IN THE SUPREME COURT OF FLORIDA

CASE NO. 09-1080

JOHN MAREK,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

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

REPLY BRIEF OF APPELLANT

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REPLY TO STATE'S STATEMENT OF THE CASE

In its Statement of the Case, the State devotes a fair space to a discussion of the procedural history of the litigation over Mr. Marek's death sentence in the past twenty-five years. This is in an effort to provide a springboard for its *res adjudicata* arguments that follow. But of course what is left out of the procedural history provided by the State is any acknowledgment that the testimony of Jessie Bannerman, Robert Pearson, Michael Conley, Leon Douglass, Carl Mitchell, or William Green was not previously presented by Mr. Marek at any time during the procedural history until after the witnesses were located in April and May of 2009. As a result in none of the decisions by any of the courts that looked at Mr. Marek's case prior to April of 2009 was there any consideration given to the testimony of these new witnesses and the impact that there testimony would have had at Mr. Marek's trial or upon the analysis of the legal issues that have been raised and addressed in the subsequent proceedings as to the validity of the death sentence.[1]

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[1]When this Court addressed a similar newly discovered evidence claim in State v. Mills, 788 So. 2d 249 (Fla. 2001), it did not address any of the procedural history of the 20 years of litigation by Mr. Mills. No mention was made in this Court's opinion of the direct appeal by Mr. Mills. Mills v. State, 476 So. 2d 172 (Fla. 1985). No mention was made of this Court's opinion reversing and remanding for an evidentiary hearing on Mr. Mills' Rule 3.850 motion. Mills v. Dugger, 559 So. 2d 578 (Fla. 1990). No mention was made of this Court's opinion affirming the denial of Rule 3.850 relief after the evidentiary hearing was conducted finding that counsel had not rendered ineffective assistance. Mills v. State, 603 So. 2d 482 (Fla. 1992). No mention was made of this Court's opinion denying Mr. Mills' petition for a writ of habeas corpus. Mills v. Singletary, 606

As to this Court's opinion on direct appeal, the State seems to be suggesting that the factual statements made by this Court and the issues raised by Mr. Marek somehow has already decided the newly discovered evidence claim adversely to Mr. Marek. However, the testimony of Jessie Bannerman, Robert Pearson, Michael Conley, Leon Douglass, Carl Mitchell and William Green was not known or presented at Mr. Marek's trial, nor for that matter was any testimony presented regarding statements made by Raymond Wigley that he killed Adela Simmons while Mr. Marek slept in the pickup truck. The evidence that has been presented now

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So. 2d 622 (Fla. 1992). No mention was made of the Eleventh Circuit opinion affirming the denial of federal habeas relief. Mills v. Singletary, 161 F.3d 1273 (11th Cir. 1998). Nor was any mention made of this Court's affirmance of the summary denial of previous successive Rule 3.850 motion, the day before Mr. Mills filed his third motion to vacate - the one on which relief was granted. Mills v. State, 786 So. 2d 547 (Fla. 2001) (this opinion issued on April 25, 2001, and the motion to vacate on which Mr. Mills obtained relief was filed on April 26, 2001).

In fact when this Court issued its opinion in State v. Mills, it simply stated:

> As to Mills' first claim, the trial court found that the evidence Mills presented met the test for newly discovered evidence as enunciated in Jones v. State, 709 So. 2d 512, 519 (Fla. 1998). We agree. The evidence presented by Anderson was unknown at the time of trial and neither Mills nor his counsel could have discovered it with due diligence, the evidence would have been admissible at trial, if only for impeachment; and the newly discovered evidence, when considered in conjunction with the evidence at Mills' trial and 3.850 proceedings, would have probably produced a different result at sentencing.

State v. Mills, 788 So. 2d at 250. Thus, it is clear that complete procedural history of Mr. Mills' case and the analysis of the issues raised at every step in the process did not and could not establish a *res adjudicata* bar.

was not in the record at the time of the direct appeal and thus it was not considered by this Court when it issued its opinion affirming Mr. Marek's sentence of death.[2]

In the 1988 proceedings on Mr. Marek's a motion to vacate, the State seems to suggest that the outcome there has some bearing on the decision of the newly discovered evidence claim against Mr. Marek. However in 1988 at the time of the "initial" Rule 3.850 motion, the testimony of Jessie Bannerman, Robert Pearson, Michael Conley, Leon Douglass, Carl Mitchell and William Green was not known or presented, nor for that matter was any testimony presented regarding statements made by Raymond Wigley that he killed Adela Simmons while Mr. Marek slept in the pickup truck. The evidence that has been presented now was not in the record at the time of the "initial" Rule 3.850 was heard and denied, and thus this evidence was not considered or addressed by either the circuit court or this Court when Mr. Marek was denied collateral relief.[3]

Similarly, the State seems to suggest that to the Eleventh Circuit's affirmance of the denial of Mr. Marek's petition for federal habeas relief is somehow binding and has decided the

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[2]The circumstances here are identical to the circumstances in State v. Mills where the testimony of Anderson that the co-defendant, Ashley, admitted to him that he was the triggerman had not been presented at trial and was not of record at the time of the direct appeal.

[3]The circumstances here are identical to the circumstances in State v. Mills where the testimony of Anderson that the co-defendant, Ashley, admitted to him that he was the triggerman was not known nor presented at during the proceedings on Mr. Mills' "initial" Rule 3.850 motion.

newly discovered evidence claim adversely to Mr. Marek. However at the time that Mr. Marek filed his federal habeas petition, he was unaware of what Jessie Bannerman, Robert Pearson, Michael Conley, Leon Douglass, Carl Mitchell and William Green had to say. Mr. Marek did not know or present their testimony in his federal habeas petition, nor for that matter was any testimony presented regarding statements made by Raymond Wigley that he killed Adela Simmons while Mr. Marek slept in the pickup truck. When the Eleventh Circuit issued its opinion, it did not have any evidence before it of Raymond Wigley's statements indicating that he was the one who had killed Adela Simmons. So therefore, the Eleventh Circuit could not have addressed its significance.[4] Moreover, the State's reliance upon the Eleventh Circuit's discussion of trial counsel's strategy is irrelevant to the

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[4]The circumstances here are identical to the circumstances in State v. Mills where the testimony of Anderson that the co-defendant, Ashley, admitted to him that he was the triggerman had not been presented in Mr. Mills' federal habeas petition and had not been considered by the federal courts when federal habeas relief was denied. Mills v. Singletary, 161 F.3d 1273 (11th Cir. 1998).

Moreover, the decision by the Eleventh Circuit denying Mr. Marek's ineffective assistance of counsel issued in 1995, was before the United States Supreme Court's decisions in Williams v. Taylor, 529 U.S. 362 (2000), Wiggins v. Smith, 539 U.S. 510 (2003), Rompilla v. Beard, 545 U.S. 374 (2005). The decision in Marek v. Singletary, 62 F.3d 1295 (11th Cir. 1995), is simply erroneous in light of the subsequent decisions by the United States Supreme Court. And in fact, the United States Supreme Court recently granted certiorari review in case in which the Eleventh Circuit had denied habeas relief on a penalty phase ineffectiveness claim in order to address whether the standards employed by the Eleventh Circuit to review ineffectiveness claims comports with the controlling precedent from the Supreme Court. Wood v. Allen, - U.S. - , Case No. 08-9156 (cert. granted May 18, 2009).

newly discovered evidence claim given that trial counsel did not have the new evidence and therefore any decision making occurred without the new evidence and would have been altered by the new evidence had it been known, as trial counsel, Hilliard Moldof, testified on June 2, 2009. Certainly, the Eleventh Circuit did not have Mr. Moldof's 2009 testimony regarding the new evidence and the effect it would have had on how he proceeded at Mr. Marek's trial when it rendered its decision in 1995.[5]

The State also discussed the motion to vacate that Mr. Marek filed in 1993 and subsequently amended a number of times. The State seeks to rely upon this Court's opinion affirming the summary denial of the motion without noting that at the time of the litigation on that motion to vacate, the testimony of Jessie Bannerman, Robert Pearson, Michael Conley, Leon Douglass, Carl Mitchell and William Green was not known or presented, nor for that matter was any testimony presented regarding statements made by Raymond Wigley that he killed Adela Simmons while Mr. Marek slept in the pickup truck. The evidence that has been presented at the June 1-2, 2009, evidentiary hearing was not in the record at the time of the circuit court's order in 2004 or this Court's decision in 2007 affirming the summary denial of Mr. Marek's

[5]The State ignores the fact that Robert Pearson's testimony and the detailed account that Raymond Wigley gave him actually corroborated Mr. Marek's testimony that he was in the pickup truck at the time that Raymond Wigley killed Adela Simmons. Mr. Moldof testified on June 2, 2009, that "that's kind of what Marek's testimony was anyway, so that would have helped. For sure, you know, those two things, separate time, separate place, two statements, for sure." (T. 341).

second motion to vacate, and thus it was not considered when Mr. Marek was denied relief at that time.[6]

Similarly as to Mr. Marek's claim premised upon Caperton v. Massey Coal Co., there is no acknowledgment by the State prior to the issuance of the Caperton opinion on June 8, 2009, no court in the history of Mr. Marek's case had considered its impact. When Mr. Marek sought to depose Judge Kaplan after his recusal in order to learn the facts regarding Judge Kaplan's relationship with Mr. Moldof beyond the terse statement by Judge Kaplan when he recused himself, no consideration was given the proper due process analysis set forth in Caperton.

As to Mr. Marek's clemency claim, all that is relevant is the fact that after Mr. Marek's direct appeal, clemency was denied when the Governor signed a death warrant in 1988 setting Mr. Marek's execution. Beyond that, the clemency claim is concerned with the arbitrary manner in which the clemency authority and the power to sign death warrants converge in one man, the Governor, and the manner in which executive powers have been used to create a system in Florida that violates the Eighth Amendment. Nothing in the procedural history is relevant to what is required by the Eighth Amendment.[7]

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[6] The circumstances here are identical to the circumstances in State v. Mills where the testimony of Anderson that the co-defendant, Ashley, admitted to him that he was the triggerman was not known nor presented at during the proceedings on Mr. Mills' second Rule 3.850 motion.

[7]This is very much like those capital collateral cases in which this Court has addressed whether the manner in which the executive was carrying out a death sentence violated the Eighth

As to Mr. Marek's claim concerning the *ex parte* preparation of the 1988 order denying postconviction relief, all that is relevant in the procedural history is that in 1988 Mr. Marek filed a Rule 3.850 motion to vacate his conviction and sentence. The subsequent proceedings were presided over by Judge Kaplan who after conducting an evidentiary hearing entered an order denying the motion to vacate. At that time nor at any subsequent time did the State advise Mr. Marek or his counsel that the order signed by Judge Kaplan had been drafted by Assistant State Attorney, Paul Zacks, on an *ex parte* basis.

As to the State's discussion as to the facts of Mr. Marek's case, the State's representative has once again slanted and misrepresented those facts in the Statement of the Case. However, Mr. Marek's counsel does not have either the time or space to spend addressing all of the inaccurate representations. All that can be done is simply point out some representative examples.

The State first presents a slanted summary of Mr. Marek's trial testimony. Ignored by the State is Mr. Moldof's testimony that in light of the new evidence, he would have had to reconsider the decision to put Mr. Marek on the witness stand ("So thinking back, that was probably a bad idea that he testified") (T. 310). Obviously, the decision to present Mr. Marek's testimony was made without the benefit of witnesses who

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Amendment. The ins and outs of a capital litigant's procedural history was not pertinent to whether the executive's manner of imposing a death sentence was unconstitutional.

could have testified that Raymond Wigley confessed that he killed Adela Simmons, and that he killed her while Mr. Marek was asleep in the pickup truck. The testimony of Jessie Bannerman, Robert Pearson, Michael Conley, Leon Douglass, Carl Mitchell and William Green would have changed how Mr. Moldof approached the case and what options he had in presenting Mr. Marek's defense. It would have impacted whether he in fact chose to call Mr. Marek to the witness stand.

The State also discusses Mr. Moldof's actions at the penalty phase. In highlighted print, the State sets forth: "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." Answer Brief at 10-11. The State's selective quotations and use of highlighting is misleading at best. Mr. Moldof's did not make such a proclamation out of the blue. In fact, here's what actually occurred during the charge conference before the evidentiary proceedings began in front of the jury when Mr. Moldof set forth his objection to Judge Kaplan's ruling:

> Additionally, I'd argue to the Court that I would like to comment on Mr. Wigley's having been sentenced to life imprisonment but I'm not going to in light of the Court's opinion that if I were to do that it would open up the possibility of Mr. Carney telling the jury the entire contents of Mr. Wigley's confession without me being given a chance to cross-examine Mr. Wigley. In light of that, I'm not going to mention the fact that Wigley was given a life sentence, but I think I should be able to do that without Mr. Carney by hearsay being able to introduce the statement of Mr. Wigley when contrarily I'd like to introduce the document that purports to be Doctor Krieger's evaluation of my client but the Court thinks that's not proper because it's hearsay and not susceptible to cross examination.

It seems like I'm caught between a rock and a hard place when I can't introduce a document. I can't but Mr. Carney - or at least tell the jury what the content of a document is.

* * *

THE COURT: I'll make some comments and then, Mr. Carney, you can make your comment.

As far as Dr. Krieger's statement that you want to introduce, I think that's hearsay and if you want to have Dr. Krieger here to testify you are welcome to do so. I'm sure he's available and you can have him if you want so I won't allow a report of Dr. Krieger's. You can just as easily bring him in. You can't cross examine a doctor's report. So I think Mr. Carney would be at a disadvantage.

Additionally, as far as mentioning what sentencing Mr. Wigley got, I don't know what the purpose is. The purpose obviously would be to indicate that one of [the] two follow[ing]. I would think he already got a stiff penalty. He is the perpetrator so go easy on Mr. Marek or also just say Marek is equally as guilty. He should not get any more than Wigley. **I think what you are trying to do is influence the jury** and I think based on that I think Mr. Carney would have a right to tell the jury, this jury, the difference in the case that it had against Mr. Wigley and the case that it had against Mr. Marek and what the possibilities were that the jury may have considered in the Wigley case which made them come back with a recommendation of life imprisonment and also why I may have considered the life imprisonment as opposed to overriding the jury advisory and imposing the death penalty, but I have indicated to you in my opinion the law is clear on that, that if the jury advises that the Court should impose the life imprisonment sentence as opposed to the death penalty the cases that I have read indicate to me that the only way the Judge can override the jury's recommendation and give death is if no reasonable person could disagree with the advisory as far as life imprisonment is concerned - That only an unreasonable person under the circumstances would life imprisonment. Any reasonable person would obviously advise the death penalty.

There is no way that I can tell 12 people that they were unreasonable. At least, in this case. There may be some circumstance in another case but in this case against Mr. Wigley I just couldn't do it legally. I'm sure if I did I'd be reversed on appeal so that takes

care of that.

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MR. MOLDOF: But I'm not commenting on hearsay. Mr. Carney would be bringing up hearsay. I think I'd be entitled to cross examine Wigley to be able to - just to exhibit Wigley to the jury and they can judge his demeanor and believability.

THE COURT: The difference is it's not hearsay the way Mr. Carney would bring it up. Hearsay is when you bring in the matter for the truth and Mr. Carney would just be telling the jury what Wigley said and how the jury may have interpreted it and not that it is the truth at all. At least, they have that to consider.

MR. MOLDOF: But - -

THE COURT: So I don't even think it would be considered hearsay. Then again it's not even evidence. It would just be a comment by Mr. Carney so I think we are talking about evidentiary matters which don't even exist.

MR. MOLDOF: Just so the record is clear, you have indicated, at least in chambers, he could say those things, that Wigley in his confession said my client did it and Wigley did it.

THE COURT: I think he had a right to do it.

MR. MOLDOF: I think I'm entitled to bring up up Wigley's sentence but I'm not going to do it in light of the Court's ruling on the confession.

(R. 1283-88)(emphasis added).

It is clear from the record that Mr. Moldof's decision was not one that he liked or that he thought he should have had to make. Mr. Moldof made it very clear that if he had any alternative but the two choices given to him by Judge Kaplan, he would have proceeded differently. And again what the State ignores is the fact that the new evidence would have given him another option - it would have changed the dynamics of the choices that he faced. At the time of the penalty phase, the

statements that Raymond Wigley made to Jessie Bannerman, Robert Pearson, Michael Conley, Leon Douglass, Carl Mitchell, and William Green were unknown and were not considered by Mr. Moldof when deciding how he would proceed, as Mr. Moldof made clear in his June 2, 2009, testimony.[8]

Next, the State turns to Mr. Moldof's testimony at the evidentiary hearing in 1988. Here too, the State ignores that the testimony in 1988 was presented at a time when the statements that Raymond Wigley made to Jessie Bannerman, Robert Pearson, Michael Conley, Leon Douglass, Carl Mitchell, and William Green were unknown and thus not considered by Mr. Moldof when he testified in 1988.[9]

The State relies upon a statement by Mr. Moldof that he monitored Wigley's trial to suggest that he knew everything that happened during the trial.[10] However, the State completely

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[8]The State also argues that it was Mr. Moldof's strategy to rely upon lingering doubt, even though case law provides that lingering doubt is not a valid mitigating circumstances and it is ineffective to give up real mitigation in favor of lingering doubt. Hardwick v. Crosby, 320 F.3d 1127 (11th Cir. 2003).

[9]The State includes a reference here to the mental health experts who evaluated Raymond Wigley and their statements that Marek dominated Wigley. Of course, the State once again chooses to ignore the fact that the mental health experts who evaluated Wigley based their conclusion entirely upon self-reporting from Wigley, and that the statements that Raymond Wigley made to Jessie Bannerman, Robert Pearson, Michael Conley, Leon Douglass, Carl Mitchell, and William Green were unknown to these experts and would have been used to show that Wigley was the dominant actor who killed Adela Simmons while Mr. Marek was asleep in the pickup truck.

[10]The State ignores in its closing Mr. Moldof's testimony in 2009 that he did not sit in for the Wigley trial. He was too

ignores the record from the Wigley trial which demonstrates that the prosecutor presented a case there that he suggested should Wigley as the controlling participant.

Indeed, a review of Wigley's trial "in context" indisputably demonstrates that the State had no evidence that Mr. Marek was more dominant than Wigley. For example, at Wigley's trial, the State used Wigley's silence to mean that he was unusual and frightening:

> Jean Trach will tell you she was very, very frightened. This was the stuff that nightmares were made of and she is going to tell you that **Wigley in particular was a little unusual in that Wigley simply sat there.** Marek did most of the talking. Wigley stood there and didn't say anything. **He just looked.**

(WR 423-4).[11] It was only after Mr. Wigley's trial when the State re-characterized Mr. Marek's friendliness and talkativeness into "dominance".

Likewise, at Mr. Wigley's trial the State characterized Officer Satnik's encounter with Wigley and Mr. Marek:

> I think he is going to tell you Wigley was intoxicated and that Marek may have been intoxicated to

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busy doing other things to just sit and watch the trial.

[11]Compare the State's characterization of Wigley in Ms. Trach's perspective at the Wigley trial to her perspective of Wigley in Mr. Marek's trial:

> The interesting point of Jean Trach's testimony: She is going to tell you that **the person who did all of the talking, the person who seemed to control what was going on was John Marek.** In fact she is going to tell you Wigley never opened his mouth. Wigley never said anything.

(R. 423-24)(emphasis added).

> a certain extent **but both of them were very cognizant of was [sic] going on.**

(WR 432). However, at Mr. Marek's trial, Officer Satnik completely changed his testimony as to Wigley being "cognizant". See R. 673.

Furthermore from the outset of Wigley's trial the State also maintained that, at a minimum, Wigley was equally or even more culpable than Mr. Marek:

> Evidence that will show you beyond a reasonable doubt, evidence that I think will show you beyond and doubt that it was Raymond Dewayne Wigley and John Marek who picked up Adella Marie Simmons on the highway. That it was Raymond Dewayne Wigley and John Marek who **were acting in concert** as they had to be when they drove her down and repeatedly sexually assaulted her in the truck.
>
> It was Raymond Dewayne Wigley and John Marek **acting in concert** together as they had to to get her body or get her up on to the lifeguard shack.
>
> It was Raymond Dewayne Wigley and John Marek who took her inside that lifeguard shack and used the ropes for whatever purpose they used the ropes and the cigarette lighters and matches to burn her pubic hair.
>
> It was Raymond Dewayne Wigley and John Marek who ended up raping her inside the lifeguard shack.
>
> It was the handkerchief to Raymond Dewayne Wigley that was used to strangle her to death as he stood there watching.
>
> It was Raymond Dewayne Wigley who was found in possession of her stolen property.

(WR 435-6).[12]

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[12]However, at Mr. Marek's trial, the State abandoned the "acting in concert" theory and presented the "he who speaks more is dominant" theory to the jury:

> Every time Wigley tried to talk, he is going to tell you Marek cut him off. Marek did the talking. Just like Jean Trach told you, he is going to tell you **Marek controlled the tempo. Marek controlled the pace. Marek did the talking.** Marek joked. And all the while 100 yards away lay the battered, burned, raped, and dead body of Adella Marie Simmons.

When Officer Satnik testified at the Wigley trial he told the jury that while Wigley appeared to have been drinking more than Mr. Marek (R. 603), that he laughed at Mr. Marek's jokes and did not "do anything or say anything directly or indirectly that indicated any fear of Mr. Marek" (WR. 608).[13] He also specifically testified that he had conversations with Wigley (WR 628).

And, Vincent Thompson who met Wigley and Mr. Marek with Officer Satnik recalled that both Wigley and Mr. Marek appeared to have been drinking (WR. 633). Specifically, Thompson was asked:

> Q. With respect to these individuals did you see a distinction between the two; that one appeared to be drinking more than the other or did they both appear about the same?
>
> A. Both about the same.

(WR 633). Thompson believed Wigley was "cognizant of everything that was going on around him" and that he was sure that Wigley "talked" (WR 633). Thompson was also asked about Mr. Marek's "dominance" of Wigley:

> Q. During any of the times that you were present did you ever observe any actions on the part of Mr. Wigley or anything that Mr. Wigley may have said that would indicate to you that Mr. Wigley was afraid of Mr. Marek.
>
> * * *

(R. 430)(emphasis added).

[13]Officer Satnik described Mr. Marek as 6'11", but only 160 lbs. So, even though he was taller than Wigley their weights were similar (WR. 607).

A. No.

(WR 636-7).

However, at Mr. Marek's trial contrary to both his and Thompson's testimony at Wigley's trial, Offcier Satnik testified that Mr. Marek did not appear intoxicated at all and that Wigley was so intoxicated that he could not stand without support, he was staggering, and his speech was slurred (R. 672-73).[14] Officer Satnik also told the Marek jury that Mr. Marek stopped Wigley from talking and that Mr. Marek was the "dominant" one (R. 670-1).

Additionally, it is clear that the prosecutor manipulated the testimony of Jean Trach at Mr. Marek's trial in a way that was quite different than what had been presented at Wigley's trial. There, the prosecutor focused on Wigley's silence as making him a more dangerous, fearful individual:

> Q. Now, at what point in time was it that you first observed Raymond Wigley and what was it about Raymond Wigley that attracted your attention or caused you to observe him?
>
> A. Mr. Marek had made the - he asked to take one of us to a station or to a phone. At that time, the passenger side of the truck, the door opened and Raymond Wigley got out and stood there.
>
> Q. Stood where?
>
> A. He closed the door. A little in front of the door towards the hood of the truck.
>
> Q Did he say anything?
>
> A Nothing.

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[14]Interestingly, the State did not call Thompson as a witness in Mr. Marek's trial.

Q Did he move?

A No.

Q Just stood still?

A Yes.

Q How long a period of time?

A I'd say 10 minutes, 15 minutes, maybe.

(WR. 661-62). Conversely, in Mr. Marek's trial, the prosecutor molded the testimony so he could assert that Mr. Marek was in fact the leader, and that he was in control (R. 423-24).[15]

During the penalty phase argument at Wigley's trial in urging the jury to recommend death, the State vehemently argued that Wigley was equally or more culpable in the murder of Ms. Simmons. The State did not focus on who did more talking, but who remained in possession of the stolen items and pick-up truck; whose bandanna was used to strangle the victim; who displayed a gun and struck the victim:

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[15]At Mr. Marek's trial, during the guilt phase closing argument, the prosecutor stated:

> We know that all of the talking, all of the conversation was done by John Marek. Wigley was in the truck and then stood outside the truck at some point but for 45 minutes Wigley didn't say anything and that's a thread that you will see running throughout this case. **It's Marek who controls the tempo. It's Marek who sets the pace. It's Marek that's the leader of the two. Marek does the talking. Marek assists in fixing the truck or the car. They can't fix the car. Marek is the one who offers a ride. Marek is the one who suggests taking one of them to a call booth.**

(R. 1137-38)(emphasis added).

> And it's interesting to note, of course, that at the time that the defendant was arrested it was Raymond Wigley and not John Marek who was in possession of those items. **It was Raymond Wigley who was in exclusive possession of those items.**

(WR. 1173)(emphasis added).

* * *

> Who, ladies and gentlemen, was the first person to display a gun to her? **It was Raymond Dewayne Wigley.**
>
> Who was the first person to rape her? **It was Raymond Dewayne Wigley.**
>
> Who was the first person to beat her? **It was Raymond Dewayne Wigley. Not John Marek.**
>
> Who was involved up to the hair on his chinnie-chin-chin with dragging her up into that lifeguard shack? **It was Raymond Dewayne Wigley and John Marek equally.**
>
> Who was involved in the burglary? **Equally, it was Raymond Dewayne Wigley and John Marek.**
>
> Who was involved in the kidnapping? **It was both.**

(WR. 1175)(emphasis added).

* * *

> I ask, ladies and gentlemen, when you go back into that jury room take the tape, and listen to it very carefully because you are going to find on that tape that the defendant did not say and there is no evidence to suggest that his participation was relatively minor.
>
> He admits sexually battering the victim himself, not once, but more than once.
>
> He admits beating her himself.
>
> He admits kidnapping her.
>
> He admits commission of a burglary.
>
> He admits being the first person to display a gun.
>
> He admits aiding and assisting Marek in everything that Marek did and he takes and equally active part that Marek does.

The second mitigating circumstance which you may consider: The defendant acted under extreme duress or under the substantial domination of another person.

Here again we get into an area that the defense has tried to argue throughout the entire case but I think you are going to find it's not a mitigating circumstance.

Where is the evidence? Not what Mr. Cohn says. Where is the evidence that the defendant was under the domination of John Richard Marek? Mr. Cohn, I'm sure is going to argue well, who was it that did the talking? Who was it that did the talking when they stopped and picked Adella Marie Simmons up; that it was John Marek that did the talking?

Who is the first one to take aggressive action towards Adella Marie Simmons? It's not Marek? It's Raymond Wigley. **Wigley is the first one to pull out the gun.**

Who is the first one to rape her? **It's not Marek. It's Wigley.**

Who is the first one to beat her? **It's not Marek. It's Wigley.**

Do you find that Wigley was dominated or submissive as he assisted, as he acted equally with Marek in the kidnapping and the beating, as he helped Marek get Adelia Marie Simmons up into the guard shack? He's acting equally. One is no more or no less guilty than the other. Is he less guilty because he helped Marek rape Adella Maris Simmons; that maybe he held her down? Does that make him less guilty or dominated by Marek?

Is there any evidence that Wigley was dominated in any respect? The defense I'm sure will say well, it was Marek who did the talking on the beach; that every time Wigley opened his mouth, Marek cut him off.

Again take that tape back and listen to it. Wigley explains that. The agreement when they first came into contact with the police, Marek says let me do the talking. Let me handle it. Remember, Wigley was perhaps a little bit more intoxicated than Marek was. Marek speaks a little better. Marek did the talking.

But it was an interesting point, as I asked both of the people that testified here that were there. From Satink down to Thompson, I asked was there

> anything about Wigley's demeanor? Was there anything about his manner? Anything that he said, anything that he did that suggested in any way that he was afraid of John Richard Marek; that there was any fear at all and both of them unequivocally said no.
>
> Was he dominated? Wouldn't you have seen some information? Won't there have been some testimony? Yes, he was frightened. The answer was no.
>
> But I think the most revealing point of all when we get down to the issue of dominance, of whether someone was dominated by another, is the fact that Wigley laughed. After he had been involved in the murder, the rape, the kidnapping, the burglary, after they had gone through the atrocities that they went through, from burning her pubic hair to beating her, he was capable of laughing afterwards. Laughing on the beach. Laughing at Marek's jokes. Is that a person who is dominated and fearful? To him it just wasn't that big a deal and that's very, very frightening.
>
> There isn't any evidence in this case that Wigley was dominated by Marek. **All of the evidence from the physical evidence to the testimonial evidence, to the tape from Wigley himself, all suggest that they were equal participants.**

(WR. 1185-88)(emphasis added).[16]

Despite this lack of evidence, during his closing argument at Mr. Marek's penalty phase, the prosecutor stated:

> The evidence from Jean Trach, it was Marek who did all the talking. The evidence from Officer Satink at the scene, it was Mr. Marek who did all the talking, Marek who controlled. Marek who set the tempo. The evidence from the other man, Thompson, that was at the scene. The temp was set by Marek. Not by Wigley. He wasn't under the domination of anybody. **If anything, he was the person who was dominating.**

(R. 1304)(emphasis added).

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[16]Thus, admittedly, by the State's very own argument, there was no evidence to demonstrate that Mr. Marek was the dominant actor in the crime. The theory that Mr. Marek was dominant because he was more talkative was directly refuted by the State in its closing argument in the Wigley case.

Following, the life sentence in Wigley, the trial prosecutor complained about the lack of evidence against Mr. Marek to even obtain a conviction "[t]he State runs the risk of potentially even losing the case against Marek with nothing other than circumstantial evidence against him and the defendant has refused to cooperate or do anything in any way to assist the State..." (WR. 1247-48).

Finally, in its current Answer Brief, the State misrepresents Mr. Moldof's 1988 testimony.[17] The State falsely asserts "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 involved in criminal activity, something to do with homosexuality." Answer Brief at 12-13. In fact, there was no reference to homosexuality and Mr. Marek's foster parents, Jack and Sally Hand. It had been several years since 21 year-old Mr. Marek had resided with the Hands (PC-T. 316). However, Mr. Marek's driver's license which Mr. Moldof had a copy of reflected the address where the Hands resided and where Mr. Marek resided when he got his license (PC-T. 319). Mr. Marek did not live with the Hands after he was arrested for charging $55 to a credit card that wasn't his and was placed in a maximum security prison in

[17]Even though Mr. Moldof's 1988 testimony about trial strategy decision which occurred without any awareness of Raymond Wigley's statements to Jessie Bannerman, Robert Pearson, Michael Conley, Leon Douglass, Carl Mitchell and William Green is entirely irrelevant to how he would have used those statements had he known of them, undersigned counsel feels compelled to take some time to point out some of the State's misrepresentations.

Huntsville, Texas, for two years. It was while he was incarcerated that Mr. Marek was forced to engage in homosexual acts, and it was after his release from prison that he was taken in by an older man in exchange for engaging in homosexual activity. It was this later time in Mr. Marek's life that Mr. Moldof referenced in his testimony - "there was some discussion of the people that he had been living with immediately prior to coming to Florida" (PC-T. 318). There was reference to "some type of criminal activity" and "[i]t may have involved some type of homosexuality" (PC-T. 318).[18]

The State suggests that Mr. Moldof received "discovery from the State" that included mitigating evidence which he did not use (State's closing at 31). However, the only reference to discovery from the State during Mr. Moldof's testimony was concerning the fact that he had received a copy of Mr. Marek's driver's license which contained the address for Jack and Sally Hand, Mr. Marek's foster parents (PC-T. 320).

The State represents that though Mr. Moldof "received a report from Dr. Krieger, he did not use it." Answer Brief at 13.

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[18]Again it is unclear why the State wishes to focus on the fact that Mr. Marek was forced in prison to engage in homosexual activity and when he got out of prison that he voluntarily engaged in such activity with an older man in exchange for a place to live. It seems entirely irrelevant to the impact the new evidence - Raymond Wigley's statements to Jessie Bannerman, Robert Pearson, Michael Conley, Leon Douglass, Carl Mitchell and William Green - would have had on the penalty phase proceedings and whether Mr. Marek would have received a sentence of death, unless it is the State's position that the death sentence should be kept in force because Mr. Marek engaged in homosexual activity.

This is false. Mr. Moldof offered it into evidence, but Judge Kaplan refused to admit it into evidence.

The State asserts that "when asked whether [he] would have used the records, [Mr.] Moldof answered no." Answer Brief at 17.[19] Actually when Mr. Moldof was asked on direct examination if he would have presented specific records that were shown to him regarding Mr. Marek's life as a foster child in Texas, he went through each document and noted the potential and concluded "Basically, it's giving a picture of John as being, having some personality disturbances that are manifested, starting to manifest themselves in sexual conflicts. Probably would have given the jury an idea as to why he wound up doing what he did if they have already found him guilty. Giving them a picture of why the man got here" (PC-T. 329).

In its 10 page discussion of Mr. Moldof's 1988 testimony, the State ignores his June 2, 2009, testimony in which he stated that he undoubtedly would have presented the new evidence. Mr. Moldof testified that he would have called Jessie Bannerman, Robert Pearson, Michael Conley, Leon Douglass, Carl Mitchell and William Green had they been available to testify to statements Raymond Wigley made admitting that he was the one who killed Adela Simmons. During the State's examination of Mr. Moldof, the

[19]The State quotes a passage from the cross-examination where Mr. Moldof is asked a hypothetical that if he had records that showed his client "could be considered a loser his whole life" would it be a good strategy to present those records. However, when asked about specific records in direct examination, Mr. Moldof's answer was different.

following testimony was elicited:

Q. Well, this has nothing to do with being psychotic, Mr. Moldof, it's the presentation of defense witnesses at the penalty phase regarding the disparity of treatment.

A. But I'm saying if that buttressed another witness' statement that didn't have that ingredient in it, and by that result I get proportionality, and I've told you before I think proportionality -- I think a jury's conscience weighs heavily on them, and if they realize another jury recommended life, I find that to be very important testimony. At a recent trial I had it was probably the most important testimony.

Q. Assuming -- well, we don't have to assume. The fact in evidence is that this witness is a nine-time convicted felon who has testified that twice Wigley told him that Wigley was in fact the one who strangled Adel Simmons, the first time they were intoxicated on moonshine, the second time they were intoxicated on reefer. Now, you're going to explain to Judge Levenson that you in fact would have presented a nine-time convicted felon to testify to the court that twice, under the influence of moonshine, whatever that may be, and pot, Wigley made these statements?

A. Yeah. Because in Penalver, the Supreme Court found the most damning evidence or the only direct evidence against Mr. Penalver was a jailhouse confession to like an eight-time convicted felon who was in jail with my client. So, yes, I definitely would have done that. Mr. Morton did it to me in Penalver. You know, anytime there is a jailhouse snitch they come into evidence. So, yeah, the State finds it useful. I would find it useful in that respect because of the proportionality argument.

Q. Now, wouldn't you presenting that open up the door to the State presenting Wigley's confession?

A. Yeah, it might, but I'm saying at that point I get proportionality in and it leaves the jury with two opposite statements by Wigley. The problem for me was I didn't have that back at the time, so I would be injecting Wigley's statement without something to counteract it, I found that to be damning. But I'll tell you right now, I don't know I would have made the same decision today, maybe I would have put it in, 'cause it was already coming in through other avenues it seems like.

Q. And wouldn't that --

THE COURT: Excuse me. What do you mean by "it was coming in through other avenues"?

THE WITNESS: 'Cause the State, it seems like in that transcript, the State was arguing that my client was the main actor. There was probably some other evidence of him being the main actor, from what I read, vis-a-vis, the lady that was with Adel Simmons apparently testified that Wigley got out later and was very passive.

So assuming, I mean, as I look back now, assuming they had that argument that my client was the main actor, I might have put that confession in anyway. I just had a case Anthony Bryant, my client and the codefendant had been convicted of attempted murder in New York, he came and testified in my case, I went first, ultimately got a life recommendation even in spite of the prior violent shooting, and Sam Halpern had the codefendant, went after me, said the most important thing was the proportionality argument, and I really agree with him. I mean, those juries, they take -- you know -- they take it very seriously.

THE COURT: Did the other guy get life?

THE WITNESS: Yeah, and that's why. I mean, my guy was the main actor in that shooting in New York, Anthony Bryant was. So, you know, knowing what I know now, I probably would have put that confession in, I think, because the case had already gone sour in the guilt side. **I 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 embarrassed by my work in this case back in '83.**

(Transcript of June 2nd at 330-33) (emphasis added).

ARGUMENT IN REPLY

ARGUMENT: THE NEWLY DISCOVERED EVIDENCE CLAIM.

1. *res adjudicata*

The notion that Mr. Marek's argument that his newly discovered evidence claim premised upon the sworn testimony of Conley and Bannerman and the stipulated testimony of Pearson is *res adjudicata* is just absurd. There is no contention by the State and no suggestion by Judge Levenson that Bannerman, Pearson, Conley, Mitchell, Douglass and/or Green previously testified in Mr. Marek's case or that their statements were

previously included in any pleading filed by Mr. Marek. Since the claim is one premised upon newly discovered evidence and since this Court has repeatedly recognized that newly discovered evidence claims are cognizable in Rule 3.850 proceedings, unless the newly discovered evidence now relied upon was previously presented, the claim cannot have already been heard and decided by a court. Jones v. State, 591 So. 2d 911 (1991); Scott v. Dugger, 604 So. 2d 465 (Fla. 1992). Because *res adjudicata* is a bar to reconsidering claims already addressed, it does not apply to newly discovered evidence claims when the newly discovered evidence has not been previously presented to the courts. Lightbourne v. State, 742 So. 2d 238 (Fla. 1999)(previously rejected Brady had to be reconsidered in light of newly discovered witness); Swafford v. State, 679 So. 2d 736 (Fla. 1996)(evidentiary hearing ordered in light of new affidavits which required revisiting issues previously presented).

In fact, this case is similar to the circumstances in State v. Mills, 788 So. 2d 249 (Fla. 2001). There, Mills presented a Rule 3.850 motion in April of 2001 that contained a newly discovered evidence claim premised upon an affidavit from Anderson who had been incarcerated in 1980 with Mills' co-defendant, Ashley. In this affidavit filed in April of 2001, Anderson said Ashley told him in 1980 that he, Anderson, had been the triggerman and that Mills had not shot the victim.

In February of 2001, Mills had filed a newly discovered evidence claim based upon a statement Ashley made in early 2001 to Mills' attorney in which he provided a version of the homicide

at variance with his trial testimony; however, it did not change from the evidence at trial that Mills was the shooter. This newly discovered evidence claim was rejected on the merits and the denial of relief was affirmed by this Court in Mills v. State, 786 So. 2d 547 (Fla. 2001). This Court's opinion in Mills v. State issued on April 25, 2001.

Despite this Court's rejection of the newly discovered evidence claim presented in Mills v. State, the newly discovered evidence claim presented days later was not barred as *res adjudicata* because it was premised upon the affidavit of Anderson which had never been previously considered by the courts. And on the basis of the Anderson affidavit, an evidentiary hearing was ordered after which Rule 3.850 issued and Mills' death sentence was vacated. State v. Mills.

2. due diligence.

The State argues that there has been a lack of due diligence. In making this argument, the State fails to point to anything that shows that prior to April 27, 2009, Mr. Marek's counsel had any reason to believe that Raymond Wigley had made any statements to anyone confessing that he was the one who killed Adela Simmons. As to the question of diligence, the circumstances here are identical to the circumstances in State v. Mills, 788 So. 2d 249 (Fla. 2001). Even though Mr. Marek has relied upon Mills, the State fails in its Answer Brief to even mention Mills in its diligence argument, let alone distinguish it. For twenty years prior to the signing of the death warrant in 2001, Mr. Mills' attorney were unaware that the co-defendant,

Mr. Ashley, had told another individual, Mr. Anderson, who Mr. Ashley had been incarcerated with before the start of Mr. Mills' trial, that he (Mr. Ashley) had been the one "who had gone into the house and shot the victim." Id. at 250. During those twenty years, none of Mr. Mills' attorneys had interviewed Mr. Anderson or anyone else that Mr. Ashley had been incarcerated with to ascertain whether Mr. Ashley had ever confessed that he had been the one to go into the house and shoot the victim. Yet, Mr. Mills was found to have been diligent because until 2001 he had no reason to believe that Mr. Ashley had made a statement to Mr. Anderson about the murder.

Due diligence is not perfection. "The question is not whether the facts could have been discovered, but instead whether the prisoner was diligent in his efforts." Williams v. Taylor, 529 U.S. 420, 435 (2000). "Diligence . . . depends on whether the prisoner made a reasonable attempt, in light of the information available at the time, to investigate. . . . [I]t does not depend . . . upon whether those efforts could have been successful." Id.

Due diligence is a legal standard. It is not explicitly defined in Rule 3.851. Nor has it been explicitly defined in case law. However, in State v. Gunsby, 670 So. 2d 920 (Fla. 1996), this Court found a lack of due diligence when a trial attorney's performance was deficient under the standard enunciated in Strickland v. Washington, 466 U.S. 668 (1984). This suggests that due diligence is established where an attorney's performance was reasonable under the Strickland

standard. Certainly, due diligence cannot require more than does the Strickland standard. Strickland itself makes clear that the analysis is not to be conducted with 20/20 hindsight, but rather from the point of view of counsel at the time he or she is conducting the investigation. The standard is reasonableness under the circumstances, not perfection.

It is clear that the State seeks to defend the circuit court's use of a standard of perfection which is premised upon 20/20 hindsight, *i.e.* since we now know the evidence was out there, there was a way that counsel could have found.[20] The State's analysis is premised upon how the evidence could have been found, not upon the reasonableness of counsel's performance in light of what he or she knew at the time.

The case on which the State seeks to rely is Hunter v. State, 33 Fla. L. Weekly S721 (Fla. 2008). However in doing so the State ignores the language that this Court used when it set forth examples of cases in which diligence was found.[21] This

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[20]The standard the State seeks to use is whether the evidence "could have been discovered." It seeks to ignore the language "through the exercise of due diligence." Rule 3.851(d)(2)(A). Under the State's approach, the words "due diligence" are rendered meaningless and the issue is one solely whether with 20/20 hindsight the evidence could have been discovered.

[21] The State also ignores Cherry v. State, 959 So. 2d 702, 708 (Fla. 2007), and what this Court stated there:

> We have also found evidence of conversations similar to those in the instant case to not be procedurally barred even though they were first introduced years later. For example, we approved a district court's holding that a claim of newly discovered evidence, statements made in 1989 by the State's

Court did not indicate that the examples set forth were the only circumstances in which due diligence could be shown. So, the State's assertions that Mr. Marek's circumstances are distinguishable is in fact a meaningless observation.

The State's observation is also an inaccurate one as well.

> key witnesses that they had lied at the defendant's trial, were not procedurally barred in 1996 under the first prong of *Jones*. *Robinson v. State*, 770 So.2d 1167, 1170 (Fla.2000). We also affirmed a postconviction order holding a 1980 confession by a codefendant to his cellmate and not presented until a 2001 postconviction motion was not procedurally barred under the first prong of *Jones*. *State v. Mills,* 788 So.2d 249, 250 (Fla.2001). Also, in *Jones,* though certain evidence was procedurally barred, jailhouse confessions made in 1985 by the alleged actual killer "clearly qualif[ied] as newly discovered evidence" in the defendant's 1991 second postconviction claim. *Jones,* 591 So.2d at 916. In comparing these cases to the above situations, where we held that testimony and evidence were procedurally barred, our determination as to whether a defendant exercised due diligence tends to turn on whether the testimony and evidence are in the possession of persons with a personal or an on-the-record connection to a case. In the present case, the confession which is the newly discovered evidence occurred in 1994, was not discovered until August 9, 1996, and was claimed in a motion filed on August 7, 1997. The evidence was not in existence at trial and so could not have been discovered at that time. There was no evidence presented either by the State or Cherry that anyone ever knew of a connection between Hill and Terry or that Terry had spoken about this crime with anyone besides Hill. Hill stated at the hearing that the first person he ever told about these conversations was Conklin in 1996. This evidence is not the testimony of a witness who was either at the crime scene or was known to have any connection to the crime by either defense counsel or the State.
>
> We conclude that the circuit court erred in holding that this evidence was procedurally barred. There is no support for the conclusion that Hill's testimony should have been discovered in 1994. Hill was not connected to any of the events of the crime. Thus, we conclude that Hill's conversations with Terry could not have been discovered with due diligence prior to their actual discovery in 1996.

One of the examples set forth is Brantley v. State, 912 So. 2d 342, 342-43 (Fla 3rd DCA 2005). There as here, this Court noted the circumstances were that "defense counsel tried to obtain the codefendant's cooperation but was refused." Hunter, 33 Fla. L. Weekly at S721. Here, Mr. Marek's counsel had in fact approached Raymond Wigley, but was not told by Wigley that he, not Mr. Marek, had killed Adela Simmons. Here, Mr. Marek's counsel approached Robert Pearson and tried to learn what Raymond Wigley had told Mr. Pearson, but Mr. Pearson refused to cooperate, as Mr. Pearson confirmed in his June 1, 2009, testimony (T. at 63). Here, Mr. Marek's counsel tried to locate Michael Conley and ascertain what Raymond Wigley had told Mr. Conley. However, when an investigator on counsel's behalf spoke to a relative of Mr. Conley in order to locate him, the relative gave the investigator bad information in order to thwart his efforts to locate Mr. Conley (May 7th Testimony of Mr. Conley at 227). So contrary to the State's representation, Mr. Marek's circumstances are identical to the circumstances of Brantley v. State, a case which this Court cited as example of due diligence.

3. admissibility

The State erroneously argues that Raymond Wigley's statements to Jessie Bannerman, Robert Pearson, Michael Conley, Leon Douglass, Carl Mitchell and William Green would have been inadmissible at Mr. Marek's trial and penalty phase proceedings. This is simply erroneous.

Section 90.804(2)(c) of the Florida Evidence Code sets forth that a statement against interest is not subject to exclusion by

virtue of the hearsay rule. A statement against interest is defined as:

> A statement which, at the time of its making, was so far contrary to the declarant's pecuniary or proprietary interest, or tended to subject the declarant to liability or to render invalid a claim by the declarant against another, so that a person in the declarant's position would not have made the statement unless he or she believed it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is inadmissible, unless corroborating circumstances show the trustworthiness of the statement.

This provision is virtually identical to Rule 804(b)(3) of the Federal Rules of Evidence, from which it was derived. The United States Supreme Court has explained the proper analysis to be employed in determining whether a statement is against interest:

> Moreover, whether a statement is self-inculpatory or not can only be determined by viewing it in context. Even statements that are on their face neutral may actually be against the declarant's interest. "I hid the gun in Joe's apartment'" may not be a confession of a crime; but if it is likely to help the police find the murder weapon, then it is self-inculpatory. "Sam and I went to Joe's house" might be against the declarant's interest if a reasonable person in the declarant's shoes would realize that being linked to Joe and Sam would implicate the declarant in Joe and Sam's conspiracy. And other statements that give the police significant details about the crime may also, depending on the situation, be against the declarant's interest. The question under Rule 804(b)(3) is always whether the statement was sufficiently against the declarant's penal interest "that a reasonable person in the declarant's position would not have made the statement unless believing it to be true," and this question can only be answered in light of all the surrounding circumstances.

Williamson v. United States, 512 U.S. 594, 603-04 (1994).

Thus according to the United States Supreme Court, Wigley's statements to Bannerman, Pearson, Conley, Mitchell, Douglass and

Green must be analyzed to determine whether each statement was one that "a reasonable person in the declarant's position would not have made [ ] unless believing it to be true."[22] Certainly, Wigley's confession to five or six separate individuals at different times that he strangled, choked and killed the victim were statements that were incriminating statements.[23]

The Supreme Court in Williamson further explained "that the very fact that a statement is genuinely self-inculpatory - - which our reading of Rule 804(b)(3) requires - - is itself one of the 'particularized guarantees of trustworthiness' that makes a statement admissible under the Confrontation Clause." Williamson, 512 U.S. at 605. Seemingly, this would satisfy the second sentence of Rule 804(2)(c) – "A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is inadmissible, unless corroborating circumstances show the trustworthiness of the statement."

Recently, the First District Court of Appeal addressed the intersection of the constitutional right to defend and §90.804(2)(c). There, the court found that the exclusion of a declarant's inculpatory statement was reversible error. Curtis

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[22]Elsewhere in its opinion, the Supreme Court explained that this analysis required a court to inquire as to "whether each of the statements in [the declarant's statement] was truly self-inculpatory." Williamson, 512 U.S. at 604.

[23]These were not statements "where the declarant is minimizing culpability or criminal exposure" as was Wigley's statement to the police trying to shift moral culpability away from himself. Williamson, 512 U.S. at 607 (Scalia, J., concurring).

v. State, 876 So. 2d 13 (Fla. 1st DCA 2004). The trial court had excluded another individual's "confession from evidence" because it "did not meet the formal requirements of the declaration against penal interest exception to the hearsay rule." Curtis, 876 So. 2d at 18.[24] The 1st DCA acknowledged that the declarant had not been shown to be unavailable.[25] Thus, the technical requirements of §90.804(2)(c) could not be satisfied. Thereupon, the 1st DCA stated:

> If the directions we have received from the state legislature regarding the admission of evidence were all that we had to consider, the argument made here would be at an end. But the courts must also consider the constitutional effect of excluding evidence in a criminal trial. In some cases, judges have a duty to admit evidence that does not fit neatly within the confines of the Evidence Code in order to protect the defendant's right to a fair trial.

Curtis, 876 So. 2d at 19.

Accordingly, the 1st DCA addressed the implications of the Due Process Clause as enunciated in Chambers v. Mississippi, 410 U.S. 284, 302 (1973)("the hearsay rule may not be applied mechanically to defeat the ends of justice"), wherein reversible error was found in the exclusion of another's confessions to the crime for which the defendant stood trial. Under Chambers, "the exclusion of the confessions denied Chambers the right to due process of law, as well as the right to confront the witnesses

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[24]In its opinion in Curtis, the 1st DCA did not address the United States Supreme Court's decision in Williamson, presumably because the technical requirements of §90.804(2)(c) were not satisfied.

[25]Here, there is no question but that Wigley is unavailable. He was murdered 9 years ago.

against him." Curtis, 876 So. 2d at 20. This was because there were "circumstances that provided considerable assurance of their reliability." Curtis, 876 So. 2d at 20. The 1st DCA found that the analysis under §90.804(2)(c) had largely merged with the Chambers analysis: "Indeed, the Florida courts have consistently applied the constitutional analysis in *Chambers*, despite the exception in *section 90.804(2)(c), Florida Statutes*, for declarations against penal interest." Curtis, 876 So. 2d at 20.[26] Thus, the 1st DCA concluded that in Curtis, "the confession in this case was made under circumstances that provided an assurance of reliability." Id.[27]

Similarly, Raymond Wigley's statements would have been admissible at the penalty phase. In Garcia v. State, 622 So. 2d 1325 (Fla. 1993), this Court found a trial attorney ineffective for not knowing that hearsay was admissible at a penalty phase and for failing to present a co-defendant's statement indicating that Garcia was not the shooter. Clearly under Garcia, Raymond Wigley's statements to Jessie Bannerman, Robert Pearson, Michael Conley, Leon Douglass, Carl Mitchell and William Green would have

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[26]The 1st DCA also noted that federal courts had applied "the principle in *Chambers* to determine whether the exclusion of a confession as hearsay deprives the defendant of the right to due process of law." Curtis, 876 So. 2d at 21.

[27]Interestingly, the confessions at issue in Curtis were made by Brenton Butler, an individual originally charged with the murder, but who was acquitted by a jury. Clearly, the jury that acquitted Butler did not accept his confessions as establishing his guilt. Nevertheless, the confessions by Butler were found by the 1st DCA to possess sufficient assurances of reliability to warrant their admission under Chambers.

been admissible at Mr. Marek's penalty phase proceeding.

4. prejudice and cumulative consideration

As to the State's prejudice argument and its cumulative consideration argument, due to time constraints, Mr. Marek stands by the argument set forth in his initial brief.

ARGUMENT: THE CLEMENCY CLAIM

Initially, Mr. Marek would point out that the State has attempted to trick this Court into misunderstanding the application of the Eighth and Fourteenth amendments to the clemency process. In suggesting that the clemency process that occurred in Mr. Marek's case was adequate, the State cites to Ohio Adult Parole Authority v. Woodard, 523 U.S. 272, 282-3 (1997).[28] However, the State cites to a portion of the opinion, that is not the controlling opinion.

Perhaps, the State's advertent or inadvertent misunderstanding of Woodard explains why the circuit court erroneously held that the Eighth and the Fourteenth amendments did not apply to the clemency process. See Order at 12-13 ("This Court finds that the clemency process is not a judicial function, but is a function of the Executive branch.").[29] However, the

[28]The State incorrectly cited the case in its brief. Mr. Marek has corrected the volume number where the case can be found.

[29]But of course, just because something is a function of the Executive Branch, i.e., prison conditions, prison discipline, manner and method of execution, does not insulate those functions from compliance with the constitution, and in particularly with the Eighth Amendment, as the recent lethal injection litigation has clearly demonstrated.

circuit court and the State's belief is simply wrong.

Mr. Marek has a continuing interest in his life until his death sentence is carried out, as guaranteed by the Due Process clause of the Fourteenth Amendment to the United States Constitution. See Ohio Adult Parole Authority, et al. v. Woodard, 523 U.S. 272, 288 (1998)(Justices O'Connor, Souter, Ginsburg and Breyer concurring)("A prisoner under a death sentence remains a living person and consequently has an interest in his life"). This constitutionally-protected interest remains with him throughout the appellate processes, including during clemency proceedings:

> Judicial intervention might, for example, be warranted in the face of a scheme whereby a state official flipped a coin to determine whether to grant clemency, **or in a case where the State arbitrarily denied a prisoner any access to its clemency process.**

Woodard, 523 U.S. at 289 (emphasis added). Ohio Adult Parole Authority, et al. v. Woodard, makes crystal clear that judicial intervention was warranted in a case where a clemency system was arbitrary. The process used in Mr. Marek's case was nothing more than arbitrary, where Mr. Marek's counsel was not even invited to the coin flip.

Furthermore, in arguing against Mr. Marek's claim, the State relies on the fact that Mr. Marek received a clemency proceeding with appointed counsel in 1988 ("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.") (Answer Brief at 76). In relying on this observation, the State

ignores what the U.S. Supreme Court has said about the clemency process in a capital case: "Far from regarding clemency as a matter of mercy alone, we have called it 'the "fail safe" in our criminal justice system.'" Harbison v. Bell, Slip Op. at 12. The Court further explained that federal habeas counsel may develop in the course of his representation "the basis for a persuasive clemency application" which arises from the development of "extensive information about his [client's] life history and cognitive impairments that was not presented during his trial or appeals." Slip Op. at 13.[30]

In Mr. Marek's case, no investigation as to Mr. Marek's background was conducted by trial counsel.[31] Consequently, the process that occurred in 1988 before the life history was investigated and developed cannot be the "fail safe" that is envisioned by the United States Supreme Court.[32]

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[30]Contrary to the State's position, Mr. Marek has not "modified" the holding of Harbison, but rather quotes directly from the opinion to support his claim, something the State cannot do as Harbison is adverse to the State's position and the circuit court's finding.

[31]The only evidence presented by trial counsel at the penalty phase was from a detention officer who described Mr. Marek's good behavior in jail (R. 1297-99).

[32]Since Mr. Marek's 1988 clemency proceeding, extensive mitigation has been uncovered by postconviction counsel. This mitigation substantiates the fact that literally from birth, Mr. Marek's life was one of abandonment, abuse, and neglect. This pathetic story emerged from voluminous foster care records, from Mr. Marek's natural parents who abandoned and neglected him, from foster parents who failed to provide the stability required by a psychologically and organically damaged child, and from numerous psychological evaluations beginning when Mr. Marek was only nine years old.

Interestingly, the State does concede what Mr. Marek has been alleging all along, that the clemency process was conducted without Mr. Marek's counsel's knowledge or for that matter without Mr. Marek having a clemency attorney who could provide the information that may warrant a decision that the Governor should not proceed with Mr. Marek's execution (See Answer Brief at 76) ("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."). As Mr. Marek asserted in his initial brief, a one-sided process that relies upon the prosecutors who have been urging that a death sentence be carried out and who have repeatedly misrepresented the facts and the record and displayed either cavalier ignorance or malevolence towards Mr. Marek and his case, cannot operate as the "fail safe" that the United States Supreme Court explained in Harbison v. Bell, – U.S. – (April 1, 2009), was expected and required. Such a process means that executions will be carried out on a completely arbitrary and random basis. Relief is warranted.

ARGUMENT: ON AN *EX PARTE* BASIS THE STATE DRAFTED THE ORDER DENYING THE FIRST RULE 3.850 MOTION

In addressing Mr. Marek's claim that the State drafted the order denying Rule 3.851 relief in 1988, the State asserts that Mr. Marek's proof is insufficient and that even if the State did prepare the 1988 order[33], the State and/or Judge Kaplan had no responsibility to alert Mr. Marek's postconviction counsel of the

[33]Curiously, the State has never denied preparing the order before the circuit court or this Court.

due process violation.

As to the State's assertion that the claim was not sufficiently proved, Mr. Marek presented evidence to the circuit court that demonstrated: 1) Judge Kaplan had previously had the prevailing party prepare orders, including orders denying Rule 3.851 relief.[34] This was so until this Court held that such a practice violated due process and required reversal. See Rose v. State, 601 So. 2d 1181, 1183 (Fla. 1992). Rose was the change in the law to which Judge Kaplan referred in his testimony on May 6, 2009. Thus, the order denying Mr. Marek Rule 3.851 relief in 1988 was at the time when the judge permitted the practice of the prevailing party to prepare his order – in this case the State. 2) The postconviction prosecutor who prepared the ex parte orders denying Rule 3.851 in Rose and Smith v. State, 708 So. 2d 253 (Fla. 1998), was the same postconviction prosecutor involved in the Marek case. 3) While the State suggests that the fact that the type and the style of the order denying Rule 3.850 entered in November of 1988 was the same as the type and style of the response to the motion to vacate that had been prepared by the Rose/Smith/Marek prosecutor is insignificant, it is exactly these type of differences that have triggered inquiries and substantiated claims like Mr. Marek's. And, 4) no notice was provided to Mr. Marek's postconviction counsel.

In addition, Mr. Marek has previously proven that Judge

[34]Contrary to the circuit court's order, Judge Kaplan did not testify that the order in question "looked like his own work." See Order at 14.

Kaplan and the postconviction prosecutor have engaged in *ex parte* communications to have orders prepared in Mr. Marek's case. See PC-R. 416. An order was prepared *ex parte* by the State in Mr. Marek's case, just a month before the order at issue here. Id.

The circumstances present here are not coincidence. Rather, the circumstances here support only one conclusion – the State, through and *ex parte* communication prepared the 1988 order denying Rule 3.851 relief to Mr. Marek.

The State also contends, as it did in below, that the claim is procedurally barred. The State claims that it is neither the responsibility nor obligation of the State, or apparently the postconviction judge, to alert a capital defendant that the process denying him relief was unfair and violated due process.

However, this Court has long held that the State is obligated to disclose Brady material which is favorable to the defendant. See Johnson (Terrell) v. Butterworth, 713 So. 2d 985, 986 (Fla. 1998)(citations omitted); Roberts v. Butterworth, 668 So. 2d 580 (Fla. 1996)(finding that *Brady* obligation continues in postconviction).[35] Certainly, exculpatory information concerning a constitutional violation of the process is just as critical to a capital defendant, like Mr. Marek, as exculpatory information concerning the substance of a claim. If this were not the case, then, the State could attempt to subvert the process at every turn, hoping that the defendant did not learn of the violation until a point that the State could claim it was too late, and no

[35]The State fails to acknowledge or distinguish these cases.

consequences would ever be suffered by the State.

As the U.S. Supreme Court held in Banks v. Drehtke:

> Our decisions lend no support to the notion that defendants must scavenge for hints of undisclosed *Brady* material when the prosecution represents that all such material has been disclosed. As we observed in *Strickler*, defense counsel has no "procedural obligation to assert constitutional error on the basis of mere suspicion that some **prosecutorial misstep** may have occurred." 527 U.S. 263 at 286-287, 144 L. Ed. 2d 286, 119 S. Ct. 1936.

540 U.S. 668, 695-6 (2004)(emphasis added).

In Banks, the Supreme Court also stated: "A rule thus declaring "prosecutor may hide, defendant must seek," is not tenable in a system constitutionally bound to accord defendants **due process**." 540 U.S. at 696 (emphasis added). That is what occurred in Mr. Marek's case. The State after the decisions in Rose and in Smith knew that the ex parte procedure employed in Rose and Smith had been employed in Mr. Marek's case in violation of the due process, yet, the State failed to alert Mr. Marek of this constitutional violation. Relief is warranted.

ARGUMENT: OTHER CLAIMS

As to the State's remaining arguments, due to time constraints, Mr. Marek stands by the argument set forth in his initial brief.

CONCLUSION

Based upon the record and his arguments, Mr. Marek respectfully urges the Court to reverse the lower court, order a new trial and/or resentencing, order new proceedings on Mr. Marek's 1988 Rule 3.850 motion, and/or remand for an evidentiary hearing.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by US Mail delivery to Carolyn Snurkowski, Assistant Deputy Attorney General, Department of Legal Affairs, The Capitol PL01, Tallahassee, Florida 32399-1050 on June 26, 2009.

CERTIFICATE OF FONT

This brief is typed in Courier 12 point not proportionately spaced.

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