

"Second Amended Motion" filed September 27, 2001, (TR V 799-804 in Marek v. State, SC04-229), Marek asserted:

> ….The state's case rested on the premise that Mr. Marek was in control of the situation (R 423, 1137-38). The State's case was based upon their argument that Mr. Marek was the person who killed Ms. Simmons (R 421). But the sentencing judge found that Raymond Wigley was involved in the crime (R 1341) and that Wigley strangled the victim (R 1344). The court further found that Wigley and Mr. Marek acted in concert together (R 1348-50). However, Mr. Marek received a sentence of death while Mr. Wigley received a lesser sentence.
>
> Since the time of Mr. Marek's trial, evidence has been discovered indicating that Wigley warranted further investigation by police as he was the person who raped and killed Ms. Simmons. A previously unavailable mental health evaluation provided evidence consistent with Wigley being the principle.

The original trial record reflects that at TR IX, p 1341, the trial court found that both Marek and Wigley "were in the tower together with the victim." However Marek's **characterization in his postconviction motion** that the trial court found "that Wigley strangled the victim (R 1344)" is totally wrong, rather what the trial court stated was:

> "To the benefit of Mr. Marek, this Court will assume for the moment that Marek's accomplice, Wigley, strangled the victim to death. Could the jury have reasonably inferred from the evidence that Marek by his conduct intended or contemplated that lethal force might be used by Wigley or that Wigley might take the victim's life? This Court feels that not only could the jury have answered that question in the affirmative but evidenced by its solid vote of 10 to two for the imposition of the death penalty that they did so find."

(TR IX, p 1344). (Emphasis added).

The trial court on September 30, 2003, denied all relief, including this issue finding it procedurally barred at (TR Supplemental Record V 658-659 in Marek v. State, SC04-229).

The Florida Supreme Court denied all appellate review, Marek v. State, 940 So. 2d 427 (Fla. 2006), *cert. denied*, April 24, 2007, "Finding no merit to any of Marek's claims, we affirm the denial of his 3.850 motion and deny his habeas petition."

Marek filed a third successive post-conviction motion, May 11, 2007, asserting two claims, a challenge to Florida's method of execution and the newest 2006 ABA report. The trial court ultimately denied all relief on April 23, 2009.[1] Marek sought public records pursuant to Rule 3.852(h), and the trial court held a hearing to review any public records issues, April 27, 2009. That same day, Marek filed a Motion for Rehearing/Motion to Amend Motion to Vacate, raising three additional claims and rearguing previously denied claims. Those additional claims were that his death sentence violated the Eighth Amendment, based on the state's use of inconsistent theories to convict; a Lackey v. Texas claim; and an argument that the pendency of Caperton v. Massey in the United States Supreme Court might

[1] On April 20, 2009, Governor Crist set a third warrant week and an execution date was set for Wednesday, May 13, 2009. That execution date was stayed by the Florida Supreme Court on Monday, May 11, 2009, until further order of the Court.

impact his case.[2] The trial court denied the motion on April 27, 2009.

On May 1, 2009, a fourth successive motion for post conviction relief was filed, raising the following: 1.) newly discovered evidence has come to light which demonstrates Marek's conviction and sentence are not constitutionally reliable, Pet. p. 8-18;[3] 2.) that the state clemency process is arbitrary and capricious, Pet. p. 18-22; and 3.) that an assistant state attorney, who represented the State in 1988, drafted the order denying post-conviction relief on an *ex parte* basis.

The trial court held an evidentiary hearing May 6-7, 2009, on these latest issues, and ultimately denied relief. The Florida Supreme Court, on May 21, 2009, reversed and remanded for another evidentiary hearing on an ancillary issue regarding a recusal issue.

The case was reassigned to a new circuit judge and, on June 1-2, 2009, after additional names (Leon Douglass, Carl Mitchell, William Green (PC2 I, 11) and David Davidson (PC2 I, 10) [David

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[2] On Monday, June 8, 2009, the United States Supreme Court decided Caperton, however, that decision is clearly distinguishable from the instant circumstances resolved herein.

[3] On May 4, 2009, Marek sought to supplement his newest 3.851 motion, providing a new inmate's name to those listed in his motion. He asserted that an inmate, Jessie Bannerman, DOC # 024468, who was around Wigley from 1984-1988, was told by Wigley one evening, while drinking moonshine together that he, Wigley had raped and killed a woman, because he was afraid she "would identify him, so he choked her."

Davidson was not called to testify]) were "added to the names of inmates" uncovered by Marek's counsel's investigator since the signing of Marek's warrant on April 20, 2009, an evidentiary hearing was held. Following the filing of written closing arguments by the parties, on Friday, June 12, 2009, Marek filed another postconviction motion raising two previously raised issues: 1. Whether the June 8, 2009, United States Supreme Court's decision in Caperton v. Massey Coal Co., 173 L. Ed. 2d 1208, 2009 U.S. LEXIS 4157, 21 Fla. L. Weekly Fed. S908 (2009), requires further consideration of Marek's recusal claim regarding Judge Kaplan;[4] and, 2. Whether trial counsel Hilliard Moldof's statement at the evidentiary hearing June 2, 2009, is newly discovered evidence "demonstrating that" Marek "received ineffective assistance of counsel."[5]

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[4] In Marek, 2009 Fla. LEXIS at *5-6, the Florida Supreme Court noted that "On April 27, 2009, Marek filed a motion that sought both rehearing of the postconviction court's summary denial of his motion to vacate and an opportunity to amend his motion to vacate. He requested leave to add the claims that his execution is unconstitutional because he has spent over twenty-five years on death row and that the United States Supreme Court's future holding in Caperton v. A.T. Massey Coal Co., No. 33350, 2008 W. Va. LEXIS 22 (W. Va. Apr. 3, 2008), *cert. granted*, 129 S. Ct. 593, 172 L. Ed. 2d 452 (U.S. Nov. 14, 2008) [*6] (No. 08-22), may demonstrate that he was denied due process when Judge Kaplan presided over his initial postconviction proceeding."

[5] In Marek, 2009 Fla. LEXIS at *4, Marek also raised the specter of ineffective assistance by Hilliard Moldof. "Finally, as part of this second claim, Marek asserted that his previously raised claim that his trial counsel failed to conduct an adequate investigation of Marek's background for the

The trial court denied all relief as to the claims before the court for evidentiary consideration on Friday, June 19, 2009. And in a separate order, the court held, that same date, the two newest issues as to the Caperton decision, and Moldof's statement of ineffectiveness, were procedurally barred claims.

The Court ordered appellate briefing on these matters on June 23, 2009, setting oral argument for July 1, 2009.

PERTINENT FACTS

The State's opening statement can be found at TR IV 420-434, wherein the State informed the jury that, based upon the grand jury's indictment, the State would prove that Marek "committed murder in the first degree by killing Adella Marie Simmons; that he kidnapped her; that he raped her and in the process he committed a burglary."

Marek testified on his own behalf at the guilt phase of his trial. He testified that on Monday, June 13, 1983, he and Raymond Wigley left Texas to come to Florida for a "fun-loving" two weeks (TR 940). He had known Wigley for a couple of months prior to the trip and they had been drinking two to four cases

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presentation of mitigation in the penalty phase of his trial should be reevaluated under the standards enunciated in Rompilla v. Beard, 545 U.S. 374, 125 S. Ct. 2456, 162 L. Ed. 2d 360 (2005); Wiggins v. Smith, 539 U.S. 510, 123 S. Ct. 2527, 156 L. Ed. 2d 471 (2003), and Williams v. Taylor, 529 U.S. 362, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000). Marek argues that these cases modified the standard of review for claims of ineffective assistance of counsel under Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)."

of beer a day during the trip to Florida (TR 936, 940). Marek testified that he was driving down the turnpike when he noticed the victim's car off of the turnpike (TR 942). **Marek testified that he stopped and offered** to take both women to a filling station and that after the women talked between themselves, the victim agreed to go with Marek and Wigley for help (TR 940, 946). Marek was the one who invited the victim to ride with him and that he, not Wigley, did all of the talking (TR 972). Marek testified that Wigley drove the truck and that he fell asleep in the passenger seat approximately two minutes after he, Wigley and the victim got into the truck (TR 947). When Marek woke up "sometime later" he asked Wigley if he dropped the victim off since he didn't see the victim in the cab of the trunk (TR 948); Wigley told him that he dropped the victim off at a gas station (TR 948). Marek testified that he then fell asleep again and, when he woke up he was on the beach (TR 949). Marek looked for Wigley and found him up on the observation deck of the lifeguard stand (TR 950). Marek climbed up on top of a trash can, grabbed one of the railings and swung himself up to meet Wigley (TR 951). He testified that he knew he was "trespassing" when he entered the observation deck (TR 954), that he never saw the victim's body inside of the observation deck because it was dark inside and a chair was obstructing his view (TR 856). Marek testified that he "felt" his way along the walls of the deck and

opened a shutter in order to exit the deck (TR 954-956). Marek testified that he was in the shack for 15 to 18 minutes (TR 957).

Marek testified that he and Wigley left their shirts on the beach to make it look like they were "messing around with the water or something" (R 957). Marek and Wigley were confronted by police after they left the observation deck. (TR 960). Wigley stood nearby Marek with his head "hung down", while Marek joked with the police (TR 960-961). Marek testified that he drove the truck away from the beach (TR 960), then, recalled that he had left his clothes on the beach. He drove back to the beach to pick them up (TR 962-963). Marek testified that he never knew there was a body in the observation deck and that he never asked Wigley what happened to the victim, Adella Simmons (TR 978).

Marek also testified that he never knew Wigley's last name even though he had known him for a couple of months before the trip. He also admitted that he drank sixty (60) beers on Thursday, June 16, 1983 (TR 969). Marek testified that he did not know where he was when he was at the beach but did tell the police on the beach that he was looking for a couple of college friends (TR 976-977). Marek explained "We1l, I knew they was in Florida. I don't know where abouts they was." (TR 977). Marek testified that he told police that he went to college (TR 977),

and also admitted to having been previously convicted of a felony (TR 977).

Marek never heard any yelling or struggling while he was asleep in the cab of the truck traveling to the beach (TR 973). Marek denied strangling the victim or burning her pubic hair (TR 976). He denied burning the victim's finger to see if she was dead (TR 976). Marek explained that he denied knowing Wigley when he was picked up on Daytona Beach because he didn't know Wigley's last name (TR 978-980). Marek admitted hearing Detective Rickmeyer tell him while he was in a holding cell in Daytona Beach, "Congratulations, you made it to the big times" (TR 1013). Marek admitted that he then told Detective Rickmeyer, "SOB must have told all" (TR 1014). Marek denied knowing that the Ford truck he was driving was stolen (TR 1015).

The closing arguments by the State at the guilt and penalty phases of Marek's trial were premised upon the evidence and arguments there from derived. (TR VIII 1132-1154, 1206-1217 and TR IX 1299-1309) In closing, the State argued that there were a number of ways to convict Marek for the first degree murder of Ms. Simmons and, all of the alternatives required that Marek, based on his actions, was a principal in the murder.

At the penalty phase held June 5, 1984, defense counsel objected to the aggravating factor of financial or pecuniary gain being read to the jury. (TR IX 1282). **Moldof informed the**

court that he was not going to mention Wigley's sentence of life imprisonment because he did not want to open the door to the prosecution regarding Wigley's confession. Moldof wanted to introduce the report of Dr. Krieger only to the doctor's initial comments and evaluation as to Marek. (TR IX 1283). The trial court stated that it would not be fair to introduce Dr. Krieger's report where he had not testified and would deny the State cross—examination of him. (TR IX 1284). **Moldof also stated that he was not going to mention anything concerning Marek's criminal history and therefore the State was precluded from arguing same to the jury. (TR IX 1284). The court specifically provided that if Moldof introduced any evidence regarding Wigley's life sentence, the State had the right to instruct the jury as to the difference between Wigley's culpability and that of Marek's. (TR IX 1285). Based on the court's ruling, defense counsel affirmatively determined that he would not mention Wigley's life recommendation. (TR IX 1288).**

At the penalty phase, Moldof discussed in great detail, Marek's drinking problem (TR IX 1315-1316), and talked about Marek's accomplice, specifically Wigley's involvement in the crime. Moldof informed the jury that there was no evidence that Marek knew what happened in the shack. Defense counsel also informed the jury that there were no eyewitnesses to this crime rather, it was a circumstantial evidence case. He observed that

this was a valid case to recommend a life sentence. He further noted that if the jury had any lingering doubt with regard to whether Marek committed the crime it would be horrible for the jury to recommend a death sentence and a number of years hence, someone comes in and confesses that they actually killed Ms. Simmons. (TR IX 1320).[6]

Testimony at 3.850 Evidentiary Hearing, November 3-4, 1988

Hilliard Moldof testified he spoke to Marek about talking with Marek's family for the penalty phase, however, Marek said that he had been in foster homes since he was a young kid and did not think the foster parents would know much about him. (CH 316-317). Moldof talked with Marek about his history in Texas, specifically, Marek told him that the foster people he last lived with might not be good persons to call because they were

[6] No portions of co-defendant Wigley's trial transcripts were introduced during Marek's trial. Marek has selected excerpts taken out of context, from the Wigley trial. Marek argues that Mr. Marek's "direct appeal attorney would have been unaware of the different positions the State took at Wigley's trial."

However, the record shows at the post-conviction hearing Hilliard Moldof, defense counsel for Marek, testified that he spoke to Wigley's defense counsel and monitored Wigley's trial. (CH 350, 400) Based upon the testimony as a whole, Moldof felt Marek benefitted from what Moldof knew about the State's case as to co-defendant Wigley. He clearly did not want any of Wigley's background to come in at Marek's trial because it would confirm that Wigley was dominated by Marek and he was afraid of Marek. (CH 348-351). Moldof believed that the reports on Wigley would have helped to prove the State's theory that Marek was the "main character" and the "perpetrator of the murder." (CH 353).

involved in some criminal activity, something having to do with homosexuality. (CH 318). While Moldof stated he did not want to bring in any criminal history, (CH 316), he testified that in considering circumstances for possible mitigation, he looked at Marek's age, his lack of serious criminal background, and Marek's mental condition. (CH 320). There was discussion about allegations from Texas concerning homosexuality and Moldof, felt at that time, there was nothing positive the jury should hear. (CH 318). Moldof received discovery from the State, and noted:

> …as you will know mitigating circumstances can be anything. You are really not limited in mitigating circumstances. So in each case it more or less depends upon the circumstances of that case.
>
> In this case - I mean in any case I'll sit down with my client. See if I can bring out his youthfulness. Some of the case law that gives you some insight to a way to address mitigating circumstances. His youthfulness, his lack of any serious criminal background. Perhaps that he was suffering from some mental disease or just anything that would show to the jury that he was less than the moving party in the sense that it was his desire to commit the crime. If he was under the direction of someone else. All those mitigating circumstances, as well as in addition to the statutory ones. Just anything that might bear will, I think, you know, on him.

(CH 320-321).

Although he received a report from Dr. Krieger, he did not use it. (CH 321). Moldof admitted that he discussed Marek's family history with Dr. Krieger. (CH 321). Moldof thought about looking at Marek's foster care history and that Marek's parents had abandoned him, (CH 322), however everything Marek told him

about his past seemed and was negative. Marek's foster parents were mad at him because he had stolen from them. Marek told Moldof that he had no clues as to how to find them. (CH 322). Moldof testified he just could not argue that Marek was retarded because the State would have "killed him" on that topic. (CH 323). Based upon his conversations with Marek, Moldof believed that Marek's distant past was bad and, that his more recent past may have involved a homosexual relationship. (CH 322—324). In reviewing the "new" materials submitted at the 3.850 hearing, Moldof said he still did not know if he would have used it "based on everything he knew." (CH 327, 329-330). For example, when questioned as to whether he would use the records from Texas that declared that John Grimm, a.k.a. John Marek was abused and a neglected child, Moldof observed the records showed only that Marek's records said that he was "declared a dependent child based on neglect." (CH 326-331).

Marek was not too responsive at trial, and although he was cooperative, he was not "very" cooperative. Marek continued to reinforce Moldof's opinion that the people in Texas, Marek's past, would not help him and that information regarding Marek's recent past would be very negative. (CH 333-334). Moldof recalled an incident when he made arrangements to move Marek to a cell in another location so that Marek could get some sun and

a tan. Marek decided not to go because he wanted to stay in the location with a homosexual population. (CH 335).

Moldof testified that he asked about Marek's family, but encountered resistance:

> …I asked him about his background and he said, you know, he was like, say, there's no way to find them you know.
>
> Certainly, if I'm saying to him listen, I want to get in touch with your family and he's telling me it's been years since I've seen these people. There is no way. That was a back door refusal, sort of.

(CH 335-336).

The mental health expert, Dr. Krieger found Marek was competent. Moldof asked Dr. Krieger to do more tests, (CH 340), specifically addressing statutory mitigating factors. Moldof did not get another, second written report, because Dr. Krieger believed Marek was falsifying answers. Dr. Krieger was to perform a number of tests including an MMPI, (CH 340), to discern any mitigation and whether Marek was manipulated by his codefendant. (CH 341). After performing the tests, Dr. Krieger observed that if Marek's test results were correct, Marek would have been "seeing pink elephants, etc." Moldof was afraid this information would come out, and Marek would be seen as manipulating both his lawyer and his doctor. (CH 342). With regard to whether Marek could remember the events of the murder, Dr. Krieger said Marek was being less than truthful. (CH 342-343)

Moldof, while not recalling Dr. Cash's report as to Wigley, ultimately testified that perhaps he did have the three doctors' reports on Marek's codefendant Wigley's mental condition. (CH 350). He knew about the trial because he had monitored it. He clearly did not want Wigley's mental reports to come in at Marek's trial because they reflected that Wigley was dominated by Marek and he was afraid of Marek. (CH 348-351). Moldof believed that the reports on Wigley could have helped to prove the State's theory that Marek was the "main character" and the "perpetrator of the murder." (CH 353). He wanted to stay away from any connection to Wigley and "who was the more dominant actor." (CH 354).

While Moldof testified that he also knew about the prior criminal record in Texas, he avoided presenting "no significant criminal history" to the jury because he was afraid of what could come out. He believed it was "too risky." (CH 355). Moldof testified that he did not believe that there was a valid intoxication defense, based upon the physical evidence presented at trial-- the medical examiner's testimony about the victim's body, that she was tortured and physically moved; the fact that within minutes of the murder, Marek had a coherent and jovial conversation with police officers; and the fact that Moldof felt the jury did not believe Marek's testimony that he drank a huge quantity of beer that day and still functioned as he did. (CH

356-357). Moldof also stated that he discussed with Marek whether Marek should take the stand in his own behalf. He told Marek not to exaggerate any of his testimony. And, it was Moldof's view that Marek wanted to testify. (CH 359).

On cross examination by defense collateral counsel, Moldof testified that he generally did not object "too much" at closing because he does not want to appear to be over—objecting if it wasn't necessary. After reviewing the "new stuff" presented, Moldof stated he did not believe it would have changed the outcome, either to the jury or to the trial judge. (CH 371—372).

When asked about certain documents contained in the records produced by collateral counsel Mr. McClain, the following exchanged occurred:

> Q Is it your view that if these excerpted records of the school records and psychiatric records had been introduced the State would then have had an open door to go into other ones, possibly more damaging records?
>
> A If I had them. That was one of my constant fears about everything we had psychologically and psychiatrically in this case is that it seemed everything I had was having the negative effect, was winding up to either just push and make it negligible I believe or perhaps even a negative in the sense of what the impact would be on the jury.

(CH 373).

Additionally when asked whether Moldof would have used the records, Moldof answered no, at CH 374. Marek was not the most helpful client, but Marek did not evidence any indication that

he was retarded or slow. (CH 376-377). Marek, vacillated in his recollection of what happened during the murder. (Ch 377).

Moldof prepared a number of pretrial motions and did receive information and background information in his discussions with Marek. He felt that the "natural" family information was very remote and that the foster family information was not positive. (CH 380). He specifically observed that he did not want the jury to know that Marek had been kicked out of his foster family's home. (CH 382). Marek told Dr. Krieger that he, Marek, had committed a number of other offenses. (CH 382).

Marek was to tell the truth to Dr. Krieger because Moldof wanted the doctor to check out Marek's "partial amnesia". (CH 385). He made a strategic decision not to call Dr. Krieger because Moldof did not want a report ("the report was going to be very negative as he termed it to me") (CH 386) or the testimony about a second set of tests brought to the attention of the jury. (CH 387). Moldof observed that he had reservations about Marek testifying but that Marek wanted to testify.

He further testified that at Marek's penalty phase he did not want to suggest Marek "might be retarded" because he felt it was negative and not a positive factor for the jury to consider. (CH 392). Any statements regarding retardedness were totally contrary to Marek's appearance in court and his testimony. (CH

393). He elected not to "insult" the jury's intelligence with an intoxication defense based on the State's evidence and the physical evidence presented at trial. (CH 394).

On redirect examination, Moldof testified he looked at alternative ways of getting information into evidence without opening the door to the State. (CH 394). He noted that he did not believe Marek's history would portray Marek in a sympathetic light. He believed that his best strategy was to argue that it was unclear whether Marek or Wigley was the more culpable in this crime and therefore, they should be punished equally. He did not believe the court would override a life recommendation by the jury if he received one. (CH 398-399). His strategy was based on the history provided to him by Marek, Dr. Krieger's review of Marek and what he had gleaned from his discussions with Wigley's counsel and monitoring Wigley's trial. (CH 400)

In response to why Mr. Moldof believed Marek's history would be bad, he stated:

> I thought a lot of it would have been not something the jury would feel sorry for. Your intent seems to be I should have let them hear all these tales about his upbringing so they will feel sorry for him. I thought some of that would have the opposite impact. Here's a guy that's very dangerous and here's the reason why. He's abandoned. This confirms.
>
> I think part of my attack was to say you said he's guilty beyond a reasonable doubt but you don't know for sure. What if ten years from now Wigley says I did all that. You don't want to put him to death. If I was going to make that argument I couldn't also say look at all this history. That shows he's probably the guy that did it.

> That's a definite problem to bring that out to the jury and say don't give a death recommendation. I made the decision it was a better tact to go to the jury and say you still can't be sure. It was a horrendous affair but you still don't know who did that.

(CH 398).

In response to why Moldof believed residual doubt was better than a life history defense, he observed:

> It would be crazy if I said no it's not important to know. Certainly it is once you have tried the case and you have seen where the jury has gone and some arguments you can see the jury has been receptive to, some they are not and use all that in determining what is going to play best to the jury in the sense of the ultimate goal of having them give a life recommendation.
>
> Although they came back guilty on him they found Wigley as guilty. I thought there was ample evidence that Wigley was involved. Because Wigley was sentenced to life I thought I could convince this jury still they were not sure what Marek had done versus Wigley….
>
> I don't want to sound presumptuous. In all the times I've been in front of Judge Kaplan my experience has been that if you can get a jury recommendation he won't override it and if he would override he had override it your way. I've seen him override a death sentence to life. Doing the opposite.

(CH 399).

In response to why Moldof believed the life history was bad, he observed finally:

> What he told me. What Dr. Krieger had in his report. What I gleaned from Jimmy Cohn. You know, we talked about Wigley and Marek and how we might -- I was thinking of calling Wigley and there's a lot there that I probably can't tell you now but I knew a lot about Marek in the sense I thought I knew a lot about him, had a feel for what I would get and a lot of it I didn't think would play to the jury in the sentencing phase, looking at how bad he was coming up.

(CH 400).

Testimony from May 6-7, 2009, and June 1-2, 2009 Evidentiary Hearing Pursuant to Subsequent Post-Conviction Motions

1. May 6-7, 2009, Stipulated Testimony

Evidence was taken at both the May 6-7, 2009, and June 1-2, 2009, evidentiary hearings. The parties stipulated to the testimony of three witnesses that testified from the May 6-7, 2009, hearing. Specifically, Judge Kaplan's testimony regarding whether he drafted the 1988 order denying postconviction relief pertained to Claim III raised in Marek's latest postconviction motion. On May 6, 2009, Judge Kaplan, the trial and post-conviction judge, testified he could not recall Marek's post-conviction hearing. (APC 12, 1855, 1859, 1860).

Michael Conley signed a declaration attached to Marek's May 1, 2009, Successive Motion for Postconviction Relief, that stated in pertinent part that, Wigley, Marek's co-defendant sometime in 1996 or 1997, told his best friend Conley, that:

> I told Wigley that I would need to know more about his case before I asked my wife to assist him. Wigley became very emotional and confessed many details that I had never known about his case. He told me that he had strangled the victim with a handkerchief after raping her. He strangled the victim because he did not want her to identify him.

Michael Conley testified more fully at the May 7, 2009, evidentiary hearing as a result of the afore-noted declaration, that he met Raymond Wigley, at Belle Glades, Florida when they were housed at Belle Glades Correctional Institution. (APC 13,

1962). Wigley eventually spoke about his case to Conley when they were together at Columbia Correctional Institution. (APC 13, 1963). Wigley knew Conley's wife worked in a law firm and wanted Conley to ask his wife to help Wigley. (APC 13, 1963).

Conley admitted that he had not seen Wigley in a while and recalled that he had been a little upset with Wigley, when they were at Belle Glades over an incident. He explained that there had been a fight and a correctional officer had been jumped, Conley tried to help save the officer but Wigley ran off. (APC 13, 1964).

Wigley wanted assistance in preparing a 3.850 motion. Conley stated that while he did not want Wigley involved with his family, he did ask Wigley about his case. Wigley told him he was involved in a murder. (APC 13, 1965).

> We met a lady on the Florida Turnpike. We took her and wound up having sex with her along the way, on the Florida Turnpike, forcing her and beating her and took her to someplace in Florida—and I can't even tell you where—I thought it was a warehouse and I was told that it was a lifeguard station or something.
>
> I said, well, what happened?
>
> He said, we repeatedly raped her.
>
> I said, you know, who?
>
> He said, me and the other guy that's on death row.
>
> I said, well how come you're not on death row?
>
> He said, well, I got a life sentence.

> I said, Ray—I looked him right in the eye—I said, Raymond, did you kill woman, and he said, no. I said, Ray, again, did you kill that woman? He said, no. Then he said—I said to him, Ray, I'm not going to help you.
>
> He said, I killed the woman, Mike. I strangled her.
>
> I said to him, how did you strangle her?
>
> He said with a scarf or a handkerchief, I believe. It's been so long.
>
> Knowing Raymond Wigley—I told you I'm going to be honest about this—he was a wimp, a real wimp, and it was hard for me to visualize him killing anybody. But in the Department of Corrections, wimps are the ones you got to watch out for. They'll kill you first before they get killed, and so whether he killed her or not, I don't know. That's up to the supreme court to decide. I can only tell you what he told me.
>
> He was crying when he told me that, so, I tended to believe him or he was a heck of an actor, one or the another.

(APC 13, 1966-1967).

Conley further noted that "In the Department of Corrections you meet all kinds of people, and Ray really was my friend, but he was a coward and a wimp, and whether he killed that woman, I can only tell you what he told me." (APC 13, 1968).

When asked again about the two denials and then the admission to killing of the victim by Wigley, Conley testified that he saw something in Wigley's eyes that was different, and opined at APC 13, 1969:

> You know, I'm a former entertainer. I had performed in—all over the country as Elvis years ago, and I really believe I can tell when somebody is being honest or dishonest, even to this day, and I felt he wasn't telling me the whole truth."

Conley never told anyone about this conversation. (APC 13, 1970). Conley was released from prison in 1999, and traveled around, (APC 13, 1971), using an alias, Mike Ellis. (APC 13, 1972).

Conley spoke to Marek's counsel's investigator, Dan Ashton, and later to Sgt. Gould from the Waterville Police Department in Maine about Wigley. (APC 13, 1974). Conley signed the declaration prepared by Mr. Ashton. He admitted that there were a couple of lines that were not correct and clarified those remarks during his testimony. (APC 13, 1976). Specifically in paragraph 8, he corrected the line to read as follows, that "He strangled the victim because he did not want her to identify **them**." (APC 13, 1978). That was the reason the victim was strangled, so she would not be able to identify them. In paragraph 13, Conley also did not agree with the use of the words "virtually impossible" in describing whether Conley could have been located sooner. (APC 13, 1979).

Conley noted Wigley did talk about his co-defendant and said that he, Wigley, felt guilty about him being on death row. Wigley described Marek as slow and a fairly big guy. (APC 13, 1980-1981). Wigley also told Conley that he wanted his life back and although he was dumped by several girlfriends, Wigley

admitted he had sex with men and women. (APC 13, 1981-1982). The State did not cross-examine Conley.

Sergeant John Gould's, Detective Sergeant with Waterville, Maine Police Department, testimony on May 7, 2009, was stipulated to by the parties. He was asked to speak with Michael Conley, a resident of Waterville, Maine, regarding statements Conley made in Marek's case going on in Florida. (APC 12, 1813-1816). He was provided a list of approximately 78 questions to ask Conley should Conley agree to speak with him. (APC 12, 1817). Conley agreed to be taped by Sgt. Gould about "what was in this declaration was his (Conley's) actual statement." (APC 12, 1829). Sgt. Gould did call Conley after the statement to clarify or ask a question that was missed. (APC 12, 1836-1838). Sgt. Gould testified that Conley wanted to correct two errors in the declaration in paragraph 8 and 13. (APC 12, 1896-1998). Conley stated there was a lot more information that he provided to the private investigator that was not included in the declaration. (APC 12, 1897).

On redirect, Mr. McClain asked questions pertaining to whether Conley said that Wigley told him that he killed the victim and whether he felt badly that Marek was on death row.

The State on recross was then permitted to inquire regarding the substance of the Conley statement made to Sgt. Gould. (APC 12, 1917). Wigley told Conley he did the murder to

get Conley to help him. Conley also had the feeling that Wigley really "wasn't the one who murdered the victim, because Wigley was trying to play tough." (APC 12, 1917). Conley agreed that Wigley told him he murdered the victim, "because he believed it was the only way that Mr. Conley would help him." (APC 12, 1917). Conley stated that he did not know why that part was not included in the declaration prepared by the CCR's private investigator, Daniel Ashton. (APC 12, 1917-1918).

Conley's full statement was introduced into evidence to complete the record.

2. <u>June 1-2, 2009, Evidentiary Hearing Testimony</u>

Following some preliminary events regarding how the trial judge drew the Marek assignment, the defense called Jessie Bannerman. Bannerman provided a sworn statement that he,

> "…met Wigley in 1984 when they were both at the Broward County Jail. Then later in 1984 through 1988 I was incarcerated with Wigley at Union Correctional Institution and Martin CI.
>
> While at Union Correctional Institution, one evening while Wigley and I were drinking moonshine, Wigley confessed that 'he had killed' and believed 'he would kill again.' Wigley went on to tell me that he had raped and killed a woman. Wigley described the woman as a teacher. Wigley specifically state (sic) that he choked the woman. In fact, the way Wigley explained it, I was unaware that another individual was convicted as Wigley's co-defendant until Dan Ashton told me.
>
> Wigley also told me that he had been drinking and was afraid that the woman would identify him, so he choked her.

Jessie Bannerman testified on June 1, 2009, that he met Raymond Wigley in the Broward County Jail in 1983. The two men

met again at Union Correctional Institution in 1987. (PC2 I, 24). While at Union CI, Wigley, Bannerman and a few others were sitting around one evening, drinking moonshine when, he asked Wigley why he was in prison. Wigley would not go into any depth. Bannerman asked again and Wigley said for killing a woman. (PC2 I, 24-25). Bannerman asked Wigley why other guys approached him on the compound as though he was a homosexual. Wigley responded that he was not a homosexual and told Bannerman that he "had killed and if his life was in jeopardy he would kill again." (PC2 I, 25). The statement was made when they were drinking moonshine. Bannerman stated there were a couple of other guys present, including Billy Ray Oliver, Raymond Hillary, and others. (PC2 I, 26).

Bannerman testified that some time later while he and Wigley were smoking one particular time at Martin CI, Wigley was having trouble with other male inmates stalking him and Bannerman again asked Wigley if he was a homosexual man. Wigley denied being gay, and again said he killed before and would kill again. (PC2 I, 27). Wigley told Bannerman that he killed a woman and went into the details. He "told me he did this out of fear that she would be able to identify him later on, he said he didn't have no other choice, 'cause I asked him, I said, why would you kill her if you had done got what you wanted from her." (PC2 I, 27). Bannerman questioned why kill

her if she gave him money and sex, so Wigley explained what happened about her car malfunctioning and how he stopped to help. Wigley said he choked her because she started to scream. (PC2 I, 28).

Bannerman never knew prior to the statement, that Wigley had a codefendant. Bannerman testified he only talked to Wigley's "old man" in prison about what Wigley said. (PC2 I, 29-31).

On cross-examination, Bannerman said he spoke to Dan Ashton two or three times before the affidavit was completed. (PC2 I, 32). Bannerman was with Wigley at Union Correctional Institution from November 1984 through March 1987. (PC2 I, 33).

The evening when Wigley made the statement, they all drank two gallons of moonshine. While this was not unusual, since they tried to brew some wine every week, Bannerman was able to recall this particular night and this particular conversation. (PC2 I, 36-37). Bannerman explained it surprised him, because Wigley never had engaged in any fights, plus other inmates always approached him. Bannerman stated he asked Wigley why these inmates kept coming around him; Wigley said he was not a homosexual. (PC2 I, 37-38). Bannerman stated that he thought Wigley was lying to him and that he was a homosexual. (PC2 I, 38). Bannerman also acknowledged that it was common for inmates to talk about their crimes among close associates. (PC2 I, 39)

Raymond Hillary was Wigley's daddy, or the person Wigley would turn to for protection in prison, because Wigley could not defend himself. (PC2 I, 40). Wigley was a small, wimpy white guy, about 130 pounds. Bannerman testified he never saw Wigley fight. (PC2 I, 40).

During their conversation at Union CI, Wigley gave no details and only told him more details at Martin CI. Wigley's comments about killing were in reference "that if people continue to stalk him as though he was homosexual, that's the impression I got, that he was trying to tell me that he would stand up for himself and he didn't have no inhibitions about hurting someone if that's what it came down to, that's the interpretation I got from it." (PC2 I, 41).

Bannerman said that Wigley was boasting and wanted Bannerman's esteem or to be viewed as "one of the regular fellows." (PC2 I, 41). When Bannerman was with Wigley at Martin CI in 1987-1989, Wigley told him more details about the murder, when they were in the rec yard and smoking marijuana. Billy Ray Oliver was also present. (PC2 I, 42).

> Q. Okay. And how did this conversation come up again, Mr. Bannerman?
> A. The same thing, I asked him, 'cause while we was standing there smoking a couple guys approached and tried to call him off, and he told them I'm trying to do something right now with my homeboys, and they went to dissing him like he was a woman or something, telling him about what he better do, and they told him that he better be over there in 20 minutes or they was coming back and

> they was going to kick off on his behind. So when they walked off I looked at him and I said like, hey, man, what that be about, you done already told me you're not no homosexual, you dig what I'm saying, that's how that came about, that's when he told me, I said, you told me that you done killed and you done killed before, but I ain't seen you stand up for yourself yet, so how did you actually catch a murder charge, and that's when he broke it down to me and told me about the woman in full degree.
>
> Q. Did he tell you anything about the guy that was with him during the murder, his codefendant?
>
> A. He never mentioned a second party at all, ma'am. To this day I still didn't know that he had a codefendant, and I'm at Florida State Prison, not too far from death row, and I didn't even know.

(PC2 I, 43).

Bannerman believed that Raymond Hillary and Wigley had a homosexual relationship, based upon the way Raymond Hillard treated Wigley and ordered him around. (PC2 I, 44). Bannerman admitted that he thought Wigley was not truthful about being a homosexual. Moreover he did not believe Wigley when Wigley first said he killed, and only believed him when they were smoking marijuana, in the "rec yard" and Wigley "vividly described certain parts of that murder that let me know he wasn't pretending." (PC2 I, 45). "The choking part. He said that he didn't really want to kill her, but she tried to scream and the next thing he knew he was choking her." "He said he used his hands." "He was afraid that she would identify him if he didn't…." (PC2 I, 45). Bannerman said Wigley never mentioned a co-defendant. (PC2 I, 46).

Bannerman admitted they were intoxicated on moonshine, and during the conversation at Martin CI, the men were smoking marijuana. When asked if Bannerman still believed Wigley's statement, Bannerman stated he had not had time to "accurately contemplate or debate" the knowledge recently acquired that Wigley had a co-defendant. (PC2 I, 47).

On redirect, Bannerman said Wigley was mildly intoxicated when drinking moonshine and had a mild buzz when smoking marijuana. Bannerman thought the victim was a smaller person than Wigley. When talking about choking the woman he just talked about it, stating he choked her because she was screaming. (PC2 I, 48). He believed Wigley. (PC2 I, 49).

Robert Pearson next testified that he met Raymond Wigley, at Columbia Correctional Institute around 1999 and 2000, or 2001. (PC2 I, 53). He was Wigley cellmate when Wigley was killed. (PC2 I, 54). Wigley worked in the law library and they would talk about cases. Wigley told him:

> A. He said that -- well, at one point he said that his codefendant was, I think this was like in '99 or 2000, his codefendant was supposedly about to be executed or something, and he was like, well, you know, if this guy would just say that -- if this guy would go ahead on and say that he did it and free me, then, you know, I wouldn't be here, and I asked him, I said, well, you know, what happened, you know, that's not what you -- you know, earlier he had told me -- he fluctuated in what he said, but he told me about when he left, he left Texas, he took a truck, left Texas, and went by this guy, picked up his buddy, and then he went on a beer run, you know, grabbed some beers, and I think somewhere in, if I'm not mistaken,

> in New Orleans, or somewhere, he broke in a house or something because he needed some money, he made it down, he came down to Florida, and on the way here there was a car broke down and there was two females on the side of the road, and he said he passed them and then he came back and he got out and he was talking to the female, and one of them didn't want to come, but he convinced one of them he was going to take them -- take her to pick up, I guess to get some gas or something, a carburetor, something was wrong with the car, he said he looked in the hood, 'cause he knew about cars or something, and he was going to go and help them. So they got in the truck, they left, and -- excuse me -- he told me he had a gun and the girl had got it and threw it out the window, and I was just teasing him about it. Excuse me, that's why I was laughing. Anyway, he said they ended up at a beach. He gave me like -- you know, he would tell me the story like three or four different times and it would always fluctuate, you know. You know, sometimes I would ask him, you know, but you told me last time this, or you said last time that.
>
> So, really, you know, you're asking me what did he tell me, and, you know, it's like he told me, you know, three or four different versions. So, you know, what version are you looking for?

(PC2 I, 55-56).

Wigley told different stories, however, Pearson said they all ended up with Wigley on the beach. "He just told me, he said they went and they partied and they went to this guard shack, life shack, lifeguard shack." They partied and Wigley gave Pearson two or three different versions. (PC2 I, 57-58).

> One version was the victim liked Marek and they went and partied, had consensual sex and then the codefendant left, and Wigley was left with the girl but he could not get an erection. Wigley then got violent. She laughed at him and then picked at him, "he took it bad, and that's where he would fluctuate a lot, he would say he passed out and when he woke up she was dead, and he tried to, like prop her up, I remember he was always saying trying to prop her up; and then he walked out and looked around, and he ran back to

> the truck and he woke the guy up and was like, hey, man, hey, man, we got to go, we got to go, we got to go. You know what I mean? And then it would fluctuate again, the next thing I know he would be back saying that the guy was gone, he was in the truck by himself, and the police pulled him over, you know.

(PC2 I, 58-59)

Another version Wigley passed out and did not know what happened. (PC2 I, 59). Another version Wigley was teased by the victim but did not really remember doing it, but if he did, he wanted "God to forgive" him. (PC2 I, 59).

> A. He got upset. And he would -- he would -- either he -- either -- like I said, he'd fluctuate, at one point he'd talk to me about it and he'd be solid that he choked her, he pretty much killed her, and then the next version he would tell me is that he passed out and he didn't remember anything, but when he woke up she was there. And I remember he was saying like there was some rope or something around. He was just always -- you know, either he was, you know, adding stuff or taking stuff away, he would never just -- there was always fluctuation in it.

(PC2 I, 60).

Wigley and his co-defendant got into some type of argument and they separated. (PC2 I, 62). Pearson said he did talk to other inmates about this because -- Wigley was his roommate when he was killed. (PC2 I, 64).

The defense next called Carl Mitchell, who knew Wigley at Columbia CI in 1998 or 1999. They slept in the same quad and he overheard Wigley say to some "dude" "don't make me kill you 'cause I already got—I already killed somebody else before. That's the only thing I remember that was said." (PC2 I, 70).

It did not sound like a threat because Wigley was arguing with someone. (PC2 I, 70).

On cross-examination by the State, Mitchell said Marek's investigator came to see him two weeks before the hearing. Wigley stood in front of Mitchell's cell and argued with Blackwelder. Wigley and Blackwelder were in a homosexual relationship. (PC2 I, 73-74). It was Blackwelder who killed Wigley. They argued all the time. Mitchell did not know who Wigley had killed before. (PC2 I, 75). Mitchell did not consider Wigley's remarks a threat "'cause a lot of people in prison say that a lot, you know, speaking out of fear." (PC2 I 77).

Leon Douglass, a Department of Corrections inmate, at Madison CI, testified that he was recently contacted by Marek's investigator concerning whether he knew Raymond Wigley. (PC2 II, 134-135). Dan Ashton contacted him on May 18, 2009, seeking information as to Wigley.

Douglass was a certified law clerk for the Department; and was familiar with Wigley when he was at Columbia CI "around the turn of the century, 2000, 2001, and in my duties as a law clerk Ray had come down and was seeking assistance, you know, with his postconviction, and I started assisting him with his case." (PC2 II, 136). Douglass was at Columbia when Wigley was killed. (PC2 II, 136). Douglass stated "the only memory I have would be the

fact that I was working and he came into the law library and started seeking assistance." (PC2 II, 137-138).

Douglass thought that Wigley wanted to work on "a principal theory of conviction" that he was concerned about. In discussing the crime, Douglass testified:

> A. During the time that we had had our discussions, we were pulling some books and I had some materials out, and I wanted to take a break, so Ray and I actually went outside of the library to like a little break area we had, and we had been pretty intense, he had practically relived the entire incident, and he was telling me during this break that in fact he was the one that had perpetrated the murder, he had actually done the killing by strangulation of the victim, and that he was quite upset with his codefendant, Mr. Marek, because he did not do something, and I really can't recall what that something was, but he didn't do what Mr. Wigley wanted him to do to help him perpetrate this murder, and Ray, he was quite adamant about it that this guy had wronged him in his own perception. He described, you know, going up into the lifeguard tower, and what have you, and actually wanting to commit a sexual battery, and then, of course, the actual murder.
>
> Q. Did he indicate, in terms of alcohol consumption, had there been any alcohol consumption?
>
> A. I believe he did, I believe he did, they were drinking and what have you. There was something else that he had mentioned about. Actually, I think him and his friend, or his buddy as he called him, Mr. Marek, they had actually separated after this crime because of a big argument, something he had related to me that they had argued about because he didn't do, there again, something that Ray thought was just absolutely unconscionable for him not to do as Ray requested.

(PC2 II, 139-140).

Ray Wigley seemed very upset that Marek had somehow wronged him.[7] Wigley purportedly had fabricated some details of his pre-trial statements. (PC2 II, 141). Douglass's only contact with Wigley was in the law library. (PC2 II, 143).

On cross-examination, the State asked when Douglass arrived at Columbia CI, possibly, November 13, 2000. Douglass thought it was August of 2000. But Douglass could not dispute if the Department records showed his arrival at Columbia was November 13, 2000. (PC2 II, 144). The transfer in 2000 was the first time Douglass was at Columbia CI. When asked how could Douglass have spoken to Wigley, when Wigley, died on May 6, 2000, Douglass had no other explanation but to state he must have been mistaken about the institution. Douglass surmised that if he did not speak to Wigley in Columbia CI, it must have been in Martin CI. (PC2 II, 145). However, the Department's records reveal that Wigley and Douglass were never in the same institution, either Columbia, Martin, or any other institution, at the same time. (PC2 II, 158).

On cross-examination, the State suggested that Douglass did not know who Raymond Wigley really was. Douglass stated that that was ridiculous, however when asked to describe Wigley, Douglass testified that "he was a black male, kind of skinny,

[7] Douglas insisted that Wigley was furious with Marek, because he asked him to do something and Marek refused. (PC2 II, 147, 148-149, 150).

brownish/black hair, dark-colored hair, if you will, five foot seven, eight"; "approximately 150 to 160 pounds." (PC2 II, 145).

The State called Yolanda Proctor, Records Custodian Supervisor for South Florida Reception Center, who testified that she reviewed the computer printout of the housing records, the official records for the Department-- of Leon Douglass, DOC #541168 and Raymond Wigley. She testified the records showed they never were housed together. (PC2 II, 155, 156-157, 158).[8]

The last inmate to testify was William Bernard Greene, presently located at Apalachee Correctional Institute. (PC2 III, 277). Greene knew Wigley at Columbia CI, because Blackwelder was Greene's roommate and Wigley's lover. (PC2 III, 279). Wigley and Blackwelder were frequently together in the cell, when Greene returned to his cell. Greene knew Wigley socially but they were not friends. (PC2 III, 279). Greene never heard Wigley talk about his case and Greene was not interested in Wigley because he did not know any law that would help Greene with his case. (PC2 III, 280, 282-283). Wigley and

[8] Following the testimony of Ms. Proctor, the Court requested the inmates' jackets for Leon Douglass and Raymond Wigley be provided to the Court and the parties.

On June 3, 2009, the inmate jacket for Leon Douglass was provided to the Court. Wigley's records were scanned upon his death in May 2000, however housing records were not retained. Nothing in Leon Douglass's inmate housing jacket changed the testimony presented that Wigley and Leon Douglass were never at the same institution at the same time. (PC2 II, 176).

Blackwelder were always arguing about Blackwelder threatening to kill Wigley if Wigley cheated with other gay men and Wigley would say that "I killed before, I'll kill again, so it don't matter." (PC2 III, 281). Greene characterized these remarks as "they're just two lovers talking, it was normal, its normal." (PC2 III, 281). Greene said he heard this on numerous occasions. (PC2 III, 281-282). Greene did not recall Leon Douglass, a law clerk in the law library. (PC2 III, 286).

Hilliard Moldof, Marek's defense counsel testified on June 2, 2009, regarding his defense of the Marek case. Moldof had not reviewed any records, (PC2 III, 292), but did recall that Wigley's case went first and Wigley received a life sentence. (PC2 III, 292). Moldof admitted he was aware of Wigley's trial but could not recall how much time he spent at Wigley's trial; he was in and out, but knew about the outcome. (PC2 III, 293). He could not accurately recall the outcome of the Marek's guilt phase on all the charges without prompting. (PC2 III, 293). He recalled not being permitted to mention Wigley's life sentence without opening the door to the admission of Wigley's confession. (PC2 III, 295). Moldof made the choice not to mention Wigley's life sentence. (PC2 III, 295). He testified that Wigley's "confession was damning and I couldn't cross it, I couldn't get at Wigley." (PC2 III, 295). Given the hypothetical that had he had witnesses who would testify Wigley was the one

who strangled the victim, Moldof said he would have used them. (PC2 III, 296). It would have been important to him. (PC2 III, 296). If he could have shown that Wigley made a statement to someone in prison, it would have been powerful evidence. If he could have shown equal culpability, that would have been powerful. (PC2 III, 297). It would have helped on proportionality respecting who was the dominant actor. (PC2 III, 298-299).

On cross-examination, Moldof was not clear whether he sought to suppress Wigley's confession and whether Marek had standing. Moldof had no recollection of these events. (PC2 III, 300). Moldof could not recall where Wigley and Marek were arrested or whether Wigley blamed Marek entirely in Wigley's statement to the police as to the murder. (PC2 III, 302). When shown a copy of Wigley's confession, Moldof was finally able to recollect that Wigley told police that, "the red bandana was used to strangle the victim, Adel Simmons, was his bandana used by John Marek to kill her"; that John Marek burned the victim's pubic hairs with a cigarette lighter. (PC2 III, 303-304).

Moldof had no recollection as to why he was present during portions of the suppression hearing on Wigley's confession, (PC2 III, 305), and did not know anything about Dr. Cash's mental health evaluation of Wigley, or Dr. Cash's testimony that Wigley was passive and a follower. (PC2 III, 307).

Moldof was shown a copy of his testimony at the 1988 motion for postconviction hearing, but had no recall of the hearing or that he testified. (PC2 III, 309). He only recalled that Marek testified at trial, after reading some portions of the 3.850 hearing transcript. Refreshed, he barely remembered that Marek testified but did allow that Marek's cross was terrible. (PC2 III, 310). Moldof only recalled he had used Dr. Krieger when he read portions of the 3.850 hearing, just prior to his testimony the day of the hearing. (PC2 III, 311). His memory was refreshed to the extent he knew from the transcript that Dr. Krieger thought Marek was falsifying has answers on the MMPI. (PC2 III, 311). He observed that Dr. Krieger believed the test itself was a lie since Marek was falsifying answers, however, Moldof testified he could have buried Dr. Krieger's report. What Moldof did not remember was that he did not have Dr. Krieger make a report specifically as to these tests. Moldof had no knowledge of what transpired. (PC2 III, 313-315).

During the hearing in 1988, Moldof did not recall Dr. Cash's report on Wigley, nor did Moldof know why he was called as a witness. (PC2 III, 318-319). Upon reviewing the 1988 hearing transcript, Moldof admitted that at trial he wanted to argue disparate treatment but the trial court ruled he could not unless the State was allowed to bring in Wigley's confession. (PC2 III, 321-323). He wanted to stay away from Wigley's

confession. (PC2 III, 323). However, Moldof insisted that it would have been powerful testimony if he had three inmates to say Wigley was the main actor to get a proportionality finding. (PC2 III, 324).

Moldof's testimony at the 1988 postconviction evidentiary hearing was introduced as evidence in the State's Exhibit 6. (PC2 III, 326).

Moldof read the Florida Supreme Court opinion and recalled some of the facts of the murder however, he had no idea regarding the medical examiner's testimony as to how the victim died. (PC2 III, 327). Moldof insisted again that in spite of his knowledge of the case he would have used the testimony of the inmates to whom Wigley made a variety of statements. (PC2 III, 328-330). Moldof reasoned that while it might open the door to the admissions of Wigley's statement, he would introduce the inmates' statements for proportionality purposes at the penalty phase. (PC2 III, 330-331, 340-341). While Moldof did not recall the facts or what he did in Marek's case he had no difficulty in analogizing Marek's case to others he handled more recently. Moldof could not recall whether his representation of Marek was found to be ineffective. (PC2 III, 333).

On redirect, in an effort to refresh Moldof's memory, he was shown the motion to suppress hearing transcript which was held jointly in Marek's and Wigley's cases pretrial. (PC2 III,

334). Further, Moldof was guided through a series of questions as to what he did, and admitted deficiencies based on having no idea what happened at trial. (PC2 III, 336). When asked about making contact with Marek's family members, Moldof stated "I don't think I did, I don't recall it, but from reading the transcript it appears I did not." (PC2 III, 336) Moldof answered questions about Wigley's trial more readily than he did his own client's trial. (PC2 III, 337-339). He could not recall the State's theory in Wigley's case yet, he was willing to state it would be important to use the "statements of the individuals in jail" which were inconsistent with evidence, concluding that "the fact that it's inconsistent is of value". (PC2 III, 342-343).

Upon conclusion of the redirect by Mr. McClain, the State called Mr. Moldof as its witness and on direct asked him to review the non-confidential psychological evaluation done by Dr. Morton Cooper of Wigley. (PC2 III, 345). Moldof was questioned as to his testimony that he would use inmates' statements regarding Wigley's statements to them, specifically whether it would open the door to Dr. Cooper's report. (PC2 III, 346-349).

Moldof stated that he could not see how it would open the door to the doctor's contemporaneous report, but admitted that the doctor could be called to testify. (PC2 III, 347). The doctor's letter to the court dated February 17, 1984, addressed

clinical interviews of Wigley, noting how Wigley was angry at Marek for getting Wigley into these difficulties. (PC2 III, 347). That Wigley accepted no responsibility for the rape and strangulation of the victim, "because Marek held a gun pointed at him and the woman. (PC2 III, 348). Wigley told Dr. Cooper that Marek strangled the woman and stated, "I like my woman dressed up like cowboys, naked and with a bandana around their necks." (PC2 III, 348).

Dr. Cooper's letter stated that Wigley had diminished capacity due to Wigley's drinking, passive participation in the "aggressive undertaken by a more dominant partner." Moldof, answered "That's what Cooper says, correct." (PC2 III, 348). Dr. Cooper's letter was admitted as State's Exhibit 7 and Dr. Arnold Zager's letter to the trial court reflecting a psychiatric evaluation was admitted as State's Exhibit 8. (PC2 III, 349).

In reviewing the psychiatric evaluation in Dr. Zager's letter to the court with Moldof, it showed that Wigley was fearful of Marek, and Wigley denied that he physically harmed or killed the victim. (PC2 III, 350). Moldof admitted the letter revealed that Wigley was intimidated by Marek brandishing the gun. Wigley said that Marek was pointing the gun at us not just the woman. (PC2 III, 351). Moldof finally admitted that opening the door to the inmates' remarks opened the door to all such statements. (PC2 III, 351). Moldof agreed letters would be

troublesome but he still, suggested that it was worth pursuing for proportionality consideration. (PC2 III, 352).

Moldof also concluded he spoke with Wigley's defense counsel, however in the weeks between the hearings in May-June 2009, his recollection of Marek's case was premised on reading a transcript just before testifying June 2, 2009. (PC2 III, 354).

On cross-examination by Mr. McClain, Moldof discussed the confrontation clause (PC2 III, 355), and agreed that inmates' testimony such as Jessie Bannerman's and Robert Pearson's, and Carl Mitchell's, and Mike Conley's, and Leon Douglass's and William Greene's, would be useful in spite of Wigley's confession and other evidence (PC2 III, 356-358). He noted "inconsistencies in the three doctors' reports or letters." (PC2 III, 359).

ISSUE I

NEWLY DISCOVERED EVIDENCE RAYMOND WIGLEY RAPED AND MURDERED ADELLA MARIE SIMMONS

Marek asserts he has unearthed "newly discovered evidence" through the statements from a number of inmates who, at various times, were with or around co-defendant, Raymond Wigley up until Wigley's death, May 2000. Such evidence would bring into question the correctness of Marek's trial and sentence of death. The trial court rejected Marek's newly discovered evidence claim finding ultimately that the probable outcome would not have been

different had these witnesses been available at trial. (Order, June 19, 2009, p. 9).

The Court after reviewing all the evidence presented and the testimony of the witnesses determined the issue was procedurally barred. The court determined that the testimony of the six inmates, made years after the "trial, appeal and postconviction proceedings" "do not impeach trial witnesses and are hearsay. The statements would be inadmissible at the guilt phase of a new trial." (Order, June 19, 2009, p. 10). And, determined that, even if these statements were admissible at the guilt phase, "they cannot be considered newly discovered evidence." (Order, June 19, 2009, p. 10).

As to the penalty phase, the court found that the defense "was not diligent in attempting to locate the witnesses. The lists of names were complied by Ms. McDermott based on material provided by the Department of Corrections years ago. Mr. Conley and Mr. Pearson were included in the first list. Mr. Bannerman was included on the most recent list, but his selection was based on the original Department of Corrections materials." (Order, June 19, 2009, p. 11). Assuming that the witnesses' testimony of what Wigley said to them would be "theoretically admissible and newly discovered," the inmates' testimony "lacked credibility. This Court further finds that the testimony does not necessarily establish that Wigley was the dominant actor or

that the witnesses even believed Wigley." (Order, June 19, 2009, p. 11). The trial court held: "Even if the six inmates' testimony existed at the time of trial, this Court finds that it is insufficient to produce a life sentence recommendation or an acquittal on retrial." (Order, June 19, 2009, p. 12).

The Inmates

1. MICHAEL CONLEY

Marek points to a "recent investigation uncovered that in 1996 or 1997, Wigley told his best friend, Michael Conley, that he had 'strangled the victim with a handkerchief after raping her.'"

Mike Conley's stipulated testimony from the May 7, 2009, prior hearing, revealed he first met Ray Wigley in Belle Glade Correctional Institution in 1990 or 1991. The two met again at Columbia Correctional Institution, where, in 1996 or 1997, Wigley asked for Conley's help because Conley's wife worked at a law firm. Conley testified that he asked Wigley to tell him about his case. Wigley told him that he was involved in a murder, that they took a woman, beat her and raped her. Conley testified that he asked Wigley if he killed the woman. Wigley twice answered that he did not. The third time Conley asked he also said "I'm not going to help you." Wigley then said that he strangled her with a scarf. Conley testified that Wigley felt guilty because he should be on death row too. Conley

testified that Wigley was crying as he confessed. Conley testified that Wigley was a coward, a real wimp and a heck of an actor.

The testimony of Sgt. Gould of the Waterville, Maine Police Department, at the May 7, 2009, evidentiary hearing was also stipulated to without objection. Sgt. Gould testified that--Conley told him, that Wigley told Conley he did the murder to get Conley to help him. Conley also had the feeling that Wigley really "wasn't the one who murdered the victim, because Wigley was trying to play tough. (APC 12, 1917). Conley agreed that Wigley told him he murdered the victim, "because he believed it was the only way that Mr. Conley would help him." (APC 12, 1917). Conley stated that he did not know why that part was not included in the declaration prepared by CCR's private investigator, Daniel Ashton. (APC 12, 1917-1918).

Conley also testified that after his release from prison, he moved to North Carolina with his wife. Following a divorce, he moved to Tennessee. He worked as an entertainer under the stage name of Michael Conley Ellis. Conley testified that in spite of what was included in his written declaration, specifically paragraph 13, it was not virtually impossible for anyone to locate him. Conley also corrected paragraph 8 of the declaration, stating that Wigley told him that he strangled the

victim because he did not want her to identify **them** [he and Marek].

Conley's full interview by Sgt. Gould was introduced at the June 1, 2009, hearing. In summary, Conley told Sgt. Gould that "Whether he did or not, (do the crime) I don't know. In my opinion I think he was a wimp. I don't see how he could murder anybody." (P. 15-16) Conley thought Wigley told him "he strangled her just to be a big shot." (P. 23) In describing Wigley, Conley said Wigley was clean cut, 140 pounds, 5'8" or 5'9", thin build, frail, reddish hair. "Ray Wigley was a hanger on." (P. 36) Conley stated that Wigley said they had to do something with the girl, so they killed her. Conley said "I only know what he told me. But when I was looking him in the eye like I'm looking you in the eye right now I didn't get the feeling that he did." "He might have been doing it just to play tough guy. A lot of people do that in prison." (P. 48)

2. JESSIE BANNERMAN

Jessie Bannerman initially met Raymond Wigley in the Broward County Jail in 1983, and the two men met again at Union Correctional Institution and then Martin CI, in 1987. One evening while at Union CI, Wigley, Bannerman and two others, Billy Ray Oliver and Raymond Hillard, were drinking moonshine when Bannerman asked Wigley why other men kept approaching him as allegedly homosexual. Wigley denied being a homosexual and

told Bannerman that "he had killed" and "if his life was in jeopardy he would kill again." On a second occasion, while the two were at Martin CI, Wigley again said he had trouble with other male inmates stalking him, when he and Bannerman were smoking marijuana. Wigley denied being gay and told Bannerman he killed a woman with whom he had had sex and then, he choked her because she could identify him. Wigley said he choked her because she started to scream.

Bannerman never knew that Wigley had a co-defendant in the murder. Bannerman testified that Wigley was a small, wimpy white guy, about 130 pounds. Bannerman admitted the men were mildly intoxicated on moonshine during the Union CI statement, and had a buzz when they were smoking marijuana during the Martin CI statement. The only other person Bannerman spoke to concerning Wigley's remarks was "Wigley's old man," Raymond Hillard, Wigley's protector in prison.

3. ROBERT PEARSON

Robert Pearson met Raymond Wigley at Columbia CI around 1999 or 2000; they were cellmates up to the time of Wigley's murder, in May 2000.

Pearson's testimony was that Wigley's statements about the murder and his participation "fluctuated." Wigley had several versions and to sum up his testimony:

"So, really, you know, you're asking me what did he tell me, and, you know, it's like he told me, you know, three or four different versions. So, you know, what version are you looking for?"

Wigley told different stories, however, Pearson said they all ended up on the beach. Apparently Wigley told him that "He just told me, he said they went and they partied and they went to this guard shack, life shack, lifeguard shack." They partied and Wigley gave Pearson two or three different versions. (PC2 I, 57-58).

One version was the victim liked Marek and they went and partied, had consensual sex and then the codefendant left, and Wigley was left with the girl but he could not get an erection. Wigley then got violent. She laughed at him and then picked at him, "he took it bad, and that's where he would fluctuate a lot, he would say he passed out and when he woke up she was dead, and he tried to, like prop her up, I remember he was always saying trying to prop her up; and then he walked out and looked around, and he ran back to the truck and he woke the guy up and was like, hey, man, hey, man, we got to go, we got to go, we got to go. You know what I mean? And then it would fluctuate again, the next thing I know he would be back saying that the guy was gone, he was in the truck by himself, and the police pulled him over, you know.

(PC2 I, 58-59). Another version Wigley passed out and did not know what happened. (PC2 I, 59). Another version Wigley was teased by the victim but did not really remember doing it, but if he did, he wanted "god to forgive" him. (PC2 I, 59).

A. He got upset. And he would -- he would -- either he -- either -- like I said, he'd fluctuate, at one point he'd talk to me about it and he'd be solid that he choked her, he pretty much killed her, and then the next version he would tell me is that he passed out and he didn't remember anything, but when he woke up she was there. And I

> remember he was saying like there was some rope or something around. He was just always -- you know, either he was, you know, adding stuff or taking stuff away, he would never just -- there was always fluctuation in it.

(PC2 I, 60).

4. CARL MITCHELL

Carl Mitchell knew Wigley from Columbia CI, in 1998 or 1999. They were in the same quad and Mitchell heard Wigley say to Blackwelder, during arguments "don't make me kill you 'cause I already got – I already killed somebody else before." Mitchell described the remarks as part of arguments, not a threat. Mitchell testified that he did not consider Wigley's remarks as a threat, "'cause a lot of people in prison say a lot, you know, speaking out of fear."

5. LEON DOUGLASS

Leon Douglass, presently housed at Madison CI, was recently contacted by Marek's investigator concerning whether he knew Raymond Wigley. (PC2 II, 134-135). Dan Ashton contacted him on May 18, 2009, seeking information as to Wigley. Douglass was familiar with Wigley when he was at Columbia CI, "around the turn of the century, 2000, 2001, and in my duties as a law clerk Ray had come down and was seeking assistance, you know, with his postconviction, and I started assisting him with his case. (PC2 II, 136). Douglass testified he was at Columbia when Wigley was killed. (PC2 II, 136), however, Douglass stated "the only memory

I have would be the fact that I was working and he came into the law library and started seeking assistance. (PC2 II, 137-138).

In discussing the Wigley's crime, Douglass testified:

> A. During the time that we had had our discussions, we were pulling some books and I had some materials out, and I wanted to take a break, so Ray and I actually went outside of the library to like a little break area we had, and we had been pretty intense, he had practically relived the entire incident, and he was telling me during this break that in fact he was the one that had perpetrated the murder, he had actually done the killing by strangulation of the victim, and that he was quite upset with his codefendant, Mr. Marek, because he did not do something, and I really can't recall what that something was, but he didn't do what Mr. Wigley wanted him to do to help him perpetrate this murder, and Ray, he was quite adamant about it that this guy had wronged him in his own perception. He described, you know, going up into the lifeguard tower, and what have you, and actually wanting to commit a sexual battery, and then, of course, the actual murder.
>
> Q. Did he indicate, in terms of alcohol consumption, had there been any alcohol consumption?
>
> A. I believe he did, I believe he did, they were drinking and what have you. There was something else that he had mentioned about. Actually, I think him and his friend, or his buddy as he called him, Mr. Marek, they had actually separated after this crime because of a big argument, something he had related to me that they had argued about because he didn't do, there again, something that Ray thought was just absolutely unconscionable for him not to do as Ray requested.

(PC2 II, 139-140).

Douglass's only contact with Wigley was in the law library. (PC2 II, 143). He insisted that Wigley was furious with Marek, because he asked him to do something and Marek refused. (PC2 II, 147, 148-149, 150).

On cross-examination, Douglass was asked when he arrived at Columbia CI, possibly, November 13, 2000. Douglass thought it was August of 2000, but, Douglass could not dispute the Department's records which showed his arrival at Columbia was November 13, 2000. (PC2 II, 144). Douglass's transfer in 2000 was the first time Douglass was housed at Columbia CI. When asked how could Douglass have spoken to Wigley, when Wigley died on May 6, 2000, Douglass had no other explanation but to state he must have been mistaken about the institution.

If Douglass did not speak to Wigley in Columbia CI, he offered, it must have been in Martin CI. (PC2 II, 145). However, the Department's records reveal that Wigley and Douglass were never in the same institution, either Columbia, Martin, or any other institution at the same time. (PC2 II, 158).

The State suggested that Douglass did not know who Raymond Wigley was. Douglass stated that that was ridiculous. However when asked to describe Wigley, Douglass testified that:

> **"he was a black male, kind of skinny, brownish/black hair, dark-colored hair, if you will, five foot seven, eight"; "approximately 150 to 160 pounds."**

(PC2 II, 145)

6. WILLIAM GREENE

The last inmate called was William Greene, who knew Wigley and Blackwelder at Columbia CI when he was Blackwelder's

cellmate. Greene knew nothing about Wigley's crime, and his testimony centered on the fact that Wigley and Blackwelder were lovers and "always arguing". Blackwelder would threaten to kill Wigley, if Wigley cheated on Blackwelder, and Wigley would retort "I killed before, I'll kill again, so it don't matter. (PC2 III, 281). Greene observed these remarks were normal, "just two lovers talking, it was normal." (PC2 III, 281).

Greene was very keen on finding someone to help him on his case, however he did not recall Leon Douglass, a certified law clerk in the prison library. (PC2 III, 286).

ARGUMENT

Marek contends that these new inmates' statements create a likelihood that the "jury would have accepted Marek's testimony as true that he did not commit the murder," as to his guilt, or alternatively, that a new penalty phase should be granted. Neither is warranted.

Marek's claim is procedurally barred. Marek has not satisfactorily shown the "new evidence" qualifies as "newly discovered evidence" because, had counsel used due diligence in prosecuting Marek's postconviction issues, the "new evidence" would have been unearthed long ago. This new evidence is pure hearsay, without any justifiable exception and would not be admitted at the guilt portion of any new trial.

Wigley never testified in Marek's trial and defense counsel made reasonable tactical decisions not to bring in any evidence regarding Wigley's life sentence and the attending culpability comparisons accompanying same -- for fear that the evidence might be more harmful. While Marek's defense at trial was he did not murder Ms. Simmons, the trial record shows how sanitized Marek's trial was because nothing about Wigley's confession or other information about Wigley infected Marek's trial. Marek's assertion that he is entitled, under a proportionality review, to a life sentence, is equally not compelling. Viewing the new evidence cumulatively, with all the evidence regarding Wigley, the new evidence would not result in a different outcome, to wit: a life sentence.

a. Procedurally barred

The various statements made by the six inmates called to testify before the Court, about Wigley's remarks to them as to the murder of Adella Simmons are embellishments of Marek's claim raised in his September 27, 2001, Second Amended Motion, wherein he argued that he has recently received previously unavailable mental health records on Wigley showing how Wigley had to be the murderer. Specifically he argued at **Claim IX** p. 98-103 of this "Second Amended Motion" filed September 27, 2001, (TR V 799-804 in Marek v. State, SC04-229), Marek asserted that:

> ….The state's case rested on the premise that Mr. Marek was in control of the situation (R 423, 1137-38). The State's case was based upon their argument that Mr. Marek was the person who killed Ms. Simmons (R 421). But the sentencing judge found that Raymond Wigley was involved in the crime (R 1341) and that Wigley strangled the victim (R 1344). The court further found that Wigley and Mr. Marek acted in concert together (R 1348-50). However, Mr. Marek received a sentence of death while Mr. Wigley received a lesser sentence.
>
> **Since the time of Mr. Marek's trial, evidence has been discovered indicating that Wigley warranted further investigation by police as he was the person who raped and killed Ms. Simmons. A previously unavailable mental health evaluation provided evidence consistent with Wigley being the principle.**

(Emphasis added)

For clarification, the original trial record reflects that at TR IX, p 1341, the trial court found that both Marek and Wigley "were in the tower together with the victim." However Marek's characterization that the trial court found "that Wigley strangled the victim (TR IX 1344)" is totally erroneous, rather what the trial court observed was:

> **"To the benefit of Mr. Marek, this Court will assume for the moment that Marek's accomplice, Wigley, strangled the victim to death.** Could the jury have reasonably inferred from the evidence that Marek by his conduct intended or contemplated that lethal force might be used by Wigley or that Wigley might take the victim's life? This Court feels that not only could the jury have answered that question in the affirmative but evidenced by its solid vote of 10 to two for the imposition of the death penalty that they did so find."

(TR IX, p 1344). (Emphasis added).

In attacking Wigley as the actual killer, Marek argued:

"4. Since the time of Mr. Marek's trial, evidence has been discovered indicating that Wigley warranted further investigation by police as he was the person who raped and killed Ms. Simmons. A previously unavailable mental health evaluation provided evidence consistent with Wigley being the principle.

5. Raymond Wigley's life has the hallmarks of a violent rapist. Wigley and his life have been examined by mental health experts. These analyses reveal that he has the attributes and qualities of a man who fantasized about violence to the point that he acted the fantasies out.

6. Wigley fits the classic violent rapist pattern. At the time of the crime he was under the age of thirty years. Wigley was raised in a under class situation. Wigley's life was marked violence. He has a history of brutality and conflict. Wigley's mother was a domineering figure in his life with whom he struggled and persistently rejected. Wigley sought power and domination over women. He had no empathy for the circumstances of others. He suffered from mental illnesses including paranoid schizophrenia, anxiety, and depression. He abused substances. He had a low aptitude and dropped out of school after the ninth grade. He did not have close relations with his parents and was shuffled from foster home to foster home eventually. He never married. He suffered mood swings between anger and depression. He had suicidal tendencies and experienced paranoid delusions. He had little respect for the law or police. Prior to meeting Ms. Simmons, he had a string of arrests and was convicted for burglary. Most significant are Mr. Wigley's history of violence, his mental illness, and his substance abuse.

7. At Mr. Marek's trial, the State presented a circumstantial evidence case. After lengthy deliberations the jury returned a verdict finding Mr. Marek not guilty of burglary. They also found Mr. Marek not guilty of sexual battery and aiding and abetting sexual battery. John Marek had no prior convictions for violent felonies at the time of his murder trial. John Marek does not fit the typical rapist pattern.

\+ + +

9. The evidence of the mental health examinations is relevant to the issue of Mr. Marek's guilt or innocence and his sentencing. In Rivera v. State, 561 So. 2d 536 (Fla.

> 1990), **the Florida Supreme Court ruled that a defendant may seek to exculpate himself by introducing evidence about another suspect if that evidence is relevant under the same standards of relevancy used to determine admissibility of "any other evidence offered by the defendant.**" Rivera, 561 So. 2d at 539. Further, the Court cautioned that where such evidence tended in any way to establish a reasonable doubt of a defendant's guilt, it would be error to deny its admission. id. at 539; Estrano v. State, 595 So. 2d 973 (Fla. 1st DCA 1992); In Interest of K.C., 582 So. 2d 741 (Fla. 4th DCA 1991)."

(Emphasis added)(TR 5, 79-801, Marek v. State, SC04-229).

On September 30, 2003, the Court denied this Claim IX, as procedurally barred at TR Supplemental Record V 658-659 in Marek v. State, SC04-229, holding:

> Defendant claims that he gained access to "newly discovered evidence" which establishes his innocence. Defendant alleges that a "previously unavailable" mental health evaluation is relevant to the issue of his guilt or innocence and his sentencing. Defendant argues that evidence has been discovered supporting his allegation that the co-defendant, Raymond Wigley, raped and killed Adella Simmons. Defendant argues that while he, himself, has no prior convictions for violent felonies at the time of his trial, Mr. Wigley has a history of violence, mental illness, and substance abuse. Furthermore, defendant argues that the jury, as co-sentencer, should have been made aware of the fact that Mr. Wigley received a "lesser sentence" of life in prison.
>
> Defendant does not present any new circumstances which would warrant an evidentiary hearing on this claim. Defendant argued that Mr. Wigley was the murder at trial, as well as on appeal to the Florida Supreme Court of Florida. Each court has decided that it was Mr. Marek who was the killer, planner, and more dominant force, and that Mr. Wigley was the lesser participant in commission of the crime. This claim is procedurally barred because it has been raised previously and decided on its merits adversely to Defendant. On appeal, the Supreme Court of Florida held that "the record of Appellant's trial is replete with evidence which justifies the conclusion that Appellant committed premeditated murder." Marek v. State, 492 So. 2d

1055, 1057 (Fla. 1986). See SMR. P. 86-88. Accordingly, Defendant's claim must be denied.

All appellate review was denied, Marek v. State, 940 So. 2d 427 (Fla. 2006), *cert. denied*, April 24, 2007.

The new evidence produced, through affidavits and more expansively through court testimony, is that Wigley made statements heard by fellow inmates Mitchell and Greene that "he killed before and would kill again." To Conley, Bannerman, and Pearson,[9] Wigley stated not only that "he killed before and would kill again," but that he choked the victim.[10] All Marek now has is more information about Wigley.

The issue is procedurally barred because, while couched in terms of newly discovered evidence, the fact remains that Marek is again merely attempting to reargue that Wigley was the murderer. Even if Marek could establish that the six inmates'

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[9] Douglass's testimony was discredited for two reasons, first Wigley and Douglass were never in the same institution at the same time. This, of course, severely challenges whether they ever talked together, one on one. This also challenges the time frame Douglass claims he was with Wigley at Columbia CI. Second, Douglass described Wigley as a black male, which Wigley was not.

[10] It comes as no surprise that Wigley knew something about the murder, he was there as a principal. This is not a case where some other person is accused of doing the murder. The fact that Wigley told "fluctuating versions" of what happened as to the murder to Robert Pearson, for example, or that he told Conley that he choked the victim after Conley told Wigley he would not help Wigley unless he told him what happened, or that Wigley told Bannerman that he choked the woman, to be manly and not admit that he was gay, does not bring into question the validity of Marek's conviction or sentence.

testimony qualifies as "newly discovered evidence," the procedural bar would still apply because this evidence was not presented within one year of discovery. Jimenez v. State, 997 So. 2d 1056, 1064 (Fla. 2008)(To be considered timely filed as newly discovered evidence, the successive rule 3.851 motion was required to have been filed within one year of the date upon which the claim became discoverable through due diligence. *Cf.* Mills v. State, 684 So. 2d 801, 804-05 (Fla. 1996)(establishing such an interpretation for rule 3.850(b)(1), which has language identical to rule 3.851(d)(2)(A))).

The record reflects at trial, and in previous post-conviction litigation, the reviewing courts have found that Marek was the dominant character in the murder of Adella Simmons. At trial, Marek's counsel presented a defense that Marek was sleeping in his truck and that he knew nothing about the murder. Evidence was always available, from the day of Marek's trial, which could have been used to attack Wigley with regard to his participation and domination in this crime. Defense counsel's strategic decisions not to use the fact Wigley got a life sentence, is not at issue here.

Marek has never challenged the physical evidence that **only** his fingerprint was found inside the observation deck where the body was discovered. 492 So.2d at 1056. And, the original trial record reflects that while Marek challenged the trial

court's denial of his motion for judgment of acquittal premised upon an asserted lack of evidence of premeditation or evidence to indicate that the killing took place during the commission of a felony, Marek never challenged the sufficiency of the evidence with regard to the fact that he committed the murder. The Florida Supreme Court found: "The record of Appellant's trial is replete with evidence which justifies the conclusion that Appellant committed premeditated murder." Marek, 492 So.2d at 1057.

Marek continues to raise claims that, when cut to the core, are variations of his complaint that he got death and Wigley got life. That issue has been resolved adversely to him by all courts who have reviewed the evidence pointing to the fact Marek was the killer, planner and the more dominant person. Wigley was a participant but was the lesser participant in this horrendous crime. See Turner v. Dugger, 614 So. 2d 1075, 1078 (Fla. 1993) (barring claims for postconviction relief "because they, or variations thereof, were raised on direct appeal"); Waterhouse v. State, 792 So. 2d 1176 (Fla. 2001)(Although Waterhouse now frames the issue as one of ineffective assistance of counsel, the appellant is merely trying to relitigate the same issue using different words.); Sireci v. State, 773 So. 2d 34 (Fla. 2000)(To the extent that Sireci used a different argument to re-litigate the same issue, the claims remain

procedurally barred, *citing e.g.*, Harvey v. Dugger, 656 So. 2d 1253, 1256 (Fla. 1995)). See Stein v. State, 995 So. 2d 329, 341-342 (Fla. 2008):

> "However, '[w]here the circumstances indicate that the defendant is more culpable than a codefendant, disparate treatment is not impermissible despite the fact that the codefendant received a lighter sentence for his participation in the same crime.'" Marquard v. State, 850 So. 2d 417, 423 (Fla. 2002) (quoting Brown v. State, 721 So. 2d 274, 282 (Fla. 1998)).
>
> Although not always the case, we acknowledge we have sometimes characterized the "triggermen" to be the more culpable of codefendants. *See, e.g.*, Ventura, 794 So. 2d at 571; Foster v. State, 778 So. 2d 906, 922 (Fla. 2000); Groover v. State, 703 So. 2d 1035, 1037 (Fla. 1997). However, the triggerman has not been found to be the more culpable where the non-triggerman codefendant is "the dominating force" behind the murder. See Larzelere, 676 So. 2d at 407 (finding death sentence for non-triggerman defendant proportional despite triggerman's life sentence because non-triggerman defendant planned, instigated, and was the "mastermind" behind the murder).

Marek cannot overcome a procedural bar that applies here. He is merely attempting to argue more "remote evidence" than previously acquired to circumvent the ruling on the merits on direct appeal that Marek was guilty of Ms. Simmons' murder, or any of the plethora of claims on this point in his postconviction litigation. See Van Poyck v. State, 564 So. 2d 1066, 1070-1071 (Fla. 1990)(while not the killer, Van Poyck was the instigator and prime participant in the crime).

b. Newly discovered evidence

To set aside a conviction based on newly discovered evidence, first, the evidence "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 [of it] by the use of diligence." Second, the newly discovered evidence must be of such nature that it would probably produce an acquittal on retrial. Robinson v. State, 865 So. 2d 1259, 1262 (Fla. 2004) (citation omitted) (quoting Jones v. State, 709 So. 2d 512, 521 (Fla. 1998)). These "two elements of a newly discovered evidence claim apply equally to the issue of 'whether a life or death sentence should have been imposed.'" Ventura v. State, 794 So. 2d 553, 571 (Fla. 2001) (quoting Scott v. Dugger, 604 So. 2d 465, 468 (Fla. 1992)).

In Buenoano v. State, 708 So.2d 941, 950-51 (Fla. 1998), the Court held: ". . . the court reasoned that even if the information is considered newly discovered because it could not have been known by Buenoano or her counsel at the time of trial by the use of due diligence, it is not of such a nature that it would probably produce a different result on retrial." Jones v. State, 591 So.2d 911, 916 (Fla. 1991). Relying on the record evidence outlined above, the court concluded that "either with impeachment evidence regarding Roger Martz or without any reference whatsoever to the attempted murder of John Gentry, there was ample evidence to show beyond a reasonable doubt that Buenoano committed the murder of James Goodyear. . . . We agree that on this record there is no

reasonable probability that the new evidence would result in an acquittal or recommendation of life on retrial. See Williamson v. Dugger, 651 So.2d 94, 89 (Fla. 1994). . . ." See also Sireci v. State, 773 So.2d 34, 43-44 (Fla. 2000) (defendant not entitled to relief where DNA was known 9 years); Glock v. Moore, 776 So.2d 243, 250 (Fla. 2001); Kight v. State, 784 So.2d 396, 400-01 (Fla. 2001); Ventura v. State, 794 So.2d 553, 570-71 (Fla. 2000) (codefendant's sentence of life affirmed one year after Ventura's sentence was affirmed where not equally culpable codefendants no error - not entitled to further review - Ventura failed to meet second prong of Jones); Groover v. State, 703 So.2d 1035, 1037 (Fla. 1997); Johnson v. State, 696 So.2d 317, 326 (Fla. 1997).

Like Ventura, Marek fails to meet the second prong of Jones. There was no mystery as to Marek's defense at trial. He took the stand and testified he did not do it. He did not know what happened to Ms. Simmons. He did not find her body in the small lifeguard shack although he was inside for 15 to 18 minutes. He did not know Wigley's last name and testified that he told the police he was a college student looking for friends. He had to go back to the lifeguard shack to retrieve his shirt, and admitted that Detective Rickmeyer told him while he was in a holding cell in Daytona Beach, "Congratulations, you made it to

the big times" (TR VII 1013). Marek told Detective Rickmeyer, "SOB must have told all" (TR VII 1014).

The six inmates' testimony regarding Wigley's statements would not bring into question Marek's conviction for murder. At most, they "might" address who actually did the murder but they would not absolve Marek based on the evidence presented.

Moreover, there is no probability Marek would have received a life sentence. Van Poyck v. State, 961 So. 2d 220, 224-229 (Fla. 2007). Marek's penalty phase was not infected with Wigley's confession that: R: "Okay, did you use this (bandana) against the lady in any way? W: No sir I didn't. R: Did John use it against her? W: Yes sir. R: What did he do with it? W: Tied it to her neck." Or that Marek had intercourse with the victim; or that Marek hit the victim in the face; or that Marek burned the victim's pubic hairs with a cigarette lighter.

Nor did Moldof have to defend Marek regarding Dr. Krieger's report as to Marek's lying and malingering. Nor did Moldof have to defend against testimony from Wigley's doctors who found that Wigley was a follower, easily lead by more dominant personalities, or that Wigley feared Marek and Marek pointed a gun at Wigley. Nor did Moldof have to explain Marek's remarks when he strangled Adella Simmons, "I like my woman dressed up like cowboys—naked and with a bandana around their necks."

c. Due diligence

Marek has failed to show how through due diligence his counsel could not have uncovered most of the six inmates he now urges have new evidence. Co-counsel admitted that they acquired public records of co-defendant Wigley following his murder in 2000, and engaged an investigator to interview those named in DOC's files "whose names appeared in Wigley's records."

While Mr. Conley seemed more difficult to find, in 2001, when first searched for by Marek's defense team, it seems miraculous that it only took 9 days after the April 20, 2009, warrant was signed to find him, secure a declaration and secure purportedly newly discovered evidence. Likewise, the names of most of the inmates called to testify were known or could have been located since all were incarcerated in the Department before and after Wigley's death in 2000.

For example Ms. McDermott, counsel and co-counsel, for Marek since 1999, (PC2 I, 86), readily admitted that when Wigley was killed in May 6, 2000, she sought and obtained records in May 2001, from a number of sources, including the State Attorney's Office and the Department of Corrections, relating to Marek's co-defendant, Wigley. At that time she thought it might be useful to secure and possibly uncover information as to Wigley through his associates and the circumstances surrounding his death, to assist in Marek's case. (PC2 I, 88-90). She readily admitted that Conley (PC2 I, 92) and Pearson, (PC2 I,

94) were on the first list compiled. While Jessie Bannerman wasn't on the first list, his name was known when Conley and Pearson were made known in 2001, but not considered by defense counsel. He made the list of names to interview in April 2009, after the death warrant was signed. (PC2 I, 96). Leon Douglass's name came to counsel attention when she finally got around to having Pearson approached a second time after the warrant was signed and after the first aborted evidentiary hearing held May 6-7, 2009. (Declaration of Daniel Ashton May 18, 2009). Willam Greene was Blackwelder's cellmate in prison when Wigley was murdered. His name was available at the time of Wigley's murder in 2000, and he could have been approached concerning matters dealing with Wigley. Carl Mitchell was in the same quad as Wigley in Columbia CI and he could have likewise been approached. These inmates were included in the files and records counsel obtained, based on the public records she sought on Blackwelder, Wigley's murderer.

During this time frame, in 2001, counsel for Marek was actively litigating his case, when they filed the September 27, 2001, Second Amended Motion including, raising Claim IX, challenging:

> **Since the time of Mr. Marek's trial, evidence has been discovered indicating that Wigley warranted further investigation by police as he was the person who raped and killed Ms. Simmons. A previously unavailable mental health**

evaluation provided evidence consistent with Wigley being the principle.

Marek's counsel's explanations fail to satisfy Rule 3.851(d)(2), because each of the six inmates' testimony could have been obtained by the "exercise of due diligence." The "newly discovered evidence" was not brought within a year of the date the evidence was or **could have been discovered** through due diligence. Glock v. Moore, 776 So. 2d 243, 251 (Fla. 2001); Jimenez v. State, 997 So. 2d at 1064.

Moreover, Marek's circumstances are quite distinguishable from ones the Florida Supreme Court detailed in Hunter v. State, 33 Fla. L. Weekly S721 (Fla. 2008). In the instant case, Wigley's death opened the doors to "a plethora of information regarding Wigley's history." Marek's counsel did public records litigation and secured not only Wigley's files but Wigley's murderer's files. Marek was actively litigating a newly discovered evidence claim in 2001, pertaining to Wigley's culpability —- and, there was no reason why every one of the six inmates' testimony could not have been discovered. Hunter does not excuse Marek's counsels' failure to use due diligence.

The record before the Court shows that the explanations given by Ms. McDermott and, indirectly, by Marty McClain in failing to find the six inmates, are insufficient. As a result, Marek has failed in his burden to show due diligence.

Since due diligence was not undertaken in this instance based on the failure of defense counsels to pursue locating Conley, or Pearson, Bannerman, Greene, Mitchell, and Douglass -- incarcerated inmates from the DOC files secured in 2001, the first prong of Jones is also wanting. See Jones v. State, 591 So. 2d 911 (Fla. 1991) or Rule 3.851(d)(2)(c), Fla. R. Crim. P.

d. Admissibility

In order to determine the viability of six inmates' statements and testimony, Marek would need to present a legal theory as to how the hearsay would be admissible. See: Trepal v. State, 846 So. 2d 405, 424 (Fla. 2003); Rogers v. State, 782 So. 2d 373, 383 n.11 (Fla. 2001); Bradley v. Nagle, 212 F. 2d 559, 567 (11th Cir. 2000). He has not.

First, as to the guilt phase, the facts at the guilt portion of Marek's trial went uncontested as to who was the dominate character in this murder. No witness was impeached by the defense; Wigley did not testify at trial, and the physical evidence showed that only Marek's fingerprint was found in the lifeguard shack where Ms. Simmons's body was found. Moreover, Marek took the stand and testified that he was present and was the one who invited Ms. Simmons to go with them to get help.

The six inmates' statements do nothing more than relate what Wigley told them, many years after the murder and Marek's trial. Their testimony does not impeach any witnesses at

Marek's trial; Wigley did not testify and therefore, these statements cannot impeach or support a recantation of any testimony at Marek's trial. The circumstances of how Wigley got a life sentence were never divulged at Marek's trial based upon Moldof's trial strategy to stay away from introducing anything regarding Wigley at the trial.

As the Court observed in Taylor v. State, 3 So. 3d 986 (Fla. 2009), in a very similar circumstance:

> To obtain a new trial based on newly discovered evidence, Taylor must meet two requirements: first, the evidence must be newly discovered and not have been known by the party or counsel at the time of trial, and the defendant or defense counsel could not have known of it by the use of diligence; second, the newly discovered evidence must be of such quality and nature that it would probably produce an acquittal on retrial. See Jones v. State, 709 So. 2d 512, 521 (Fla. 1998) (citing Jones v. State, 591 So. 2d 911, 915 (Fla. 1991)). **In determining whether the evidence compels a new trial, the trial court must "consider all newly discovered evidence which would be admissible," and must "evaluate the weight of both the newly discovered evidence and the evidence which was introduced at the trial."** Jones, 591 So. 2d at 916.
>
> This determination includes
>
> > whether the evidence goes to the merits of the case or whether it constitutes impeachment evidence. The trial court should also determine whether the evidence is cumulative to other evidence in the case. The trial court should further consider the materiality and relevancy of the evidence and any inconsistencies in the newly discovered evidence.
>
> Jones, 709 So. 2d at 521 (citations omitted). As noted above, the second prong of Jones requires a showing of the probability of an acquittal on retrial.

> On review, "[t]his Court does not substitute its judgment for that of the trial court on issues of fact when competent, substantial evidence supports the circuit court's factual findings." Smith v. State, 931 So. 2d 790, 803 (Fla. 2006) (citing Windom v. State, 886 So. 2d 915, 921 (Fla. 2004)); see also Blanco v State, 702 So. 2d 1250, 1252 (Fla. 1997) (citing Demps v. State, 462 So. 2d 1074, 1075 (Fla. 1984)).

While the six inmates' testimony and statements would not be admissible at the guilt phase of Marek's trial, their admissibility might occur at any penalty phase, under Rutherford v. State, 926 So. 2d 1100, 1108 (Fla. 2006), as to whether, the "newly discovered evidence" is of such a nature that it would probably produce a life sentence recommendation.

e. Prejudice

Marek has not met his burden to establish the second prong of the newly discovered evidence standard, i.e. "the newly discovered evidence must be of such nature that it would probably produce an acquittal on retrial." See Jones v. State, 709 So. 2d 512, 521 (Fla. 1998). Newly discovered evidence satisfies the second prong of the Jones test only if it "weakens the case against [the defendant] so as to give rise to a reasonable doubt as to his culpability." Jones, 709 So. 2d at 526 (quoting Jones v. State, 678 So. 2d 309, 315 (Fla. 1996)). The evidence against Marek is substantial and would not be undermined by the six inmates' testimony. Marek, 492 So. 2d at 1056-58.

However, as noted earlier, the utilization of these six inmates' testimony would open the door to a field day for the prosecution regarding degrees of culpability between Marek and Wigley. The trial testimony by witnesses at the original trial placed Marek as the more dominant actor. Marek, himself, while testifying that he was sleeping through it all, admitted that he was the one that talked to Jean Trach and the police officer on the beach just after the murder. Wigley's confession clearly shows that Marek was more dominant, Wigley's doctors' reports and letters show Marek was more dominant, and even the six inmates' testimony show that, while Wigley said he killed before and would kill again, they thought he was boasting, or trying to get something in exchange for his statements.

At the penalty phase held June 5, 1984, **Moldof informed the court that he was not going to mention Wigley's sentence of life imprisonment because he did not want to open the door to the prosecution regarding Wigley's confession.**[11] Moldof wanted to introduce the report of Dr. Krieger **only** to the doctor's initial comments and evaluation as to Marek. (TR IX 1283). The trial court stated that it would not be fair to introduce Dr. Krieger's report where he had not testified and it would result

[11] The record shows that Moldof was well aware of Wigley's confession; he as well as the State, had access to it when the confession was introduced at the joint motion to suppress hearing held pre-trial.

in hearsay which would deny the State cross—examination of him. (TR IX 1284). **Moldof also stated that he was not going to mention anything concerning Marek's criminal history and therefore the State was precluded from arguing same to the jury. (TR IX 1284). The court specifically provided that if Moldof introduced any evidence regarding Wigley's life sentence, the State had the right to instruct the jury as to the difference between Wigley's culpability and that of Marek's. (TR IX 1285). Based on the court's ruling, defense counsel affirmatively determined that he would not mention Wigley's life recommendation. (TR IX 1288).**

Based on this trial record Marek cannot now suggest there was a probability that had the six inmates' testimony been available, their testimony would have been admitted at Marek's penalty phase, and he would have received a life sentence.

f. Cumulative Consideration

Hilliard Moldof's trial strategy is not the issue before the Court. However, as discussed above, viewing all "evidence" cumulatively, the clear trial strategy in place distancing Marek from evidence that would have come forward had Wigley's life sentence been made known to the jury and court-- is not challenged by the revelations of the six inmates' testimony. While Moldof's testimony on June 2, 2009, focused upon the penalty phase of Marek's trial and the ability to produce

evidence of proportionality of their sentences, Moldof's remarks are seriously undercut by his total unfamiliarity with what happened at Marek's trial, his trial strategy, long forgotten, and how he was able to sanitize Marek's involvement.

The test for determining whether counsel rendered effective assistance is not whether counsel was successful but rather whether it was deficient and prejudicial. Neither prong of Strickland, occurred in Moldof's defense of Marek. Note: Marek v. Singletary, 62 F. 3d 1295, 1298-1301 (11th Cir. 1995). The tactical strategy utilized to withhold Wigley's life sentence being made known, was the best opportunity Marek had based on what was known at the time. The fact that Marek can now point to other information --as to Wigley's statements regarding his involvement, is not significant when viewed objectively, and without filters as to what these inmates actually related.

Marek invites cumulative consideration of all the facts. He no longer is seeking to assess the impact of the six inmates' testimony but rather suggest that because he has presented their testimony he is free to revisit all other complaints. He is not entitled to any further consideration on this otherwise barred claim or reopen other issues such as whether mitigation unearthed at the 1988 evidentiary hearing should be presented; or revisit his previously argued Edmund v. Florida claim.

ISSUE II

CLEMENCY

Next Marek argues that under Furman v. Georgia, 408 U.S. 238 (1972)(*per curiam*), the Florida Clemency process is "freakishly imposed", because the Governor sought out information before he made a decision to sign Marek's third warrant for execution, and did not ask Marek. Citing Harbinson v. Bell, 129 S. Ct. 1481, 173 L. Ed. 2d 347 (2009), Marek has modified the holding in Harbinson, from a decision that allows for the federal payment for counsel in State cases to a application of Furman to a state's clemency model. In support of this notion he points to 50 named cases that are "ripe for warrants" based on the oversight Commission on Capital Cases, and states nothing more. The trial court found Furman distinguishable.

Initially, the compilation of cases by the Commission on Capital Cases is a legislatively created entity, whose purpose under §27.709(2)(b), Fla. Stat., is not done for the Executive branch and its clemency function.[12] The updated reports,

[12] §27.709(2)(b), Fla. Stat., provides in material part:

> (b) As part of its duties, the commission shall compile and analyze case-tracking reports produced by the Supreme Court. In analyzing these reports, the commission shall develop statistics to identify trends and changes in case management and case processing, identify and evaluate unproductive points of delay, and generally evaluate the way cases are progressing.

available on the Commission's website, are not a part of the Executive Clemency Board's records and have an independent purpose having nothing to do with the selection by the Governor in determining what information is germane to that executive clemency process.

Marek received a full blown clemency proceeding with appointed counsel, for the sole purpose of handling his clemency effort, on February 10, 1988, prior to the first death warrant signed to enforce Marek's death sentence. Based on the materials provided pertaining to Marek, the interview of Marek with counsel present and the application prepared by Marek's counsel, clemency was denied, when the Governor signed his first death warrant.

The emails exchanged between the Governor's Office and agencies with information regarding Marek, allowed the Governor to receive an update on Marek's status. See: Ohio Adult Parole Authority v. Woodard, 522 U.S. 272, 282-283 (1997).

Except to express his disagreement with the signing of a third death warrant, Marek can point to no circumstance that has occurred to suggest he has been deprived of clemency consideration. Marek has been treated like every other death row inmate regarding clemency consideration and is entitled to

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The commission shall report these findings to the Legislature by January 1 of each year.

no further consideration or review on this point, Rutherford v. State, 940 So. 2d 1112, 1122 (Fla. 2006); Glock v. Moore, 776 So.2d 243, 252 (Fla. 2001); Bundy v. State, 497 So.2d 1209, 1211 (Fla. 1986), and all other named death row inmates listed in his pleadings that have had a clemency hearing. Marek v. State, 2009 Fla. LEXIS 745 (Fla. May 8, 2009).

ISSUE III

STATE DRAFTED 1988 ORDER DENYING 3.850 ON AN EX PARTE BASIS

Marek without a scintilla of evidence, argues because the same prosecutor who handled Marek's Rule 3.850 proceedings, was involved in the Rose v. State, 601 So. 2d 1181, 1183 (Fla. 1992), case, that prosecutor must have drafted the post-conviction denial order herein.[13] The allegations are even more spurious since the underlying facts used to support this unsubstantiated allegations are that the style and font used in the order look like the order in another case. The trial court concluded that the allegations "based upon the font and the style of the Order drafted in 1988 does not state a claim for relief." (Order, June 19, 2009, p. 14). Moreover the trial court found "that the claim is procedurally barred as the actual

[13] Marek was provided two opportunities at the May and June, 2009, hearings, to perfect his allegation that wrong-doing occurred in the drafting of the postconviction order denying relief. Yet, the record reflects that a no point did defense counsel seek to secure the testimony of the prosecutor who he continues to accuse. Counsel's failure speaks volumes.

Court order has been in the Court record and available for review since 1988." (Order, June 19, 2009, p. 14).

At the evidentiary hearing held on June 1-2, 2009, Marek's counsel stipulated to the testimony of Judge Stanton Kaplan, who previously testified at the May 6, 2009 hearing, that he had no independent recollection of what occurred in 1988. (APC 12, 1855, 1859, 1860). While Judge Kaplan was able to talk generally about his normal practice, he had no independent recollection of what happened in Marek's case. Thus, based on a deficiency in proof, the claim was properly denied.[14]

Judge Kaplan testified at that period, he would write some orders, sometimes ask "the party that I was ruling in favor of…prepare me an order…even put it on the record. (APC 12, 1856). When asked about style or formatting, Judge Kaplan said that he relied upon whatever his secretary did. (APC 12, 1857-1858). When asked to review the order denying post-conviction review, he had no independent knowledge as to what occurred in this case some 21 years ago. Moreover, since there was a

[14] The record from the 1988 evidentiary hearing reflects that during the course of the hearing, Judge Kaplan had ruled on a number of the 22 claims before him. While he also deferred ruling on a few, Mr. McClain acknowledged same and did not state anything further. The Court specifically stated it would rule by Monday, and the court closed out by stating that "I'll review this." (TR XVIII 492)

subsequent successive motion filed after Marek's[15] 1988 motion, his time has long expired for raising a claim that existed some 21 years ago, thus the claim is barred. Marek failed to sustain his burden because his claim was insufficiently pled and more importantly not proven.

Additionally, Marek's reliance on Banks v. Dretke, 540 U.S. 668, 675-76, 124 S.Ct. 1256, 157 L.Ed.2d 1166 (2004) is misplaced. While the State may have an ethical obligation after conviction to disclose truly exculpatory evidence, Brady does not extend to post-conviction matters and certainly not to procedural post-conviction matters. Grayson v. King, 460 F.3d 1328, 1337-1338 (11th Cir. 2006), *cert. den.*, 549 U.S. 1117, 127 S.Ct. 1005, 166 L.Ed.2d 712 (2007)(noting that there was no authority for the proposition that Brady extended beyond the trial to post-conviction matters because Brady is premised on the right to a fair trial; explaining, in a footnote in Imbler v. Pachtman, 424 U.S. 409, 427 n. 25, 96 S.Ct. 984, 993 n. 25, 47 L.Ed.2d 128 (1976), which refers to an ethical obligation, not a due process obligation; concluding that Brady only covers suppression of evidence before and during trial); but see Duckett v. State, 918 So.2d 224, 239 (Fla. 2005)(stating that the State's duty to disclose "exculpatory material" under Brady

[15] Marek's counsel's recent notice of the "font and style" of the order is not a waiver of any bar since counsel of record was counsel of record at the time of the 1988 order.

is ongoing and "extends to postconviction proceedings."). The State has no duty under Brady to disclose any communications.

Moreover, even if Brady extended to post-conviction procedural matters, the drafting of an order is not exculpatory or impeachment evidence. Marek's guilt or culpability is not lessened, in any way, based on who drafted a post-conviction order. Nor could any fact witness be impeached based on the drafting of the post-conviction order. Whether any *ex parte* communication occurred regarding the drafting of the postconviction order is simply not Brady material.

Terminally, the trial judge in this case was not the trial judge in either Rose or Smith v. State, 708 So. 2d 253 (Fla. 1998), and there is no basis to suggest that the trial judge engaged in any suspect conduct. Thus the trial court properly concluded this claim was barred and groundless.

ISSUE IV

ISSUES ARISING FROM JUNE 12, 2009, FIFTH RULE 3.851 MOTION

On Friday, June 12, 2009, at 4:10 P.M., the State received a fifth, successive postconviction motion, raising two previously raised issues: 1. Whether the June 8, 2009, United States Supreme Court's decision in Caperton v. Massey Coal Co., requires further consideration of Marek's recusal claim

regarding Judge Kaplan;[16] and, 2. Whether trial counsel Hilliard Moldof's statement at the evidentiary hearing June 2, 2009, is newly discovered evidence "demonstrating that" Marek "received ineffective assistance of counsel."[17]

INTRODUCTION--PROCEDURAL BAR AS TO BOTH CLAIMS

Marek sought in the trial court either further evidentiary hearing as to each claim or at the very least, discovery, based on the United States Supreme Court's release of Caperton v. Massey, on June 8, 2009, and "newly discovered evidence" that Hilliard Moldof, at the June 2, 2009, hearing, admitted he did a

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[16] In Marek, 2009 Fla. LEXIS at *5-6, the Court noted that "On April 27, 2009, Marek filed a motion that sought both rehearing of the postconviction court's summary denial of his motion to vacate and an opportunity to amend his motion to vacate. He requested leave to add the claims that his execution is unconstitutional because he has spent over twenty-five years on death row and that the United States Supreme Court's future holding in Caperton v. A.T. Massey Coal Co., No. 33350, 2008 W. Va. LEXIS 22 (W. Va. Apr. 3, 2008), *cert. granted*, 129 S. Ct. 593, 172 L. Ed. 2d 452 (U.S. Nov. 14, 2008) [*6] (No. 08-22), may demonstrate that he was denied due process when Judge Kaplan presided over his initial postconviction proceeding."

[17] In Marek, 2009 Fla. LEXIS at *4, Marek also raised the specter of ineffective assistance by Hilliard Moldof. "Finally, as part of this second claim, Marek asserted that his previously raised claim that his trial counsel failed to conduct an adequate investigation of Marek's background for the presentation of mitigation in the penalty phase of his trial should be reevaluated under the standards enunciated in Rompilla v. Beard, 545 U.S. 374, 125 S. Ct. 2456, 162 L. Ed. 2d 360 (2005); Wiggins v. Smith, 539 U.S. 510, 123 S. Ct. 2527, 156 L. Ed. 2d 471 (2003), and Williams v. Taylor, 529 U.S. 362, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000). Marek argues that these cases modified the standard of review for claims of ineffective assistance of counsel under Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)."

poor job defending Marek.[18] Each claim raises legal issues which can be resolved without further evidentiary proceedings. As observed in Marek v. State, 2009 Fla. LEXIS 745, *6-7, 34 Fla. L. Weekly S325 (Fla. 2009):

> An evidentiary hearing must be held whenever the movant makes a facially sufficient claim that requires a factual determination. Amendments to Fla. Rules of Crim. Pro. 3.851, 3.852, & 3.993, 772 So. 2d 488, 491 n.2 (Fla. 2000). However, "[p]ostconviction claims may be summarily denied when they are legally insufficient, should have been brought on direct appeal, or are positively refuted [*7] by the record." Connor v. State, 979 So. 2d 852, 868 (Fla. 2007). Because a postconviction court's decision whether to grant an evidentiary hearing on a rule 3.851 motion is ultimately based on written materials before the court, its ruling is tantamount to a pure question of law, subject to de novo review. See State v. Coney, 845 So. 2d 120, 137 (Fla. 2003). We conclude that the postconviction court's summary denial of Marek's second successive motion was not erroneous. Each of Marek's claims is legally insufficient or, because it could have been or was raised in a prior proceeding, procedurally barred.

Both claims have been extensively vetted over the years of litigation and the record and merits rulings by the several courts examining same as late as June 19, 2009, have decided Marek is entitled to no relief. As such both claims are procedurally barred from further review, based on law of the

[18] "To be entitled to an evidentiary hearing on a claim of ineffective assistance, the defendant must allege specific facts that are not conclusively rebutted by the record and which demonstrate a deficiency in performance that prejudiced the defendant." Jones v. State, 845 So. 2d 55, 65 (Fla. 2003); "Failure to sufficiently allege both prongs results in a summary denial of the claim." Spera v. State, 971 So. 2d 754, 758 (Fla. 2007) (citing Thompson v. State, 796 So. 2d 511, 514 n.5 (Fla. 2001)).

case, res judicata, and collateral estoppel. Topps v. State, 865 So. 2d 1253 (Fla. 2004); Denson v. State, 775 So. 2d 288, 290 (Fla. 2000) ("[T]he concept of fundamental error was never intended to provide litigants with a means to circumvent the type of procedural bar that occurs when the exact claim has already been decided on the merits and is thus res judicata."). And, the courts have emphasized that collateral estoppel precludes relitigation of issues[19] actually litigated in a prior proceeding. Hochstadt v. Orange Broadcast, 588 So. 2d 51 (Fla. 3d DCA 1991); Sireci v. State, 773 So. 2d 34, 40 (Fla. 2000)("To the extent that Sireci uses a different argument to relitigate the same issue, the claims remain procedurally barred.); See, *e.g.*, Harvey v. Dugger, 656 So. 2d 1253, 1256 (Fla. 1995); Turner v. Dugger, 614 So. 2d 1075, 1077 (1992).

a. No Case Management Hearing

Marek's first issue asserts that the trial court improperly found the two afore-noted claims procedurally barred -- without

[19] For the doctrine of collateral estoppel to apply to bar relitigation of an issue, five factors must be present: (1) an identical issue must have been presented in the prior proceedings; (2) the issue must have been a critical and necessary part of the prior determination; (3) there must have been a full and fair opportunity to litigate that issue; (4) the parties in the two proceedings must be identical; and (5) the issues must have been actually litigated. Goodman v. Aldrich & Ramsey Enters., Inc., 804 So. 2d 544, 546-47 (Fla. 2d DCA 2002).

Both of Marek's claims, herein presented, satisfy all five factors.

holding a case management hearing pursuant to Rule 3.851(f)(5)(B), after Marek filed his fifth 3.851 motion. He couches this argument in terms of a due process violation.

The record clearly reflects that the two claims presented are repeats of claims raised in his previously filed 3.851 litigation and, as such, the trial court was in the best position after reviewing the record and the parties' pleadings to discern that no further evidentiary hearing was warranted. Marek cites no authority for his assertion that a trial court must hold a Huff hearing "any time anything" is filed, except for Huff v. State, 622 So. 2d 982 (Fla. 1993), which sets in motion that a hearing should be held to determine if a claim warrants further evidentiary consideration. Even assuming that the trial court was required to hold a Huff hearing, the facts of this case demonstrate any error was harmless, since no evidentiary hearing was required and relief was not warranted on the motion. See: Davis v. State, 736 So. 2d 1156, 1159 n. 1 (Fla. 1999)(Harmless error applies).

b. Application of Caperton v. A.T. Massey Coal Company, 2009 U.S. LEXIS 4157, * (2009)

The ligation history of Marek's case is long and multifaceted. The recusal challenge to Judge Kaplan did not end with Judge Kaplan's self-imposed removal on January 15, 1997, but rather continues because of Marek's persistent flip-flopping

of assertions as to Judge Kaplan's disqualifications—"either" Judge Kaplan became, over the years, too friendly with Moldof's family which might be harmful to Marek's defense or that Judge Kaplan exhibited bias that tainted Marek's trial and his 1988 postconviction proceedings,-- because of funding/conflict of interest issues in July 1993; because of bias that tainted the proceedings and, because of a newly discovered deposition of Judge Kaplan in August 1996, in another case, wherein Judge Kaplan testified as to his alleged "judicial philosophy."

In Marek v. State, 2009 Fla. LEXIS at *19-21, the Court in affirming the trial court's denial of review addressed the applicability of Caperton, *certiorari granted*. On June 8, 2009, the United States Supreme Court issued its opinion in Caperton v. A.T. Massey Coal Company, 2009 U.S. LEXIS 4157, at *8, (2009). Nothing in that opinion changes the Florida Supreme Court's ruling in Marek, supra. The Court in Caperton, reaffirmed the standard set out in Withrow v. Larkin, 421 U.S. 35, 47, 95 S.Ct. 1456, 43 L.Ed.2d 712 (1975), that the objective standards requiring recusal are shown when "the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionallly tolerable." The court found that applying those principles to the circumstances in Caperton, "we find that, in all circumstances of this case, due process requires recusal." Caperton, 2009 U.S. LEXIS 4157, at *8.

In discussing the "teachings" of Withrow, the United States Supreme Court found that in Caperton, 2009 U.S. LEXIS at * 24-25, based on those facts, that:

> . . . Not every campaign contribution by a litigant or attorney creates a probability of bias that requires a judge's recusal, but this is an exceptional case. Cf. Mayberry, supra, at 465, 91 S. Ct. 499, 27 L. Ed. 2d 532 ("It is, of course, not every attack on a judge that disqualifies him from sitting"); Lavoie, supra, at 825-826, 106 S. Ct. 1580, 89 L. Ed. 2d 823 (some pecuniary interests are "'too remote and insubstantial'"). We [*29] conclude that there is a serious risk of actual bias -- based on objective and reasonable perceptions -- when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge's election campaign when the case was pending or imminent. The inquiry centers on the contribution's relative size in comparison to the total amount of money contributed to the campaign, the total amount spent in the election, and the apparent effect such contribution had on the outcome of the election.

Caperton, 2009 U.S. LEXIS at *28-29.

In fact, in Florida's jurisprudence, courts have routinely found that pecuniary benefit or campaign contributions could warrant recusal. Note: MacKenzie v. Super Kids Bargain Store, Inc., 565 So. 2d 1332 (Fla. 1990). However, in the instant circumstances, the Caperton decision addresses an extreme, not the circumstances in MacKenzie, or the instant case where Marek sought to remove Judge Kaplan based on Kaplan's purported judicial philosophy and, later, based on his "budding friendship with defense counsel."

As the Supreme Court noted in Caperton, it is "axiomatic that '[a] fair trial in a fair tribunal is a basic requirement of due process.' Murchison, supra, at 136, 75 S. Ct. 623, 99 L. Ed. 942." However, the Court also recognized, that "most matters relating to judicial disqualification [do] not rise to a constitutional level." FTC v. Cement Institute, 333 U.S. 683, 702 (1948). The Court observed that "matters of kinship, personal bias, state policy, remoteness of interest, would seem generally to be matters merely of legislative discretion." Tumey v. Ohio, 273 U.S. 510, 523 (1927). Therefore, personal bias or prejudice "alone would not be sufficient basis for imposing a constitutional requirement under the Due Process Clause." Aetna Life Ins. Co. v. Lavoie, 475 U. S. 813, 820 (1986).

Herein, Marek's complaints are premised upon sheer speculation without any basis -- Marek points to Judge Kaplan's judicial philosophy based on an interview and deposition in another case. See: Waterhouse v. State, 792 So. 2d 1176, 1195 (Fla. 2001); Rivera v. State, 717 So. 2d 477, 480-81 (Fla. 1988) (finding that the written response by the trial judge to a parole commission inquiry that "I am inalterably opposed to any consideration for Executive Clemency and I believe the sentence of the court should be carried out as soon as possible" was

insufficient to disqualify the judge from further presiding over the case).

Marek has never pointed to one legal issue or any facts that evidences any erroneous ruling or an incorrect assessment of the facts. Grim v. State, 971 So. 2d 85, 96 (Fla. 2007) (Grim, "has not pointed to anything that shows the trial judge was biased or that otherwise undermines confidence in the outcome of the proceeding."); Griffin v. State, 866 So. 2d 1, 11 (Fla. 2003)(finding the Strickland prejudice prong could not be met where, even if counsel had moved for recusal, he would not have prevailed). Merely receiving an adverse ruling does not constitute legitimate grounds for recusal. Moser v. Coleman, 460 So. 2d 385 (Fla. 5th DCA 1984)(a judge whose decision has been reversed is not required to recuse himself). Tafero v. State, 403 So. 2d 355, 361 (Fla. 1981) "No personal bias or prejudice had been demonstrated" where the "mere fact that Judge Futch was, in the distant past, a highway patrol officer does not support a claim of bias or prejudice on the judge's part. Tafero presented nothing to warrant the judge's disqualification. See: United States v. Archbold-Newball, 554 F.2d 665 (5th Cir.), *cert. denied*, 434 U.S. 1000, 98 S. Ct. 644, 54 L. Ed. 2d 496 (1977)." And, in W.I. v. State, 696 So. 2d 457, 458 (Fla. 4th DCA 1997) the Court held that trial judge's

voluntary disclosure of friendship with juvenile defendant's caseworker was not sufficient to require disqualification.

In the instant case, Marek readily admits that the closeness of the relationship between the trial judge and defense counsel apparently was made know in 1997. And it was pretty evident that defense counsel had a professional relationship with Judge Kaplan based on the affidavit he, Moldof, executed during that time.

Nothing pertaining to these two circumstances is compelling since:

1. Marek's trial and postconviction proceedings were long ago completed years **before** the instant revelations; 2. Moldof knew he had a professional relationship with the trial court, he appeared in Judge Kaplan's court and, "presumably" he knew about the developing personal relationship between them; 3. Moldof's affidavit dealt with the funding/conflict issue brewing in Broward County in 1997, and did not relate to any "relationship"; 4. Judge Kaplan voluntarily removed himself from Marek's successive postconviction motion when he concluded his growing personal relationship with the Moldof family might be perceived as an issue; and 5. No court has found an adverse ruling or improper factual conclusion as to Judge Kaplan's rulings.

Marek has failed to demonstrate how either further evidentiary hearing or further discovery will uncover anything more than what has been presented. The quantum leap he seeks to make regarding the events which unfolded in 1984, during Marek's trial and then four years later, in 1988, at the initial postconviction proceeding, would not and were not impacted by the disclosures in 1997. These disclosures are, at best, sheer speculation without factual support and legal authority. The trial court properly denied all relief.

c. Ineffectiveness of Counsel

As previously noted, trial counsel's effectiveness was an issue as early as Marek's initial postconviction motion, when in 1988, the trial court ordered an evidentiary hearing as to a number of claims asserting Moldof's ineffectiveness. On October 10, 1988, Marek filed his **initial** postconviction motion pursuant to Fla.R.Crim.P. 3.850, raising twenty-two (22) claims, and filed his state habeas corpus petition in the Florida Supreme Court, October 12, 1988, urging sixteen (16) issues for review, thirteen (13) of which paralleled his Rule 3.850 motion). The trial judge, Judge Kaplan, granted an evidentiary hearing as to the ineffective assistance of counsel claims and other matters and, held said hearing on November 3-4, 1988. The trial court denied the post-conviction relief, and the Florida Supreme Court, denied Marek's state habeas and affirmed the denial of

his 3.850 motion, in Marek v. Dugger, 547 So.2d 109 (Fla. 1989)(As to Marek's claim of counsel's ineffectiveness in his rule 3.850 petition, we find the dictates of Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), were properly applied.).

The Eleventh Circuit Court of Appeals, from the denial by the district court of Marek's federal habeas corpus petition, found in Marek v. Singletary, 62 F.3d 1295, 1298-1301 (11th Cir. 1995), that defense counsel Moldof's strategic decisions at the guilt and penalty phases, were reasonable and, alternatively no prejudice occurred.

In Marek v. State, 2009 Fla. LEXIS *4, Marek argued that Rompilla v. Beard, 545 U.S. 374, 125 S. Ct. 2456, 162 L. Ed. 2d 360 (2005); Wiggins v. Smith, 539 U.S. 510, 123 S. Ct. 2527, 156 L. Ed. 2d 471 (2003), and Williams v. Taylor, 529 U.S. 362, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000), modified the standard of review for claims of ineffective assistance of counsel under Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). The Florida Supreme Court found that Marek's claims were wanting, holding at 2009 Fla. LEXIS *11-13 (Emphasis added):

> The postconviction [*12] court also did not err in denying Marek's argument that his previously raised claim of ineffective assistance of counsel should be reevaluated under the standards enunciated in Rompilla, Wiggins, and Williams. Contrary to Marek's argument, the United States

Supreme Court in these cases did not change the standard of review for claims of ineffective assistance of counsel under Strickland. In Rompilla, the Court expressly concluded, based on the factual record in that case, that trial counsel's failure to review the defendant's prior conviction file for mitigation evidence constituted ineffective assistance of counsel. 545 U.S. at 390. Similarly, in Wiggins, the Court concluded that given the information trial counsel had regarding Wiggins' childhood, their failure to broaden the scope of their investigation into possible mitigating factors constituted ineffective assistance of counsel as defined in Strickland. Indeed, the Wiggins Court began its analysis by stating that Strickland "established the legal principles that govern claims of ineffective assistance of counsel." 539 U.S. at 521. Finally, the Williams Court also concluded that trial counsel's failure to discover and present [*13] mitigating evidence violated Williams' rights as defined in Strickland. As the Supreme Court explained in Williams, "It is past question that the rule set forth in Strickland qualifies as 'clearly established Federal law, as determined by the Supreme Court of the United States.'" 529 U.S. at 391. Furthermore, we are not aware of any reported decision, and Marek has not identified any, adopting the view that Rompilla, Wiggins, and Williams modified the standard of review governing ineffective assistance of counsel claims.

Moreover, **Marek's argument is procedurally barred because he previously litigated this issue.** In his appeal from the denial of his prior successive postconviction motion, Marek argued that his claim of ineffective assistance of counsel should be reexamined under those cases because "Judge Kaplan's partiality impaired his ability to follow these standards in evaluating prejudice in Mr. Marek's case." In his accompanying habeas petition, Marek argued that the "Court's prior decision affirming the denial of [his] claim that he received ineffective assistance at the penalty proceeding is in error in light of the recent decision[s] by the United States Supreme Court in Rompilla v. Beard, 545 U.S. 374, 125 S.Ct. 2456, 162 L. Ed. 2d 360 (2005), [*14] and Wiggins v. Smith, 539 U.S. 510, 123 S. Ct. 2527, 156 L. Ed. 2d 471 (2003)." Marek is not entitled to relitigate this issue. 3

FOOTNOTES

3 To the extent that Marek relies on Cone v. Bell, No. 07-1114, 2009 U.S. LEXIS 3298 (U.S. Apr. 28, 2009), to argue that this claim is not barred, his argument is without merit. In Cone, the Supreme Court held that the Tennessee courts' procedural rejection of a claim, where the Tennessee courts never addressed the merits of the claim, did not bar federal habeas review. 2009 U.S. LEXIS 3298 at 17, 27. The Supreme Court's decision has no impact on the Florida courts' policy of not allowing defendants to relitigate claims in state court that have been adjudicated previously on their merits.

Marek attempted to resurrect his ineffective assistance claim by arguing that trial counsel, Hilliard Moldof, at the June 2, 2009, hearing, admitted "he would have done a lot of things different. I would have gotten some psychiatric testimony; I would have gone to Texas. You know, quite frankly, I'll be honest with you, I'm embarassed by my work in this case back in '83." (Transcript June 2, 2009, at 333.)

Again, citing Williams v. Taylor, 529 U.S. 362, 396 (2000); Rompilla v. Beard, 545 U.S. 374 (2005); and Wiggins v. Smith, 539 U.S. 510, 527 (2003), Marek urges that Moldof abandoned his client and failed to discover and present evidence of Marek's tortured childhood, thus denying the court of the "wealth of mitigation" as to "Marek's life history."

Initially, Moldof could not recall what he did in 1984, at Marek's trial, therefore, his *mea culpa* is suspect. See, Sireci v. State, 773 So. 2d 34, 40 n.11 (Fla. 2000)(noting that claims of ineffective assistance of trial counsel and claims of "newly discovered evidence" are logically inconsistent because evidence

cannot be newly discovered if trial counsel knew or should have known of evidence). He could not recall that at the commencement of the penalty phase of Marek's trial, he informed the trial court that **"that he was not going to mention anything concerning Marek's criminal history and therefore the State was precluded from arguing same to the jury. (TR IX 1284)."** This was so because Moldof knew Marek had some criminal history and, more importantly, Marek was adamant that his short and long term life experiences in Texas were not good. To the jury Moldof discussed in great detail, Marek's drinking problem (TR IX 1315-1316), and talked about Marek's accomplice, specifically Wigley's involvement in the crime. Moldof informed the jury that there was no evidence that Marek knew what happened in the shack. He further observed that Marek's age, insight based on his drinking, and the impact of liquor played a part in the crime.

> Mr. Carney would like you to believe that well Mr. Marek is now putting on a show for Deputy Webster and you being on the verge of tears and being upset and being quite human about this but Mr. Marek up until this time, has not displayed any of the characteristics like she said of some of the male inmates that display some very distasteful, disrespectful, foul language at a female detention officer and act very disrespectful and quite often either attacked them -- at least attack them verbally. Mr. Marek has been, at least while incarcerated, courteous, respectful and she had no problems with him. I think that does speak to his character and the type of individual he is and something you can take into consideration in determining what your sentence should be.

(TR IX 1317—1319)

Defense counsel also informed the jury that there were no eyewitnesses to the crime, rather, it was a circumstantial evidence case. He observed that this was a valid case to recommend a life sentence. He further noted that if the jury had any "lingering doubt" with regard to whether Marek committed the crime, it would be horrible for the jury to recommend a death sentence and a number of years hence someone comes in and confesses that they actually killed Ms. Simmons. (TR IX 1320).

Contrary to Marek's newest assertions, there were and are "negative aspects" that **would not** have portrayed Marek in the best light possible to the jury.

Indeed, courts are not bound by defense counsel's confessions that he rendered deficient representation. Breedlove v. State, 692 So. 2d 874, 877 n. 3 (Fla. 1997), citing Routly v. State, 590 So. 2d 397, at 401 n.4 (Fla. 1991), that an attorney's own admission that he or she was ineffective is of little persuasion in these proceedings. Burns v. State, 944 So. 2d 234, 243 (Fla. 2006)(footnote omitted)(citing Breedlove). Note: Jones v. State, 928 So. 2d 1178, 1185 (Fla. 2006)(citing Johnson v. State, 921 So. 2d 490, 501 (Fla. 2005) "counsel cannot be deemed ineffective for failing to present evidence that would open the door to damaging cross-examination and rebuttal evidence that would counter any value that might be

gained from the evidence."); Gilliam v. Sec'y, 480 F. 3d 1027, 1034-35 (11th Cir. 2007)(Emphasis added)(defense counsel has refused to characterize the decision as strategic is not dispositive.) Lastly, as observed in Chandler v. Unites States, 218 F. 3d 1305, 1316 n. 16 (11th Cir. 2000)(Emphasis added):

> To uphold a lawyer's strategy, we need not attempt to divine the lawyer's mental processes underlying the strategy. "There are countless ways to provide effective assistance in any given case." Strickland, 104 S. Ct. at 2065. No lawyer can be expected to have considered all of the ways. If a defense lawyer pursued course A, it is immaterial that some other reasonable courses of defense (that the lawyer did not think of at all) existed and that the lawyer's pursuit of course A was not a deliberate choice between course A, course B, and so on. The lawyer's strategy was course A. And, our inquiry is limited to whether this strategy, that is, course A, might have been a reasonable one. See generally Harich v. Dugger, 844 F.2d 1464, 1470-71 (11th Cir.1988) (*en banc*) (concluding--without evidentiary hearing on whether counsel's strategy arose from his ignorance of law--that trial counsel's performance was competent because hypothetical competent counsel reasonably could have taken action at trial identical to actual trial counsel), replacing vacated panel opinion, 813 F.2d 1082 (11th Cir.1987) (2-1 opinion) (remanding for evidentiary hearing on whether pursuit at trial of actual innocence defense, instead of intoxication defense or a combination of defenses, was informed strategic decision); Bonin v. Calderon, 59 F.3d 815, 838 (9th Cir.1995) (holding--where petitioner alleged that trial counsel's mental processes were impaired by drug use--that, because an objective standard is used to evaluate counsel's competence, "once an attorney's conduct is shown to be objectively reasonable, it becomes unnecessary to inquire into the source of the attorney's alleged shortcomings"). **See also Roe v. Flores-Ortega, 528 U.S. 470, 120 S. Ct. 1029, 1037, 145 L. Ed. 2d 985 (2000) ("The relevant question is not whether counsel's choices were strategic, but whether they were reasonable.").**
>
> We look at the acts or omissions of counsel that the petitioner alleges are unreasonable and ask whether some

> reasonable lawyer could have conducted the trial in that manner. **Because the standard is an objective one, that trial counsel (at a post-conviction evidentiary hearing) admits that his performance was deficient matters little. See Tarver v. Hopper, 169 F.3d 710, 716 (11th Cir.1999) (noting that "admissions of deficient performance are not significant"); see also Atkins v. Singletary, 965 F.2d 952, 960 (11th Cir.1992) ("Ineffectiveness is a question which we must decide, [so] admissions of deficient performance by attorneys are not decisive.").**

Hilliard Moldof's admissions that he would have done more and is embarrassed by his representation-- "are not significant."

d. Denial of Motion to Correct Record

Marek contends that the testimony of Leon Douglass as to his description of Raymond Wigley is incorrect. The trial court denied Marek's motion finding specifically that:

> In the motion, defense counsel states that he is absolutely certain that he did not hear Douglass describe Wigley as a black man. However, this Court has a specific recollection that Mr. Douglass described Raymond Wigley as a black man at that point during his testimony. The transcript of the testimony regarding Leon Douglass' description of Raymond Wigley on page 145 of the transcript is not in error.

(Order Denying Defendant's Motion For Correction of Transcript, June 19, 2009)

De hors the record, Marek's counsel now relates how he personally contacted the court reporter, without notifying the state, and presents hearsay evidence to this Court as to what transpired between the two. Interestingly, **counsel does admit that the court reporter advised "but that was what is soundly [sic] like Mr. Douglass said on the backup tape." (AB p. 69).**

Essentially, the court reporter confirms the trial court's recollection and supports the denial order by the trial court.

Marek's counsel now wants to "change the record" of his witness when, the best evidence is the transcript and what the court reporter heard on the backup tape.

This issue is insufficiently pled, requires rank speculation and hearsay, and ultimately is of no moment, since the trial court found Leon Douglass's testimony wanting not because of the description of Wigley alone, but rather based upon the fact that Douglass's testimony was not credible since credible evidence was produced that Douglass was never housed with Wigley --at the same institution at the same time. (Order, June 19, 2009, p.10)(This Court finds that Raymond Wigley and Leon Douglass were never housed in the same Correctional Institution at the same time. Wigley could not have directly made any statements to Douglass.).

Marek's issue is wanting and without factual or legal support.

e. Assignment of Judge Levenson

Marek also argues that he was confused about the assignment of a new judge for the remand ordered by this Court on May 21, 2009. (AB 72) He points to the explanation provided by the trial judge about the practices in Broward County, and the blind appointment that was made—which assigned Judge Levenson to the

remand case, and now insinuates wrong doing on the part of the State. Marek's counsel brought the matter up on June 1, 2009, just before the testimony portion of the case commenced. He now states, "when the matter was brought up, the State stood silent and did not make any statements or indicate that the prosecutors possessed any knowledge of what happened." (IB p.72)

The only thing the State did was send a notice to the Chief Judge of the Seventeenth Judicial Circuit, after the remand order issued on May 21, 2009, informing the Chief Judge of the remand order. Copies were sent to all parties via email and mailed via U.S. Mail.

CONCLUSION

Marek is entitled to no relief as to any of the issues raised.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing ANSWER BRIEF OF THE APPELLEE has been furnished via e-mail to martymcclain@earthlink.net, lindammcdermott@msn.com, jlevenso@17th.flcourts.org, CMcCann@sao17.state.fl.us, & sbailey@sao17.state.fl.us and via U.S. mail to Martin J. McClain, McClain & McDermott, PA, 141 NE 30th Street, Wilton Manors, FL 33334, this 25th day of June, 2009.

_____
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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the instant brief has been prepared with 12 point Courier New type, a font that is not spaced proportionately.

_____
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