IN THE SUPREME COURT OF FLORIDA

JOHN MAREK

Appellant,

v.

STATE OF FLORIDA,

Appellee.

_____/

CASE NO. SC09-1454

CAPITAL CASE
Active Warrant - Wednesday, August 19, 2009, 6 p.m.

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 evidentiary hearing record will be "CH" followed by the appropriate volume and page number. References to Marek's initial brief will be to "IB" followed by the appropriate page number.

INTRODUCTION

On July 17, 2009, Governor Crist set a new the warrant week beginning at 12:00 noon on Friday, August 14, 2009, through 12:00 noon on Friday, August 21, 2009, with the execution set for Wednesday, August 19, 2009, at 6:00 p.m. At the present time no stays of execution exist.

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 both the conviction and imposition of the death penalty in 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. On October 12, 1988, he filed his state habeas corpus petition in the Florida Supreme Court urging sixteen (16) issues for review thirteen (13) of which paralleled his Rule 3.850 motion).

An evidentiary hearing was held November 3-4, 1988, by state trial court on Marek's motion for postconviction relief. The trial court denied the motion, and the Florida Supreme Court, denied Marek's state habeas and the appeal from the denial of his 3.850 motion, in Marek v. Dugger, 547 So.2d 109 (Fla. 1989).

Marek then filed his federal petition for writ of habeas corpus in the Southern District of Florida, asserting twenty-two (22) claims. Habeas corpus review 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. That court affirmed the denial of federal habeas corpus relief. Marek v. Singletary, 62 F.3d 1295 (11th Cir. 1995).

During the pendency of the Eleventh Circuit's appeal, Marek filed his second, successive state rule 3.850 on July 22, 1993, arguing six (6) claims.

On January 24, 1994, Marek filed a "supplemental motion," raising a seventh claim to his 1993 state motion. A new 2001 motion was filed by Marek included Claims II, III, IV, V, VI, VII and VIII which were practically verbatim to seven (7) claims raised by Marek in his 1993/1994 motion for postconviction relief. A supplemental response was filed April 2, 2002, and on September 30, 2003, the trial court denied all relief. Rehearing was subsequently denied on January 8, 2004. Following briefing by the parties, and the Florida Supreme Court in a one-page order denied all appellate review, Marek v. State, 940 So. 2d 427 (Fla. 2006), *cert. denied*, 550 U.S. 910 (2007).

On May 11, 2007, Marek filed another successive post-conviction motion asserting two claims, a challenge to Florida's method of execution and the newest 2006 ABA report. The trial court denied relief on April 23, 2009. Marek sought public records pursuant to Rule 3.852(h), and the court set a hearing to review any public records issues for 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, that 1.) his death sentence violated the Eighth Amendment, based on the State's use of inconsistent theories to convict; 2.) a Lackey v. Texas claim; and 3.) an argument that the pendency of Caperton v. Massey might impact his case. The trial court denied the motion on April 27, 2009.

Marek's May 1, 2009, fourth successive motion for post conviction relief raised the following: 1.) newly discovered evidence has come to light which demonstrates Marek's conviction and sentence are not constitutionally reliable, based upon the affidavits of inmates, Pet. p. 8-18; 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.

On May 4, 2009, Marek filed another 3.851 motion, adding a new inmate's name to a growing list of inmates' affidavits.

The state trial court held its second postconviction evidentiary hearing May 6-7, 2009, on these latest issues, and denied relief. However on May 21, 2009, the Florida Supreme Court on appeal, on an ancillary issue regarding a recusal issue, reversed and remanded for another, third evidentiary hearing. The case was reassigned to a new circuit judge and, on

June 1-2, 2009, after more names were "added to the names of inmates" uncovered by Marek's investigator, the third evidentiary hearing occurred.

Relief was again denied by the trial court and, the matter was returned to the Florida Supreme Court. This Court denied all relief and lifted the stay previously entered by the Court, on July 16, 2009, in Marek v. State, __ So. 3d __, 2009 WL 2045416 (Fla.), 34 Fla. L. Weekly S461 (Fla. 2009). The Court discussed "the newly discovered evidence in this case consists of statements Wigley made to other prisoners while he was serving a life sentence." Following detailed summaries of each inmate, the Court observed, Marek, at *5-7:

> Before proceeding with the analysis, we observe that even if we assume that the witnesses accurately recounted what Wigley had said to them, this newly discovered evidence is of minimal value because there is no reason to believe that Wigley was being truthful when he made the statements which lessened the culpability of Marek. Certain of Wigley's statements are vague statements ("I've killed before") that have no express connection with the murder of Ms. Simmons. Other statements which are connected with Simmons' death reveal specific details that Wigley would have known by virtue of his being present at the crime for which he was convicted (e.g., the victim was strangled). Furthermore, most of the witnesses considered Wigley's statements to have been boasting or otherwise self-interested, rather than unadulterated expressions of guilt. The testimony suggests that Wigley's acquaintances did not necessarily believe Wigley, and the evidence showed that Wigley's statements were either calculated to garner favor or were "tough talk" for prison as a means of self-protection, intimidation, or braggadocio. The testimony that Wigley was a small, "wimpy" man was uncontradicted, and several witnesses suggested that he may have made the claims for his own personal protection. Wigley made the statements in

situations in which he was being questioned about his sexual orientation and thus felt a need to brag, was arguing or talking to his lover, or was under the influence of alcohol or drugs. Even his statements to Conley-which contain the admission that Wigley strangled the victim-were made after he had denied killing the victim and feared that Conley would not help him obtain legal assistance to challenge his murder conviction. In addition, when speaking to Pearson, Wigley equivocated about whether he remembered strangling the victim. Given the inconsistencies in Wigley's statements and the strong inference that the statements constituted prison "tough talk" and were calculated by Wigley to obtain some advantage for himself, the probative value of the testimony recounting Wigley's statements is negligible.

As to the guilt phase of Marek's trial, the Court found "newly discovered evidence" from a variety of inmates, would not be admissible during the guilt phase and as a result "the evidence would not probably produce an acquittal on retrial"; and that the testimony was not within the "scope of this hearsay exception" (Statement Against Interest, §90.804(2)(c), Fla. Stat.).
Wigley's statements that he killed before or that he strangled the victim were not "so far contrary to the declarant's pecuniary or proprietary interest" that "a person in the declarant's position would not have made the statement unless he or she believed it to be true." § 90.804(2)(c), Fla. Stat. (2008). At the time of his statements to Conley, Bannerman, Pearson, and Blackwelder (as overheard by Mitchell and Green), Wigley was serving a life sentence for the first-degree murder of Simmons. He could not be retried for that crime as a result of confessing to being the person who actually strangled Simmons. In addition, this Court has held that where an inmate recants trial testimony many years after trial, he would not reasonably believe that he could be prosecuted for perjury. See Lightbourne v. State, 644 So.2d 54, 57 (Fla.1994). Finally, Wigley's statements would not have exposed him to civil liability for the intentional torts committed against Simmons. A civil suit must be brought within the applicable statute of limitations, which would be either two or four years, depending on the cause of action asserted. See § 95.11(3)(o), Fla. Stat. (1983) (establishing four-year statute of limitations for actions based on intentional torts); § 95.11(4)(d), Fla. Stat. (1983) (establishing two-year statute of limitations for

> wrongful death actions). Simmons was murdered in June 1983. Thus, Wigley's statement to Bannerman, made sometime after they encountered one another in Union Correctional Institution in 1987, likely occurred after the statue of limitations had run. Wigley's statements to Conley in the mid-1990s, his statements to Pearson, which occurred sometime in 1999 or 2000, and his statements to Blackwelder, which were overheard by Mitchell and Green no earlier than 1998, would not have exposed Wigley to civil liability because the statute of limitations had expired.

Marek, at * 8.

The Court rejected any claim that under Chambers, Marek made a showing that the testimony about Wigley's confessions to inmates was admissible because "due process requires the bending of the technical rules of evidence regarding confessions by third parties." "Marek has not shown that Wigley's statements were reliable. Accordingly, Marek has not demonstrated that testimony about Wigley's confession would be admissible in the guilt phase of a retrial." Marek, at * 9.

As to the penalty portion of Marek's trial, the Court found the inmates' testimony was not compelling. The Court held "in this case **we assume** that the due diligence prong was met" the admission of the six inmates' testimony would be admissible because the State had a fair opportunity to rebut the evidence. However, after reviewing whether the evidence would "probably yield a less severe sentence, citing, Kormondy v. State, 983 So. 2d 418, 437-38 (Fla. 2007), Marek, at *9-10, the Court held:

> We reach the same conclusion in this case. In affirming Marek's death sentence in light of Wigley's life sentence,

> we cited evidence and determined that Marek, "not Wigley, was the dominant actor in the criminal episode." Marek, 492 So.2d at 1058. Wigley's statements are not credible. They would have no effect on the previous determination that-without regard to the identity of the actual killer-Marek's death sentence is appropriate due to his dominant role in the entire criminal episode.
>
> Wigley's statements do not undermine Marek's convictions for first-degree murder, kidnapping, attempted burglary, and battery. Nor do they undermine the evidentiary basis for the three aggravating factors supporting the death sentence. They do not call into question the conclusion that Marek played the dominant role in this murder. When considered in context with the other evidence from Marek's guilt and penalty phases, Wigley's post-trial statements-which were made years after the crime and in circumstances which provide no indication of reliability-lack both weight and credibility. **Accordingly, we hold that their admission in the penalty phase would not probably result in a lesser sentence.**

Marek, at *11, (Emphasis added).

On July 17, 2009, Florida Governor Charlie Crist reset the warrant week, and Marek's execution was set for Wednesday, August 19, 2009, at 6:00 p.m.

On August 3, 2009, Marek filed another motion for postconviction relief asserting he had unearthed more "newly discovered evidence" to-wit: "another inmate, Lee Johnson DC#836857," incarcerated since 1982, who was housed at some point in the same institution as Wigley. Without specifying any particular time or what institution, Johnson's affidavit states that Wigley told him about his case. Marek now argues that this newest statement creates a "new likelihood that the jury would have accepted Mr. Marek's testimony as true that he did not

commit the murder." Following a case management hearing August 17, 2009, the trial court denied relief that same day.

On August 3, 2009, Marek through his collateral counsel, Mr. McClain, filed a "new application for executive clemency" with Governor Crist and the Executive Clemency Board. That request is currently pending.

On August 6, 2009, Marek filed a petition for writ of certiorari and motion for stay in the United States Supreme Court, raising two issues, the Florida Supreme Court's failure to apply the Strickland standard as modified by Taylor, Wiggins, and Rompilla; and the Florida Clemency process violates Furman. Each claim was addressed by the Florida Supreme Court's in Marek v. State, 8 So. 3d 1123 (Fla. 2009).

On August 10, 2009, Marek filed his successive petition for writ of habeas corpus with the District Court, raising two issues, the Florida Supreme Court's failure to apply the Strickland standard as modified by Taylor, Wiggins, and Rompilla; and the Florida Clemency process violates Furman. The new petition was dismissed without prejudice by the District court and the request for stay was denied on August 13, 2009. On Saturday, August 15, 2009, Marek filed a notice of appeal and a request for a certificate of appealability. **The District Court granted a Certificate of Appealability on Sunday, August 16, 2009.**

On Monday, August 17, 2009, Marek filed In the Eleventh Circuit Court of Appeals a request for stay of the execution in order to permit briefing and oral argument on the two issues raised. That request is pending. The State filed a Motion to Strike the Grant of a Certificate of Appealability, and Opposition to the request for stay of execution.

STATEMENT OF THE FACTS

The Florida Supreme Court affirmed Marek's conviction and sentence of death for the first degree murder of Adella Marie Simmons on direct appeal in Marek v. State, 492 So. 2d 1055, 1056-1058 (Fla. 1986), wherein the facts have been clearly set forth. The Florida Supreme Court found, "We find the record of appellant's trial is replete with evidence which justifies the conclusion that appellant committed premeditated murder." And found that as to Marek,

> **The evidence in this case clearly established that appellant, not Wigley, was the dominant actor in this criminal episode. Both appellant and the victim's traveling companion testified that appellant talked to the two women for approximately forty-five minutes after he stopped, purportedly to aid them. During most of this conversation, Wigley remained in the truck. When Wigley got out of the truck to join appellant, he remained silent. Appellant, not Wigley, persuaded the victim to get in the truck with the two men. That evidence was reinforced by the testimony of three witnesses who came into contact with the appellant and Wigley on the beach at approximately the time of the murder, which indicated that appellant appeared to be the more dominant of the two men. Finally, only appellant's fingerprint was found inside the observation deck where the body was discovered. This**

evidence, in our view, justifies a conclusion that appellant was the dominant participant in this crime.

(Emphasis added).

Other relevant facts may be found in the opinions of the Court and extensive briefing done in this case.

SUMMARY OF THE ARGUMENT

Marek is entitled to no relief based upon the newest affidavit by inmate Lee Johnson, who apparently spoke to Raymond Wigley regarding the murder of Adella Simmons. The Florida Supreme Court's opinion in Marek v. State, 2009 WL 2045416 (Fla. 2009), rejected similar inmate affidavits that Wigley told inmates with whom he was incarcerated that he killed the victim. The Court found that the previously submitted affidavits were not credible, but more importantly would not have impacted Marek's guilt or the sentence imposed, because as the trial court found, "Wigley's post-trial statement made to Lee Johnson years after the crime, would probably not result in a lesser sentence." August 17, 2009, Order Denying Defendant's Motion to Vacate Judgments of Conviction and Sentence With Special Request For leave to Amend Dated August 3, 2009.

ARGUMENT

ISSUE

THE TRIAL COURT DID NOT ERROR IN DENYING MAREK'S SUCCESSIVE POSTCONVICTION MOTION ASSERTING NEWLY DISCOVERED EVIDENCE BASED ON A NEW INMATE AFFIDAVIT REGARDING CODEFENDANT WIGLEY'S STATEMENT THAT HE KILLED ADELLA SIMMONS

Marek asserts he has unearthed more "newly discovered evidence" to-wit: "another inmate, Lee Johnson DC#836857," incarcerated since 1982, who was housed in the same institution as Wigley. Without specifying any particular time or what institution, Johnson's affidavit states that Wigley told him about his case. Purportedly Wigley told Johnson every time they spoke that Wigley's "fall partner" has

> "a death sentence for a crime he did not commit. Every time I spoke to Wigley he maintained that he was the person whol(sic) killed the victim in his case. In fact, Wigley seemed motivated to want to help his co-defendant and asked if I had any advice on what he could do."

Johnson observed how Wigley was concerned about whether he could receive the death penalty and whether he could be prosecuted for perjury. Johnson **did not explain** "what advice" he gave Wigley, but did tell Wigley not to worry about these matters. Wigley confided in Johnson that "he was worried that he did not waqnt (sic) to hurt his chance for parole."

Marek argued before the trial court that this newest statement creates a "new likelihood that the jury would have accepted" Mr. Marek's "testimony as true that he did not commit the murder." The trial court rejected this argument, finding Johnson's affidavit adds nothing additional or new to the previously rejected newly discovered evidence claim. See State v. Marek, Case No. 83-7088CF10B, decided August 17, 2009, wherein the trial court held, "Likewise, this Court finds that Wigley's statement as reported by Lee Johnson is hearsay, is inadmissible during the guilt phase, and would probably not produce an acquittal on retrial." (Order p. 2.)

As the trial court found, Wigley's statement to Johnson that he "killed the victim," is simply "more" hearsay. Marek has argued unsuccessfully that Wigley was the true murderer based on Wigley's statement to other inmates similar to Lee Johnson.[1]

[1] The previous trial judge, on September 30, 2003, denied all relief including an almost identical issue, finding it procedurally barred, holding:

> 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.

Marek has litigated the statements from other inmates with whom Wigley spoke in his last appeal in Marek v. State, __ So. 3d __, 2009 WL 2045416 (Fla.), 34 Fla. L. Weekly S461 (Fla. 2009). The Florida Supreme Court found that neither Marek's guilt phase nor his penalty phase would have been impacted by the inmate affidavits.

Marek's newest statement regarding co-defendant Wigley's involvement in Ms. Simmons' murder, while couched in terms of newly discovered evidence, is a regurgitation of Marek's last 3.851, when he paraded a number of inmates' testimony about Wigley's statement. As such the instant statement should be procedurally barred because Marek is attempting to reargue that Wigley was the murderer, the circumstances of which was decided on the merits. The record reflects at trial, and in previous post-conviction litigation, the reviewing courts have found that Marek was the dominant character and the murderer of Adella Simmons. Courts have emphasized that collateral estoppel precludes relitigation of issues[2] actually litigated in a prior

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The Florida Supreme Court denied all appellate review, Marek v. State, 940 So. 2d 427 (Fla. 2006), *cert. denied*, 550 U.S. 910 (2007).

[2] 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

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 (Fla. 1992).

Evidence was always available that could have been used to attack Wigley with regard to his participation and domination in this crime. 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. The Florida Supreme Court affirmed, finding the record replete with evidence justifying the conclusion Marek committed the murder. Marek, 492 So.2d at 1057. See Turner v. Dugger, 614 So. 2d 1075, 1078 (Fla. 1993); and Stein v. State, 995 So. 2d 329, 341-342 (Fla. 2008). Marek is attempting to argue, yet another "statement," to circumvent the ruling on the merits on direct appeal that Marek was guilty of Ms. Simmons' murder. Marek v. State, ___ So. 3d ___, 34 Fla. L. Weekly S461 (Fla. 2009); 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).

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issues must have been actually litigated. Goodman v. Aldrich & Ramsey Enters., Inc., 804 So. 2d 544, 546-47 (Fla. 2d DCA 2002).

Marek's claim satisfies all five factors.

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)).

In Marek's case, based on the newest, woefully lacking, affidavit of Lee Johnson, it is not known when, where or how the "newly discovered information" occurred. See Buenoano v. State, 708 So.2d 941, 950-51 (Fla. 1998); Jones v. State, 591 So.2d 911, 916 (Fla. 1991); Ventura v. State, 794 So.2d 553, 570-71 (Fla. 2001); Groover v. State, 703 So.2d 1035, 1037 (Fla. 1997); Johnson v. State, 696 So.2d 317, 326 (Fla. 1997).

This newest declaration does not meet the definition of newly discovered evidence and, any impact it would have had on the trial is known, because the Florida Supreme Court on July 16, 2009, so held. Johnson's statement is nothing more than a poorer version of inmates Bannerman's or Pearson's statements about Wigley's conversations with them. The Florida Supreme Court rejected each when it provided that, Marek, at *7,

> "...even if we assume that the witnesses accurately recounted what Wigley had said to them, this newly discovered evidence is of minimal value because there is no reason to believe Wigley was being truthful when he made the statements which lessened the culpability of Marek."

The Florida Supreme Court has already concluded in Marek, at *8, that there is no probability Marek would have received a life sentence. See also Van Poyck v. State, 961 So. 2d 220, 224-229 (Fla. 2007).

Moreover in order to determine the viability of Johnson's declaration, it would seem only logical that Marek would present a valid legal theory as to admissibility. What he now has done through the affidavit of Lee Johnson, is suggest that Wigley's remarks to Johnson were "statements against interest." This Court has found in Marek, 2009 WL 2045416 at *8, that there is no likelihood Wigley's intent in making these statements was credible.[3]

> Marek fails to show that Wigley's statements were within the scope of this hearsay exception.
>
> Wigley's statements that he killed before or that he strangled the victim were not "so far contrary to the declarant's pecuniary or proprietary interest" that "a person in the declarant's position would not have made the statement unless he or she believed it to be true." § 90.804(2)(c), Fla. Stat. (2008). At the

[3] Simply because Marek's newest find-- Lee Johnson's affidavit-- conveniently makes a statement regarding Wigley's concerns for his welfare does not overcome the Court's previous credibility findings that Wigley's statements were not statements against interest.

> time of his statements to Conley, Bannerman, Pearson, and Blackwelder (as overheard by Mitchell and Green), Wigley was serving a life sentence for the first-degree murder of Simmons. He could not be retried for that crime as a result of confessing to being the person who actually strangled Simmons. In addition, this Court has held that where an inmate recants trial testimony many years after trial, he would not reasonably believe that he could be prosecuted for perjury. See Lightbourne v. State, 644 So.2d 54, 57 (Fla.1994). Finally, Wigley's statements would not have exposed him to civil liability for the intentional torts committed against Simmons. A civil suit must be brought within the applicable statute of limitations, which would be either two or four years, depending on the cause of action asserted. See § 95.11(3)(o), Fla. Stat. (1983) (establishing four-year statute of limitations for actions based on intentional torts); § 95.11(4)(d), Fla. Stat. (1983) (establishing two-year statute of limitations for wrongful death actions). Simmons was murdered in June 1983. Thus, Wigley's statement to Bannerman, made sometime after they encountered one another in Union Correctional Institution in 1987, likely occurred after the statute of limitations had run. Wigley's statements to Conley in the mid-1990s, his statements to Pearson, which occurred sometime in 1999 or 2000, and his statements to Blackwelder, which were overheard by Mitchell and Green no earlier than 1998, would not have exposed Wigley to civil liability because the statute of limitations had expired.

Marek, 2009 WL 2045416 at *8

Terminally, the evidence showed that, first, 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. Second, 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. Third, as the Florida Supreme Court noted recently, Marek, 2009 WL 2045416 at *8, the "... court correctly determined that this evidence (inmate statements) would not be admissible during the guilt phase" and would not probably produce an acquittal." Taylor v. State, 3 So.3d 986 (Fla. 2009). In Taylor, the court further noted: "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.'"

While not unmindful that Johnson's affidavit would never come in at the guilt phase of Marek's trial, its value at the penalty phase is gauged by whether the "newly discovered evidence" is of such a nature that it would probably produce a life sentence recommendation. In this case the answer is no. The Florida Supreme Court in Marek, 2009 WL 2045416 at *9-11, held:

> "...because in this case **we assume** that the due diligence prong was met, Wigley's statements to the six witnesses would be admissible in a new penalty phase only if the State would have a fair opportunity to rebut the evidence. As explained below, the State has ample, admissible rebuttal evidence; thus, Wigley's statements would be admissible."

(Emphasis added).

And further noted that the inmates' statements would not change the facts or the outcome, Marek, 2009 WL 2045416 at *10-12:

When considered in context, the newly discovered evidence does not significantly undermine the evidence of Marek's dominant role in the crime. Marek was charged in the alternative with premeditated and felony first-degree murder, and in opening and closing arguments, the State's theory of prosecution was explained to the jury in the alternative as well. That is, either Marek killed Simmons, or Wigley killed her and Marek was a principal to the premeditated murder or a participant in the felony murder. Based on the evidence we recited above, the jury found him guilty of first-degree murder. Other than the jail deputy's testimony that Marek was a well-behaved prisoner, no other testimony or evidence was adduced in the penalty phase. Accordingly, in finding Marek guilty and in recommending a sentence of death (by a vote of ten to two), the jury clearly did not believe Marek's trial testimony that he slept through the entire criminal episode and never saw the victim even as he walked around for a quarter of an hour inside the small lifeguard shack where the body of Adella Simmons lay.

* * *

Although this Court has previously held that a codefendant's life sentence precluded a death sentence for the other defendant, we have held otherwise when the codefendant sentenced to death is found to be the dominating force in the crime. See Stein v. State, 995 So.2d 329, 341 (Fla. 2008) ("However, the triggerman has not been found to be the more culpable where the non-triggerman codefendant is 'the dominating force' behind the murder."). In Henyard v. State, 992 So.2d 120 (Fla. 2008), for example, the defendant brought a similar claim to this Court, relying on newly discovered evidence that while his codefendant awaited trial, another inmate overheard him brag that he was a "killa." Henyard and his codefendant kidnapped a woman and her two children from a parking lot, raped and shot the woman, and killed the two children. This Court held that even assuming the statement was admissible as newly discovered evidence, the admission of this statement would not probably yield a lesser sentence. Id. at 126. We found that the State's case at trial "relied on [Henyard's] dominant role in the entire criminal episode and unrefuted evidence of his close proximity to the child victims at the time of

> their deaths." Id. The identity of the actual killer was unimportant in light of "Henyard's substantial culpability." Id.
>
> We reach the same conclusion in this case. In affirming Marek's death sentence in light of Wigley's life sentence, we cited evidence and determined that Marek, "not Wigley, was the dominant actor in the criminal episode." Marek, 492 So.2d at 1058. Wigley's statements are not credible. They would have no effect on the previous determination that-without regard to the identity of the actual killer-Marek's death sentence is appropriate due to his dominant role in the entire criminal episode.
>
> Wigley's statements do not undermine Marek's convictions for first-degree murder, kidnapping, attempted burglary, and battery. Nor do they undermine the evidentiary basis for the three aggravating factors supporting the death sentence. They do not call into question the conclusion that Marek played the dominant role in this murder. When considered in context with the other evidence from Marek's guilt and penalty phases, Wigley's post-trial statements-which were made years after the crime and in circumstances which provide no indication of reliability-lack both weight and credibility. Accordingly, we hold that their admission in the penalty phase would not probably result in a lesser sentence.

Ultimately the trial court found that "the Defendant's motion, the files and records in this case conclusively show that the Defendant is entitled to no relief. Therefore, this Court declines to set an evidentiary hearing. This Court finds that this claim has been raised previously, discussed at great length, and thoroughly considered through numerous years of litigation. This court finds the Defendant's claim to be without merit." See Walton v. State, 3 So. 3d 1000, 1005-07

(Fla. 2009) and Henyard v. State, 992 So. 2d 120, 125-126 (Fla. 2008), wherein the court held:

> When determining whether an evidentiary hearing is required on a successive rule 3.851 motion, the court may look at the entire record. "If the motion, files and records in the case conclusively *126 show that the movant is entitled to no relief, the motion may be denied without an evidentiary hearing." Fla. R.Crim. P. 3.851(f)(5)(B).

The trial court properly summarily rejected Marek's latest motion for postconviction relief.

CONCLUSION

Based on the foregoing, all relief should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail and via e-mail to Martin McClain, Esq., McClain & McDermott, P.A., 141 N.E. 30th Street, Wilton Manors. Florida 33334-1064; martymcclain@earthlink.net, this 18th day of August, 2009.

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CAROLYN M. SNURKOWSKI
Assistant Deputy Attorney General

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.

_____
CAROLYN M. SNURKOWSKI
Assistant Deputy Attorney General