IN THE SUPREME COURT OF FLORIDA

CASE NO. SC09-____

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

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This proceeding involves the appeal of the circuit court's summary denial of post-conviction relief. The following symbols will be used to designate references to the record in this appeal:

"R." -- record on direct appeal;

"1PC-R." -- record on first Rule 3.850 appeal;

"1PC-T." -- hearing transcripts on prior Rule 3.850 appeal;

"2PC-R." -- record on second 3.851 appeal;

"2PC-T." -- hearing transcripts on instant Rule 3.850 appeal;

"Supp. 2PC-R." -- supplemental record on instant 3.850 appeal;

"3PC-R." -- record on instant 3.851 appeal;

"WR." -- record from the trial of Wigley, Mr. Marek's co-defendant.

REQUEST FOR ORAL ARGUMENT

Mr. Marek has been sentenced to death. The resolution of the issues involved in this action will therefore determine whether he lives or dies. This Court has not hesitated to allow oral argument in other capital cases in a similar procedural posture. Lightbourne v. State, 742 So. 2d 238 (Fla. 1999); Mills v. Moore, 786 So. 2d 532 (Fla. 2001) Swafford v. State, 828 So. 2d 966 (Fla. 2002); Roberts v. State, 840 So. 2d 962 (Fla. 2002); Wright v. State, 857 So. 2d 861 (Fla. 2003). A full opportunity to air the issues through oral argument would be more than appropriate in this case, given the seriousness of the claims involved and the stakes at issue. Mr. Marek, through counsel, accordingly urges that the Court permit oral argument.

STATEMENT OF THE CASE AND FACTS[1]

On July 6, 1983, Mr. Marek and his co-defendant, Raymond Wigley, were charged by indictment in the Circuit Court of the Seventeenth Judicial Circuit, Broward County, Florida, with first degree murder, kidnapping, burglary, and two counts of sexual battery. Wigley was tried first, was found guilty as charged on all counts, and was sentenced to life imprisonment.

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[1]Mr. Marek's death warrant was signed on April 20, 2009, without any notice to undersigned counsel while a Rule 3.851 motion was pending in circuit court. This Court then directed the circuit court to resolve all issues by April 27th and directed undersigned counsel to submit an initial brief by noon on April 29th.

Undersigned counsel represents Mr. Marek as his registry counsel. Counsel is a member of a two person law firm. He does not have the resources that the CCRC offices possess. He is not handling Mr. Marek's case as a Special Assistant CCRC as he did during Mr. Tompkins' recent death warrant litigation. Undersigned counsel has been doing capital collateral litigation for many years and has represented a number of individuals with an execution date pending. In his over 20 years of experience doing this in Florida, he does not recall an instance wherein while Rule 3.851 and Rule 3.852 proceedings were occurring in circuit court, he was required to file an initial brief in this Court within 9 days of the signing of the warrant. This schedule can only assure that undersigned counsel is unable to professionally and adequately represent Mr. Marek. It means that the brief that he submits and the preparation of any other pleadings and the pursuit of any additional investigation in light of the disclosure of new public records will be of inferior quality and thus less likely to produce a positive result for Mr. Marek. In order to meet this Court's arbitrary deadline, counsel has had to stop reviewing and investigating the public records disclosed less than 48 hours ago. This Court's action in setting the briefing schedule in the fashion that it did and in burdening a two person law firm with a schedule that has not been imposed on the CCRC offices which are much better equipped to handle such a burden certainly constitutes another arbitrary aspect of Florida's capital sentencing scheme.

At Wigley's trial in early May of 1984, the prosecutor maintained that Wigley was equally or even more culpable than Mr. Marek:

> 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).

After convicting Wigley of first degree murder, his jury returned a life recommendation which the judge followed. Wigley received a life sentence. During Wigley's sentencing hearing, the prosecutor complained that "[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). Of course, because Wigley received a life sentence, the court record was not before this Court at the time of Mr. Marek's direct appeal and this Court and Mr. Marek's direct appeal attorney would have been unaware of the different position the State took at Wigley's trial.

Mr. Marek's trial began shortly thereafter on May 22, 1984, also before Judge Kaplan. At Mr. Marek's trial, the prosecutor took a different position than the one taken at the Wigley trial. Contrary to his position in Wigley's trial, the prosecutor now asserted that Mr. Marek was the leader and dominant actor. During his opening statement, the prosecutor stated:

> 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).

* * *

> 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.

(R. 430)(emphasis added).

Subsequently, during his 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).[2]

During his closing argument at the 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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[2]In Mr. Marek's trial, the prosecutor neglected to mention, as he did in Wigley's trial, that Mr. Marek was doing the talking through a pre-arranged agreement.

In the presentation of evidence, the prosecutor molded the testimony of his witnesses at Mr. Marek's trial in a very different way than he had at Wigley's trial. For example, during Wigley's trial, Dennis Satink testified that while Wigley appeared to have been drinking the most (WR. 603), he was cognizant of what was going on (WR. 604). Further, Satink testified that Wigley showed no fear of Marek (WR. 608-09). And, Satink testified that he did in fact have some conversations with Wigley (WR. 627). But at Mr. Marek's trial, Satink's testimony portrayed a much different scenario. In this version, Wigley was so intoxicated that he was unable to stand without support, he was staggering, and his speech was slurred (R. 672-73). In this version, whenever Wigley tried to speak, Marek interrupted and stopped him from talking (R. 670-71). And in this version, Satink stated that Marek was the more dominant of the two (R. 671).

Additionally, it is clear that the prosecutor manipulated the testimony of Jean Track 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.
>
> 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). From this testimony, the prosecutor emphasized to the jury that it was Wigley who frightened Jean Trach:

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

On June 1, 1984, after lengthy deliberations the jury found Mr. Marek guilty of first degree murder (on a felony murder

theory), kidnapping, attempted burglary with an assault (a lesser included offense), and two counts of battery (lesser included offenses of sexual battery). The penalty phase was conducted on June 5, 1984. When Mr. Marek's counsel said he intended to tell the jury about Wigley's life sentence, Judge Kaplan said if counsel did so, he would allow the State to introduce Wigley's self-serving confession in which he tried to shift culpability to Mr. Marek, without providing an opportunity to confront and/or cross-examine (R. 1283).[3] At the same time, Judge Kaplan would not allow the defense to introduce Dr. Seth Krieger's psychological report as mitigating evidence on the grounds that it was hearsay (R. 1283). Trial counsel presented one mitigation witness, a detention officer who described Mr. Marek's good behavior in jail(R. 1297-99). By a 10-2 vote, the jury recommended death.

On July 3, 1984, Judge Kaplan imposed death, finding no mitigating circumstances and four aggravating ones.[4] Mr. Marek unsuccessfully appealed to this Court. Marek v. State, 492 So. 2d 1055 (Fla. 1986).

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[3]Yet in his sentencing order, Judge Kaplan found that Mr. Marek and Wigley "acted in concert from beginning to end" (R. 1471).

[4]These were: (1) prior violent felony based upon Mr. Marek's contemporaneous conviction of kidnapping; (2) murder committed while engaged in burglary; (3) murder committed for pecuniary gain; (4) heinous, atrocious or cruel (R. 1472).

On October 10, 1988 while a death warrant was pending, Mr. Marek filed a motion under Rule 3.850, Fla. R. Crim. P. The motion presented twenty-two claims, including, *inter alia*, trial counsel failed to investigate and present mitigating evidence (Claims V, VI), the defense mental health expert provided inadequate assistance (Claim II), the jury's death recommendation was tainted by invalid aggravators (Claims XI, XII, XIII, XIV), the death sentence rests upon an unconstitutional automatic aggravating circumstance (Claim XX), the jury's sense of responsibility for sentencing was diluted (Claim XVII), and the jury was prevented from considering the co-defendant's life sentence and a mental health evaluation of Mr. Marek as mitigation (Claim IX)(1PC-R. 1-118).

On October 31, 1988, Mr. Marek filed a Motion to Disqualify Judge Kaplan (1PC-R. 250). The motion relied upon a letter dated June 24, 1987, from Judge Kaplan to the Florida Parole and Probation Commission. In the letter Judge Kaplan stated his opinions that Mr. Marek was "unfit to live in our society," was "capable of killing again and should not be released or given any leniency," and "enjoyed every minute of abuse that he inflicted upon [the victim], including raping her repeatedly, burning her, kicking her, beating her and strangling her" (1PC-R. 255). This latter representation was made in disregard of the fact that the jury had acquitted Mr. Marek of the two counts of sexual battery,

convicting him of the lesser included offense of battery (R. 1441-42). Judge Kaplan denied the Motion to Disqualify alternatively as "untimely and legally insufficient on its face" (1PC-R. 260).

An evidentiary hearing was conducted on November 3 and 4, 1988, days before Mr. Marek's scheduled execution. Mr. Marek presented numerous witnesses and documents regarding his claim that trial counsel provided ineffective assistance in failing to investigate and present evidence of mitigation and regarding his claim that the trial mental health expert curtailed his evaluation of Mr. Marek and thus the cost of that evaluation in order to assure future court appointments. Mr. Marek also contended that allowing the jury to consider the prior violent felony aggravator and Judge Kaplan's finding of that aggravator were legally erroneous because the aggravator relied upon Mr. Marek's contemporaneous conviction for kidnapping.

In his order denying post conviction relief, Judge Kaplan made both oral and written factual findings regarding Mr. Marek's claims of penalty phase ineffective assistance of counsel and inadequate mental health evaluation (1PC-R. 262-64; 1PC-T. 487-88). Judge Kaplan stated: "This Court finds however that MAREK was uninterested in calling family members and in fact indicated to defense counsel that the whereabouts of his relatives were unknown and that any testimony they would give would be negative"

(1PC-R. 263-64). Judge Kaplan further indicated that even if defense counsel had investigated and "contacted these family members or obtained school records and welfare records from Texas, the exposure of this information to the jury would have served as a double-edged sword in that both positive and negative information would have come before the jury" (1PC-R. 264). Judge Kaplan did agree that the prior violent felony aggravator had to be struck, but found the erroneous consideration of the aggravator was harmless error (1PC-R. 266).

Mr. Marek appealed. Regarding ineffective assistance of counsel, this Court deferred to Judge Kaplan: "As to Marek's claim of counsel's ineffectiveness in his rule 3.850 petition, we find the dictates of Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984), were properly applied." Marek v. Dugger, 547 So. 2d 109 (Fla. 1989). Without any discussion, this Court affirmed Judge Kaplan's decision to strike the prior violent felony aggravating circumstance and hold the previous consideration of the aggravator harmless. Without discussion, this Court affirmed Mr. Marek's Argument XIX, in which Mr. Marek challenged Judge Kaplan's denial of the motion to disqualify. Id. The Court also denied Mr. Marek's state habeas corpus petition. Id.

In 1989, Mr. Marek filed a federal petition for a writ of habeas corpus. The district court denied relief, and Mr. Marek

appealed. On August 14, 1995, the Eleventh Circuit affirmed. Marek v. Singletary, 62 F.3d 1295 (11th Cir. 1995).

While his Eleventh Circuit appeal was pending, Mr. Marek discovered new information and filed a second Rule 3.850 motion on July 22, 1993 (Supp. 2PC-R. 1-98). Mr. Marek's counsel had learned that the Broward County scheme of budgeting for the costs of administering the courts and for the costs of special public defenders created a judicial interest in denying funds for a criminal defendant. On February 23, 1993, Broward County Circuit Court Judge Tyson revealed that "the funds that [the Broward] County Commission gives the judiciary is for administrative purposes and also to cover the special public defenders that have been appointed and the costs" (State v. Correia, 17th Judicial Circuit, Case No. 92-27313CF, Hearing Transcript at 2).

Mr. Marek's Rule 3.850 motion alleged that this competition for funds between the judiciary and court-appointed counsel gave Judge Kaplan a stake in opposing legitimate and necessary costs and in the resolution of the adequacy of trial counsel's representation, and that this interest in the outcome was previously unknown to Mr. Marek or his collateral counsel (Supp. 2PC-R. 1-2, 4, 5-12). The motion re-presented claims from the first Rule 3.850 motion because the prior "proceedings were tainted" by the judicial interest in the outcome (Supp. 2PC-R. 1). The motion noted that in the prior proceedings, "Mr. Marek

challenged the adequacy of the [trial] mental health evaluation and the adequacy of his [trial] representation. Evidence was presented that investigation and mental health testing were not conducted in order to save taxpayers money and insure future court appointments" (Supp. 2PC-R. 4).[5]

Simultaneously with the filing of his second Rule 3.850 motion, Mr. Marek filed a Motion to Disqualify Judge Kaplan. This motion relied upon new information "which, in conjunction with the materials included in the original Motion to Disqualify [filed in 1988], further establishes that Mr. Marek cannot receive a fair and impartial hearing before Judge Kaplan" (Supp. 2PC-R. 100-01). The information came from a March 31, 1993, segment of the CBS television show "48 Hours" which included an interview with Judge Kaplan in which he explained that his job in dealing with criminal defendants was "to get rid of these people . . . and keep them off the streets as long as possible so that you and I can be rid of them" (Supp. 2PC-R. 101-02). His policy

[5]In support of this claim, the 1993 motion recited facts from the 1988 evidentiary hearing. In 1988, trial counsel, Hilliard Moldof, had testified that mitigation investigation was not conducted at least in part because of a shortage of time and money. Counsel testified that to investigate he "would have had to request the Court to appoint an investigator for a very oblique reason. I couldn't have given any real reason for it" (1PC-T. 318). In 1988, the appointed mental health expert, Dr. Seth Krieger, had testified: "One of the reasons that I had so much court appointed work was because . . . I was a county taxpayer and I wasn't going to run up a bill if there wasn't something to be gotten from it" (1PC-T. 281).

was "you've got to fight fire with fire" (Supp. 2PC-R. 102). Prosecutors who were interviewed said they were "excited" when they were assigned cases in front of Judge Kaplan because, as Judge Kaplan explained, "Sometimes you give them a little stiffer sentence so they'll spend some more real time in jail" (Supp. 2PC-R. 102). When a criminal defendant appeared before him, Judge Kaplan said, "I'm always looking at a negative approach, somebody's trying to con me" (Supp. 2PC-R. 122).

Judge Kaplan did not rule on Mr. Marek's Motion to Disqualify, and Mr. Marek supplemented it numerous times. On December 2, 1993, Mr. Marek's first supplement alleged that an essentially identical disqualification motion had been filed in State v. Lewis, that Judge Kaplan had recused himself in Lewis, and that the new judge had denied the State's motion to quash Mr. Lewis's subpoena to depose Judge Kaplan (2PC-R. 3-6). On February 9, 1994, Mr. Marek filed a Second Supplement to the Motion to Disqualify. On July 1, 1994, Mr. Marek's Third Supplement alleged that on June 23, 1994, Judge Kaplan revealed that he had sought representation from the Office of the Attorney General because of the efforts to depose him in Lewis and that the Office of the Attorney General had been and still was representing Mr. Marek's party opponent (2PC-R. 62-68). On September 2, 1994, Mr. Marek's Fourth Supplement alleged that Judge Kaplan had been represented by the Office of the Attorney

General in Moore v. Kaplan, 640 So. 2d 199 (Fla. 4th DCA 1994)(2PC-R. 118-21). On September 14, 1995, Mr. Marek's Fifth Supplement alleged that the log from this Court's Clerk's Office indicated *ex parte* communication between Judge Kaplan and the State(2PC-R. 122-30).[6] On March 19, 1996, Mr. Marek alleged that Judge Kaplan had failed to immediately rule on the motion to disqualify as required by Rule 2.160, Fla. R. Jud. Admin.(2PC-R. 142-44).

On March 26, 1996, the State finally filed a response to Mr. Marek's 1993 Motion to Disqualify and its first five supplements (2PC-R. 147-61). Immediately thereafter on March 28, 1996, Judge Kaplan denied the Motion to Disqualify as "legally insufficient" (2PC-R. 240). Mr. Marek's counsel received both the State's response and Judge Kaplan's order on April 2, 1996 (2PC-R. 243).

On April 12, 1996, Mr. Marek filed a "Sixth" Supplement to his Motion to Disqualify (2PC-R. 242-47). Mr. Marek filed an Amended Sixth Supplement on May 7, 1996 (2PC-R. 277-83). This supplement pointed out that Mr. Marek's counsel had received the State's response and Judge Kaplan's order on April 2, 1996, and therefore had no opportunity to reply. The supplement contended that this procedure established *ex parte* communication between the State and judge had occurred. The supplement also included

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[6]This supplement was erroneously captioned "Third Supplement." The succeeding supplements were also mis-captioned.

the reference to Judge Kaplan's decision to disqualify himself from collateral proceedings in State v. Thompson, 17th Judicial Circuit, Case No. 85-899CFA, based upon his friendship with Mr. Thompson's trial counsel, Roy Black. Mr. Marek's supplement observed that Judge Kaplan also had a friendship with Mr. Marek's trial counsel, Hilliard Moldof, and that Mr. Marek's collateral counsel had no way to monitor the friendship or communications between Judge Kaplan and Mr. Marek's trial counsel.

On April 17, 1996, the State responded to Mr. Marek's March 19, 1996, supplement (2PC-R. 267-68). On April 22, 1996, Judge Kaplan denied that supplement as "legally insufficient" (2PC-R. 271). On April 23, 1996, the State responded to Mr. Marek's "Sixth" Supplement (2PC-R. 272-76). On May 9, 1996, and May 16, 1996, Judge Kaplan denied the "Sixth" Supplement and Amended Sixth Supplement as "legally insufficient" (2PC-R. 286, 287).

On June 3, 1996, Judge Kaplan ordered the State to respond to Mr. Marek's Rule 3.850 motion by September 6, 1996 (2PC-R. 290). On August 29, 1996, the State requested a 90-day extension of time for filing its response, and the motion was granted (2PC-R. 291-93, 438).

On August 21, 1996, Judge Kaplan was deposed in State v. Lewis (2PC-R. 441). On August 30, 1996 (nine days later), Mr. Marek filed an Amended Motion to Vacate containing nine claims (2PC-R. 313-437). In addition to the six claims pled in the Rule

3.850 motion filed in July of 1993 and the one claim pled in a supplement filed in January of 1994 (2PC-R. 19), the amended motion alleged that Judge Kaplan's bias had tainted the trial and collateral proceedings (Claim IX, 2PC-R. 423-35),[7] and newly discovered evidence regarding Wigley (Claim VIII, 2PC-R. 417-23).

Also on August 30, 1996, Mr. Marek filed a motion to depose Judge Kaplan (2PC-R. 294-306). The motion relied upon the recently-conducted deposition in Lewis and upon State v. Lewis, 656 So. 2d 1248 (Fla. 1995)(2PC-R. 294). The motion stated, "Mr. Marek's counsel is seeking to depose Judge Kaplan regarding Judge Kaplan's animosity towards Mr. Marek, inappropriate remarks made while being interviewed on a television news program, and the conflict of interest issue based on the funding methods of the Seventeenth Judicial Circuit" and noted that these were precisely the reasons the deposition was allowed in Lewis (2PC-R. 294-95). The motion pointed out that Mr. Marek had moved to disqualify Judge Kaplan because of these matters and argued that Judge Kaplan "likely possesses additional information that may provide a basis for claims for relief" (2PC-R. 295-96).[8]

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[7]This claim relied in part upon Judge Kaplan's Lewis deposition, which had not yet been transcribed (2PC-R. 426). The transcript was filed on October 3, 1996 (2PC-R. 440-532).

[8]The motion stated that Claim I of Mr. Marek's pending Rule 3.850 motion raised the conflict of interest issue arising from the funding methods (2PC-R. 296-301). Claim I noted that new information regarding the court funding matter was particularly pertinent to testimony presented in Mr. Marek's initial post-

On August 30, 1996, Mr. Marek also filed another motion to disqualify Judge Kaplan (2PC-R. 307-12). In addition to the allegations presented in his previous motion to disqualify and its supplements, Mr. Marek relied upon Judge Kaplan's deposition testimony in which Judge Kaplan revealed his biases in sentencing convicted defendants and his skepticism about pleas for mercy (2PC-R. 308). Based upon Judge Kaplan's sworn testimony, "Mr. Marek faced a judge who was biased against him throughout the penalty phase of his trial and during the pendency of his collateral proceedings" (2PC-R. 308).

The State did not respond to the amended Rule 3.850 motion, the motion to depose Judge Kaplan, or to the motion to disqualify Judge Kaplan. On September 20, 1996, Judge Kaplan denied the motion to disqualify as "legally insufficient" (Supp. 2PC-R. 133). On December 2, 1996, the State requested and received another 90-day extension of time to file a response to Mr. Marek's Rule 3.850 motion (2PC-R. 147-49, 150).

On December 19, 1996, Mr. Marek filed another supplemental motion to disqualify, this time based upon *ex parte* contact

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conviction proceedings: trial counsel had testified that he limited his investigation of mitigation in part due to concerns about obtaining the necessary funding, and the trial mental health expert testified that he received court-appointed work because he was known as someone who "wasn't going to run up a bill" (2PC-R. 298-99). Mr. Marek argued that the new information necessitated deposing Judge Kaplan because he "possesses critical facts" and "[n]o one but Judge Kaplan possesses these facts" (2PC-R. 302).

between the judge and the State (Supp. 2PC-R. 151-55). On January 15, 1997, Judge Kaplan issued an order finding the motion "legally insufficient" but granting a recusal on the basis of his friendship with Mr. Marek's trial counsel (Supp. 2PC-R. 156-57).

On December 2, 1996, Mr. Marek had filed a Supplemental Motion to Vacate raising a public records claim (Supp. 2PC-R. 139-46). On March 7, 1997, Mr. Marek filed a Motion to Compel public records compliance (Supp. 2PC-R. 162-64). On March 5, 1997, the State requested that the order requiring it to respond to the Rule 3.850 motion be held in abeyance because Mr. Marek should be permitted to amend the motion once the public records litigation was completed (Supp. 2PC-R. 158-61). The court granted the State's motion (Supp. 2PC-R. 169-70).[9]

On November 22, 1999, the court heard argument on Mr. Marek's motion to depose Judge Kaplan (2PC-T. 37-45). The State opposed the motion, arguing that Mr. Marek's counsel "has set forth no reason whatsoever to depose Judge Kaplan" (2PC-T. 38). The State argued that Mr. Marek was not entitled to explore Judge

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[9]Mr. Marek filed additional motions to compel (Supp. 2PC-R. 176-262 [filed 2/17/98]; Supp. 2PC-R. 333-419 [filed 7/21/99]; 2PC-R. 633-38 [filed 10/12/00]; 2PC-R. 692-95 [filed 4/9/01]). From 1996 into 2001, Mr. Marek litigated public records issues (See 2PC-R. 533-670, 671-95, 700-01; Supp. 2PC-R. 162-64, 171-73, 176-302, 327-464, 465-67, 553-63, 569-78; 2PC-T. Vols. 1, 2). During these proceedings, evidentiary development occurred regarding compliance with public records laws. After this litigation concluded, the court ordered Mr. Marek to amend his Rule 3.850 motion by September 28, 2001 (2PC-T. 66).

Kaplan's animosity toward Mr. Marek because "that is a personal feeling of the Court which is not subject to go into a deposition," that Judge Kaplan had already been deposed in Lewis regarding his CBS interview, that the CBS interview was not relevant or material because Judge Kaplan had not mentioned Mr. Marek by name in the interview, and that the issue regarding the funding of special public defenders was moot in light of Rose v. State, 675 So. 2d 567 (Fla. 1996), and Rivera v. State, 717 So. 2d 477 (Fla. 1998)(2PC-T. 39-40). Mr. Marek's counsel argued that Lewis supported the motion to depose Judge Kaplan, that the Lewis deposition was specific to Mr. Lewis' case and that the Lewis deposition did "not cover and embrace what I would ask regarding Mr. Marek" (2PC-T. 41). The court reserved ruling and directed Mr. Marek's counsel to "show me some reason to redepose a judicial officer again, he's already been deposed on the same exact issues that were raised" (2PC-T. 44).

On February 10, 2000, Mr. Marek filed an Amended Motion To Permit Discovery, renewing his request to depose Judge Kaplan (Supp. 2PC-R. 468-87). The motion argued that the deposition should be permitted because the Lewis deposition did not cover matters specific to Mr. Marek's case such as Judge Kaplan's 1987 letter to the Parole Commission and his knowledge of how the funding issue affected Mr. Marek's case (Supp. 2PC-R. 469-70).

After another hearing on the motion to depose, the court

ordered the parties to file memoranda of law on the issue (*See* Supp. 2PC-R. 505-06). In his memorandum, Mr. Marek explained, "Mr. Marek was neither a party to the Lawrence Lewis action nor represented during the deposition of Judge Kaplan" (Supp. 2PC-R. 493), and "Mr. Lewis had neither motive nor authority to assert and protect Mr. Marek's rights to develop his facially valid claims of judicial bias at trial and in postconviction" (Supp. 2PC-R. 498). Mr. Marek protested the State's arguments that the deposition would place an "undue burden" on Judge Kaplan: "The judge himself, with assistance from the Attorney General's Office, resisted efforts to expedite and consolidate the [Marek and Lewis] cases and this necessitates a subsequent deposition" (Supp. 2PC-R. 493). Mr. Marek summarized the specific areas of inquiry to be pursued: Judge Kaplan's bias against Mr. Marek and convicted defendants, as demonstrated by his CBS interview, and Judge Kaplan's method of selecting and compensating special public defenders in capital cases (Supp. 2PC-R. 493-94). Mr. Marek also pointed out that during the Lewis deposition, "Judge Kaplan repeatedly refused to answer questions regarding funding and the conflict of interest claim" (Supp. 2PC-R. 494).

Mr. Marek noted that in prior collateral proceedings, Judge Kaplan accepted the testimony of his "good friend," trial counsel Hilliard Moldof, in denying numerous ineffective assistance of counsel claims (Supp. 2PC-R. 494-95). Thus, "Judge Kaplan

determined his close personal friend's credibility and made fact findings in that regard. The judge should be questioned regarding his actual relationship with trial counsel, as his order disqualifying himself is vague in this regard" (Supp. 2PC-R. 495). The State opposed the request to depose Judge Kaplan, calling the request "a fishing expedition" (Supp. 2PC-R. 504-09).

The court denied the motion to depose Judge Kaplan (2PC-R. 696-98). Regarding Mr. Marek's contention that he should be allowed to question Judge Kaplan about his 1987 letter to the Parole Commission, the court relied upon Rivera v. State, 717 So. 2d 477, 481 (Fla. 1998), to rule that Judge Kaplan's comments "are not a sufficient indicator of bias and do not demonstrate the 'good cause' necessary to take his deposition" (2PC-R. 697). As to Mr. Marek's request to depose Judge Kaplan regarding the funding/conflict of interest issue, the court found the claim meritless based upon Rivera, 717 So. 2d at 480 n.2 (2PC-R. 697). Finally, the court ruled that Mr. Marek could not depose Judge Kaplan regarding his comments in "Rough Justice" because "[t]he deposition of Judge Kaplan in the Lewis case has been available to Marek in the Lewis court file, and Marek has not presented this Court with the deposition although referring to same in his allegations, and has not presented good cause to this Court to

order Judge Kaplan's deposition" (2PC-R. 698).[10]

Mr. Marek's amended Rule 3.850 motion was filed on September 27, 2001 (2PC-R. 702-841). The motion raised twelve claims: 1) access to public records; (2) the conflict of interest created by Broward County's system for funding special assistant public defenders and expert witnesses; (3) ineffective assistance provided by trial counsel and the trial mental health expert at the penalty phase; (4) jury recommendation was tainted by invalid aggravators; (5)unconstitutional automatic aggravator; (6) dilution of jury's sense of responsibility for penalty; (7) exclusion of mitigating evidence; (8) due process violated by litigating prior Rule 3.850 motion under death warrant; (9) newly discovered evidence regarding Wigley; (10) Judge Kaplan's bias tainted the trial, penalty phase and prior post-conviction proceedings; (11) capital sentencing statute violated Sixth Amendment; (12) lethal injection violated Eighth Amendment.

Mr. Marek filed an affidavit from his trial counsel:

> 3. In early 1993, I learned that legal fees paid to special public defenders in capital cases and to confidential mental health experts is taken from the funds allocated to Broward County circuit court judges for administrative costs.* * *
>
> 4. Until Judge Tyson revealed this conflict, I was totally unaware of this budgeting provision. I was astounded when Judge Tyson revealed this conflict. Had I known in 1984 when I represented Mr. Marek, I would

[10]The transcript of Judge Kaplan's deposition in Lewis had in fact been filed with the clerk on October 3, 1996 (2PC-R. 440).

have objected and placed the matter on the record.* * *

5. Moreover, this conflict certainly impacted on Mr. Marek's defense. Judge Kaplan imposed caps on fees payable to confidential mental health experts and to court appointed counsel. I was aware of the cap. I was also aware of Judge Kaplan's hesitancy to authorize expenditures of money to assist a capital defendant. As I explained in 1988, I did not request the appointment of an investigator to assist me because "I would have had to request the Court to appoint an investigator for a very oblique reason." I did not request the appointment of a co-counsel because "it [was] not something that the Court [was] going to readily agree to when I [could]n't give a very detailed reason." It was clear to me that Judge Kaplan would not appoint either an investigator or a co-counsel simply because I felt it was necessary to adequately investigate and prepare.

6. I knew Judge Kaplan very well. When I was a public defender, I was assigned to Judge Kaplan's docket. He knew my caseload when he appointed me to represent Mr. Marek. He knew that at the time "I had other files and I usually carr[ied] one or two murder ones." I knew that he expected me to remain within the cap, juggle my schedule, and not request other assistance. I did my best to honor his expectations. I did not know of the conflict described by Judge Tyson.

7. Dr. Seth Krieger was appointed by Judge Kaplan to conduct a confidential mental health evaluation of Mr. Marek. Dr. Krieger was obligated to act within a cap on his fees. The cap provided a maximum of one hundred fifty dollars as compensation for his evaluation of Mr. Marek. Mental health experts who did not abide by the cap would not get appointed to do evaluations.

(2PC-R. 711-13). On November 27, 2001, the State filed its response (2PC-R. 842-939).

On February 19, 2002, the court heard argument on the Rule 3.850 motion (2PC-T. Vol. 4). Mr. Marek's counsel explained that

the State's response was erroneous regarding the procedural history of Mr. Marek's claims, particularly as to Claim X (2PC-T. 73-78). Counsel explained that Claim X was the essence of the motion and that because of Judge Kaplan's bias, "the sentencing should be revisited [and] everything that was decided in the [prior] 3.850 should be revisited" (2PC-T. 78-80). Relying upon Thompson v. State, 731 So. 2d 1235 (Fla. 1998), and State v. Lewis, 17th Judicial Circuit, No. 89-9095CF, both cases in which the State had conceded the need for an evidentiary hearing on Judge Kaplan's bias, counsel argued that Claim X required an evidentiary hearing (2PC-T. 83-87, 89). Counsel also argued that Claims IX and II required an evidentiary hearing (2PC-T. 87-88).

The State conceded its response was erroneous regarding the procedural history of Claim X and agreed to file a supplemental response (2PC-T. 92, 99, 100). The State opposed an evidentiary hearing on Claim X because "there's been nothing presented that evidences Judge Kaplan had any kind of bias in Mr. Marek's case" and because Judge Kaplan's prior rulings had been reviewed by this Court (2PC-T. 98-112). The State argued Lewis and Thompson did not mean Mr. Marek's claim required an evidentiary hearing because in those cases "there was some nexus" (2PC-T. 100).

Mr. Marek's counsel asserted that the State's argument that Mr. Marek had "not pled specific as to John Marek what Judge Kaplan has said" missed the point because "the reason [Mr. Marek

has] not pled specific is because the deposition has not occurred. And the state's the party that's blocked the deposition" (2PC-T. 114-15). Counsel also argued that in all the prior proceedings in Mr. Marek's case, Judge Kaplan's rulings were "reviewed with a presumption that the presiding judge was not biased," but that "the question is here whether that presumption is valid" (2PC-T. 119).

The State filed a supplemental response on April 2, 2002 (2PC-R. 940-1045). This response deleted the allegations from the first response that the entirety of Claim X was procedurally barred. Where the first response had asserted, "Marek has done nothing to prosecute this issue [since 1994]," the modified response stated, "In August 1996, Marek filed as Claim IX, the Disqualification of Judge Kaplan. His arguments therein are practically identical to those now argued in his 2001 motion" (*Compare* 2PC-R. 931-32 *with* 2PC-R. 1031). The modified response did add an argument that the aspect of Claim X relating to Judge Kaplan's 1987 letter to the Parole Commission was procedurally barred because it was raised in Mr. Marek's 1988 post-conviction proceedings and was not pursued on appeal (2PC-R. 1029-30). The issue was presented as Argument XIX in Mr. Marek's prior Rule 3.850 appeal. Mr. Marek filed a reply to the State's modified response (2PC-R. 1046-60).

On September 30, 2003, the circuit court summarily denied

Rule 3.850 relief (Supp. 2PC-R. 650-64). The court ruled, "this Court finds that the Defendant's claims fail to state facts which must be resolved in an evidentiary hearing, fail to state grounds for relief that are cognizable in this proceeding, and that his motion may be resolved as a matter of law" (Supp. 2PC-R. 651). The court denied an evidentiary hearing on Claim X because "If, in fact, there is sufficient bias [on the part of Judge Kaplan] to warrant any relief, the matter may be decided on the basis of the documents included in this record" (Supp. 2PC-R. 660). The court then discussed only Judge Kaplan's deposition in Lewis and Judge Kaplan's explanations in that deposition for the comments he made to CBS (Supp. 2PC-R. 660-61). The judge stated he had reviewed Mr. Marek's submissions and found "nothing to indicate he did not receive a fair trial" (Supp. 2PC-R. 661). Therefore, the court stated, "the issues before this Court are whether [Judge Kaplan's] statements indicate bias at sentencing, and whether or not the Defendant received a full and fair review of his post-conviction motions" (Supp. 2PC-R. 661). The court found Lewis v. State, 838 So. 2d 1102 (Fla. 2002), Thompson v. State, 731 So. 2d 1235 (Fla. 1998), and Porter v. State, 723 So. 2d 191 (Fla. 1998), "distinguishable from Marek's case"(Supp. 2PC-R. 662). The court concluded that no bias infected Mr. Marek's sentencing because it found "no case law where impermissible bias was found on the basis that the trial judge is known to be

'tough' in sentencing" (Supp. 2PC-R. 662). The court also concluded that no bias infected Mr. Marek's sentencing or prior post-conviction proceedings because "the trial judge's sentence in the case at bar, as well as his rulings on previous motions for post-conviction relief, have been examined and upheld by the Florida Supreme Court" (Supp. 2PC-R. 662).

The court ruled that Claims III through VII were procedurally barred because they were raised in Mr. Marek's 1988 Rule 3.850 motion (Supp. 2PC-R. 653-56). The court denied Claim VIII, finding that Mr. Marek had not shown how he was "prejudiced" by being forced to litigate his first Rule 3.850 motion under a death warrant (Supp. 2PC-R. 657-58).

The court denied Mr. Marek's motion for rehearing (Supp. 2PC-R. 1262, 605-49). Mr. Marek appealed (2PC-R. 1264-65). This Court issued a summary order affirming the denial of the motion to vacate on June 16, 2006, specifically indicating that this Court found "no merit to any of Marek's claims."

On May 11, 2007, Mr. Marek filed his third Rule 3.851 motion in circuit court. On June 14, 2007, the circuit court ordered the State to file a response to the motion. On July 2, 2007, the State served its Response. The circuit court conducted a hearing on the motion on June 18, 2008, and granted Mr. Marek leave to file an amendment to the Rule 3.851 motion within 30 days. On July 18, 2008, Mr. Marek filed his amended Rule 3.851 motion. On

August 18, 2008, the State served its Response to the amended motion. The State attempted to call the case up for a status hearing on January 30, 2009. However, the hearing was delayed until February 6, 2009. In light of supplemental authority served by the State at that time, Mr. Marek's counsel requested the opportunity to address the supplemental authority in a memorandum of law. The court granted the request and gave Mr. Marek until February 23, 2009, to submit the memorandum. The memorandum was in fact filed on February 23, 2009.

On April 20, 2009, the governor signed a death warrant scheduling Mr. Marek's execution for May 13, 2009. The governor signed Mr. Marek's death warrant after consulting with Ms. Snurkowski, Assistant Deputy Attorney General, who represents the State in these proceedings, and after obtaining mental health records concerning Mr. Marek from the Office of the State Attorney. Despite the pendency of Mr. Marek's Rule 3.851 before this Court, Ms. Snurkowski successfully encouraged the governor to sign a death warrant for Mr. Marek. Following the signing of the death warrant, the circuit court entered an order denying Mr. Marek's pending Rule 3.851 motion on April 23, 2009.

On April 27, 2009, Mr. Marek filed a motion for rehearing/motion to amend. Several hours later, the State filed a response. The motion was heard by the circuit court at a hearing conducted on the afternoon of April 27th. Later in the

afternoon, the circuit court entered an order denying the motion.

STANDARD OF REVIEW

The claims presented in this appeal are constitutional issues involving mixed questions of law and fact and are reviewed *de novo*, giving deference only to the trial court's factfindings. Stephens v. State, 748 So. 2d 1028, 1034 (Fla. 1999); State v. Glatzmayer, 789 So. 2d 297, 301 n.7 (Fla. 2001). The lower court denied an evidentiary hearing, and therefore the facts presented in this appeal must be taken as true. Peede v. State, 748 So. 2d 253, 257 (Fla. 1999); Gaskin v. State, 737 So. 2d 509, 516 (Fla. 1999); Lightbourne v. Dugger, 549 So. 2d 1364 (Fla. 1989).

ARGUMENT

ARGUMENT 1: MR. MAREK'S SENTENCE OF DEATH VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS BECAUSE IT IS THE RESULT OF A PROCESS THAT PERMITTED AN ARBITRARY AND CAPRICIOUS IMPOSITION OF A SENTENCE OF DEATH.

A. Introduction.[11]

Over thirty years ago, the United States Supreme Court announced that under the Eighth Amendment, the death penalty must be imposed fairly, and with reasonable consistency, or not at

[11]Mr. Marek notes at the outset that this Court addressed a similar claim in Rutherford v. State, 940 So. 2d 1112, 1117 (Fla. 2006). In addressing the merits of the claim and denying relief, this Court indicated that Rutherford had failed to demonstrate how the arbitrary factors outlined by the ABA Report prejudiced him. Mr. Marek presents this claim herein because he believes that he can demonstrate the prejudice that this Court found necessary, but wanting in Rutherford.

all. Furman v. Georgia, 408 U.S. 238, 310 (1972)(per curiam). At issue in Furman were three death sentences: two from Georgia and one from Texas. The Petitioners relying upon statistical analysis of the number of death sentences being imposed and upon whom they were imposed argued that the death penalty was cruel and unusual within the meaning of the Eighth Amendment. Five justices agreed, and each wrote a separate opinion setting forth his reasoning. Each found the manner in which the death schemes were then operating to be arbitrary and capricious. Furman, 408 U.S. at 253 (Douglas, J., concurring) ("We cannot say from facts disclosed in these records that these defendants were sentenced to death because they were black. Yet our task is not restricted to an effort to divine what motives impelled these death penalties. Rather, we deal with a system of law and of justice that leaves to the uncontrolled discretion of judges or juries the determination whether defendants committing these crimes should die or be imprisoned. Under these laws no standards govern the selection of the penalty. People live or die, dependent on the whim of one man or of 12."); Id. at 293 (Brennan, J., concurring) ("it smacks of little more than a lottery system"); Id. at 309 (Stewart, J., concurring) ("[t]hese death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual"); Id. at 313 (White, J., concurring) ("there is no meaningful basis for distinguishing the

few cases in which it is imposed from the many cases in which it is not"); Id. at 365-66 (Marshall, J., concurring)("It also is evident that the burden of capital punishment falls upon the poor, the ignorant, and the underprivileged members of society. It is the poor, and the members of minority groups who are least able to voice their complaints against capital punishment. Their impotence leaves them victims of a sanction that the wealthier, better-represented, just-as-guilty person can escape. So long as the capital sanction is used only against the forlorn, easily forgotten members of society, legislators are content to maintain the status quo, because change would draw attention to the problem and concern might develop.")(footnote omitted). As a result, Furman stands for the proposition most succinctly explained by Justice Stewart in his concurring opinion: "The Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be . . . wantonly and . . . freakishly imposed" on a "capriciously selected random handful" of individuals. Id. at 310.

However, it is now clear that in Mr. Marek's case arbitrary factors have infected the process. His execution will be as arbitrarily imposed as if he had been "struck by lightning". Id. at 309 (Stewart, J., concurring) ("[t]hese death sentences are cruel and unusual in the same way that being struck by lightning

is cruel and unusual").

B. Disparity in treatment of Mr. Marek and his co-defendant.

When the State's evidence and argument in Wigley's case is compared to the evidence and argument in Mr. Marek's case, the difference in the sentencing result can only rest on arbitrary factors. It is as if a lottery was used to decide who got the death sentence. It is as if Mr. Marek drew the short end of the stick.

The prosecutor at Wigley's sentencing acknowledged that his evidence against Mr. Marek was thinner and more circumstantial. He expressed concern that he would not be able to obtain a conviction (WR. 1247-48). So when Mr. Marek's case went to trial, the prosecutor changed his position as to who was the more culpable defendant. The evidence was tailored and shifted. And, the prosecutor ignored the evidence at Wigley's trial, that Mr. Marek was the one speaking to law enforcement because Wigley and Mr. Marek had decided beforehand that Mr. Marek would do the talking. Instead, the prosecutor argued that Mr. Marek's actions established that he was the dominant of the two and the one who was in charge.

The State's use of inconsistent theories in Mr. Marek's trial and his co-defendant's trial resulted in an arbitrary sentencing process in violation of the Eighth Amendment and the due process clause of the Fourteenth Amendment. This is a

failure to "assure consistency, fairness, and rationality in the evenhanded operation of the state law." Proffitt v. Florida, 428 U.S. 242, 259-60 (1976). The State's case was different in the two cases, the arguments in support of death was different, and the juries were different. The resulting selection of Mr. Marek for a death sentence while Wigley received a life sentence cannot be described as "the even handed operation of the state law."

In Raleigh v. State, 932 So. 2d at 1066, this Court addressed the recent United States Supreme Court decision in Bradshaw v. Stumpf, 545 U.S. 175 (2005), and said:

> In *Stumpf*, the state first tried Stumpf under the theory that he was the principal actor in the shooting death of the victim. *Id. at 2403-04.* Then, based upon new evidence that came to light after Stumpf had been tried and convicted, the state tried Stumpf's codefendant under the inconsistent theory that the codefendant was the principal actor in the shooting death of the same victim. *Id.* The United States Supreme Court held that the use of such inconsistent theories warranted remand to determine what effect this may have had on Stumpf's sentence and to determine whether the death penalty violated due process.

In denying relief in Raleigh, this Court found no error because in Raleigh's trial and his co-defendant's trial:

> the State did not take an inconsistent position as the prosecution did in *Stumpf*. In Figueroa's trial, the State never contradicted the position it took at Raleigh's trial regarding Raleigh's culpability. It did not change course by seeking to prove that Figueroa, not Raleigh, was the principal actor in Eberlin's death. Therefore, the due process concerns raised in *Stumpf* do not apply.

Raleigh, 932 So. 2d at 1066.

Here, unlike the situation in Raleigh, it is clear that the State took inconsistent positions regarding the culpability of Mr. Marek and his co-defendant, Raymond Wigley.[12] It is also clear why the prosecutor took the inconsistent positions since he explained his fear that the evidence against Mr. Marek was thin and merely circumstantial (WR. 1247-48). It is clear that the prosecutor's conduct was a product of a desire to win.

In Berger v. United States, 295 U.S. 78, 88 (1935), the

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[12]Moreover, it is clear that Mr. Marek was prejudiced by the State's actions. In affirming Mr. Marek's death sentence on direct appeal, this Court stated:

> 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.

Marek v. State, 492 So. 2d 1055, 1058 (Fla. 1986). However at Wigley's trial, the State argued that this evidence proved that Wigley was the dominant actor and merited a death sentence. Of course, this Court and Mr. Marek's appellate counsel were unaware of the what transpired at Wigley's trial because the Wigley record was not before the Court.

United States Supreme Court explained that a prosecutor is:

> the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.

Most recently, the U.S. Supreme Court has stated:

> The right to a fair trial, guaranteed to state criminal defendants by the Due Process Clause of the Fourteeenth Amendment, imposes on States certain duties consistent with their sovereign obligation to ensure "that 'justice shall be done'" in all criminal prosecutions.

Cone v. Bell, — U.S. — (decided April 28, 2009), Slip Op. at 1.

Here, the prosecutor disregarded this principle and instead did whatever he had to in order to secure a death sentence. This violated due process and led to a death sentence for Mr. Marek that "smacks of a little more than a lottery system." Furman at 293 (Brennan, J., concurring).

The circuit court in denying Mr. Marek's motion for rehearing/motion to amend motion to vacate said:

> As to Defendant's claim (1) of disparate treatment of the co-defendant, this Court finds that the claim is without merit. In Marek v. State, 462 So. 2d 1054, 1058 (Fla. 1986), the Florida Supreme Court already decided the issued against the Defendant. Additionally, the Defendant's reliance on Bradshaw v. Stumpf, 545 U.S. 175 (2005) and Raleigh v. State, 932 So. 2d 1054 (Fla. 2006) is misplaced. The law of the case as set forth in Marek, supra, controls as does the law in the case of Gore v. State, 964 So. 2d 1257 (Fla. 2007), cert. den. 128 S.Ct. 1250 (U.S. Fla. 2008).

Order of April 27, 2009, at 1.[13] However, this Court did not have before it at the time of the direct appeal the Wigley record that included the trial transcript. Without access to the Wigley transcript showing the prosecutor's argument and the evidence presented by the State, this Court could not have considered it. On direct appeal, this Court was merely addressing whether the life sentence for Wigley warranted a life sentence for Mr. Marek in light of the evidence at Mr. Marek's trial.

Mr. Marek's has presented a Furman claim in which he cites to the specific prejudice that he suffered as this Court indicated in Rutherford v. State, 940 So. 2d 1112, 1117 (Fla. 2006), was required to establish a basis for relief. Under Furman, Mr. Marek's sentence of death cannot stand. It is a product of system that has failed to assure "rationality in the evenhanded operation of the state law." Proffitt v. Florida, 428 U.S. at 259-60.

C. Failure to properly apply Strickland v. Washington as subsequent cases from the United States Supreme Court demonstrates.

In making his argument that he can demonstrate the prejudice that this Court indicated in Rutherford v. State was a necessary component to a Furman claim, Mr. Marek relied upon the arbitrary

[13]In its decision in Cone v. Bell (announced on April 28, 2009), the United States Supreme Court made it clear that a procedural bar premised upon *res adjudicate* or law of the case is not valid and cannot preclude merits consideration of the federal question.

refusal to apply the standards of Strickland v. Washington, 466 U.S. 668 (1984), as those standards have been defined in Williams v. Taylor, 529 U.S. 362, 396 (2000); Wiggins v. Smith, 539 U.S. 510, 527 (2003); Rompilla v. Beard, 545 U.S. 374 (2005). In those decisions, the Supreme Court made it clear that the rulings therein related back to Strickland and that the relief granted in those cases was required by Stickland.[14] Under those decisions, there can be no question but that those decisions are applicable to capital trials conducted in 1984.

Moreover, those decisions make it clear that Mr. Marek's trial counsel's failure to investigate his family background was deficient performance. Mr. Marek's belief that the family members would not have something helpful to say does not relieve trial counsel of the duty to investigate and find out what mitigation is available. Those cases make it equally clear that the fact that an investigation may turn up some unfavorable information does not preclude the finding of deficient performance or prejudice. The proper analysis requires consideration of whether the favorable evidence that trial

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[14]This Court has acknowledged its failure to properly apply aspects of Strickland in a number of cases. Stephens v. State, 748 So. 2d 1028, 1032 n. 2 (Fla. 1999). Despite this acknowledgment, this Court has refused to correct its error and reconsider those cases in which the error had been committed. Those defendants who have been deprived of the benefit of Strickland have been arbitrarily denied the opportunity to have the ineffective assistance of counsel claims judged according to the proper constitutional standard.

counsel failed to uncover because he failed to investigate undermines confidence in the outcome. It would be for the sentencer to ultimately decided whether the unfavorable information outweighed the significant and compelling mitigation.

Here, there is no question that Mr. Marek's counsel did not investigate. Under Williams, Wiggins and Rompilla, counsel's performance was deficient. This reality can only be ignored by refusing to recognize that those decisions described trial counsel's obligation in 1984 and refusing to recognize that those decisions are inconsistent with this Court's affirmance in 1989 of the denial of Mr. Marek's ineffective assistance of counsel claim.

The mitigation that was readily available had any effort to investigate been undertaken was compelling. Mr. Marek was born in Germany to an emotionally unstable mother who took large amounts of tranquilizers and diet pills during her pregnancy and to a largely absentee father (1PC-T. 79). At the age of eight or nine months, John overdosed to the point of convulsions when his brother fed him some of his mother's medication (1PC-T. 107-08, 211-12). Doctors said his mind would forever be affected, and his childhood development of such skills as walking and talking was markedly slow (1PC-T. 88, 213-14). Labeled a "retard" throughout his childhood, John was rejected by his disappointed father and inadequately fed and clothed by his neglectful mother

(1PC-T. 93-94). Unable to speak intelligibly and suffering from constant enuresis, he was ridiculed by his peers. His parents divorced when he was a couple of years old.

Mr. Marek's mother remarried an alcoholic who spent the family money on liquor and who continued the rejection John had experienced since he was a baby. John was a loving child and tried again and again to seek affection, only to be rejected again and again. After a family altercation in which John came close to being shot by his stepfather, John's mother gave up her children. John's brothers went to live with their father, who refused to take John--age 9, labeled a "retard", unable to speak (1PC-T. 97-100).

At age nine, John Marek was placed in the custody of the Tarrant County, Texas, Child Welfare Unit (1PC-R. D-Ex. 1, Tab 2, p. 3). Psychological testing done at that time revealed John was not retarded but of normal intelligence. However, psychologists reported John had not been able to develop normally because of cerebral dysfunction, deep feelings of inadequacy, and emotional deprivation. At the age of ten, John Marek told a mental health evaluator, "He wants to change from being a boy who is sad all the time to being a boy who is happy all the time" (1PC-R. D-Ex. 1, Tab 4, p. 6). Over the ensuing years, psychological and child welfare reports continued to note John's emotional difficulties, his frustration and anger at his natural parents and stepfather,

his learning disabilities resulting from psychological and neurological problems, his enuresis, and his feelings of inadequacy and rejection (PC-R. D-Ex. 1, Tab 4).

After passing through at least four foster families, at age 12, John was sent to a residential treatment facility, paid for by his father's insurance (1PC-R. D-Ex. 1, Tab 5). John received therapy and responded well, beginning to exhibit some emotional stability and academic progress. However, when the insurance company terminated the funding for this placement, John was returned to his foster family, despite the treatment facility's warnings that John's emotional and neurological disabilities required continued, intensive residential treatment, and prediction that removing John from residential treatment would destroy all the progress he had made (1PC-R. D-Ex. 1, Tab 8, pp 27, 30, 34, 38-39).

After living briefly with his foster family, John was again placed in an institution, where psychological testing revealed that his previous progress had been lost (1PC-R. D-Ex. 1, Tab 7). His scores on intellectual testing had plummeted, the result, evaluators noted, of organic brain damage and emotional disabilities. After about two years in this institution, John was again returned to his foster parents, who washed their hands of him four months later (1PC-R. D-Ex 1, Tab 29).

Following a brief stay in a shelter, John was placed in yet

another foster family (PC-T. 239). He was then seventeen years old, and heavily involved in drug use. A few months later, John was convicted of credit card abuse and placed on probation. After John violated his probation, a competency evaluation noted his limited intellectual capacity, possibly resulting from brain dysfunction, and recommended drug treatment in a structured environment, stating that intervention could well reshape John's behavior. No treatment was provided, and John was sentenced to serve two years in prison (1PC-R. D-Ex 1, Tab 30). After his release, with nowhere to go, John resumed his drug and alcohol abuse. At age 21, he traveled to Florida with Raymond Wigley. Drinking heavily, the two were arrested for murder shortly after arriving in Florida.

Mr. Marek's jury did not hear any of this evidence because trial counsel did not investigate and did not prepare for the penalty phase. Counsel testified that he made no effort to discover whether he could obtain records from Texas regarding Mr. Marek having been in custody of the state as a child (1PC-T. 317), although he knew Mr. Marek had been in foster care (1PC-T. 321-22), and had information that when Mr. Marek was a toddler, "his natural father left the family and his mother remarried, this time to an abusive alcoholic. At age nine [Mr. Marek] was turned over to the State [of Texas] and lived in a variety of foster homes until striking out on his own at age 17" (1PC-R. D-

Ex 1, Tab 10).[15] Thus, counsel did not find Texas court records which said Mr. Marek was declared "a dependent child based on neglect" (1PC-T. 326). Counsel made no effort to obtain Texas prison records (1PC-T. 336) or court records (1PC-T. 337), although he knew that Mr. Marek had been in prison in Texas (1PC-T. 336), and had a print-out in his file which revealed Mr. Marek's Texas inmate number (1PC-R. D-Ex 1, Tab 30). Counsel made no effort to check out the address on Mr. Marek's Texas driver's license (1PC-T. 320), although he had a copy of it in his files (1PC-T. 319).

Had counsel taken any one of these simple steps, the information detailed above would have flooded in. For example, records from the Texas Adult Probation Department contained a life history of Mr. Marek (1PCR. D-Ex 1, Tab 19). This life history explained that Mr. Marek was placed in the custody of the Texas Department of Human Resources in October, 1970, and listed the names of the special schools Mr. Marek attended. With this one document, counsel would have had enough specific information to unearth the 99 pages of documents contained in the files of the Texas Department of Human Services (1PC-r. D-Ex 1, Tab 29).

Similarly, had counsel checked the address on Mr. Marek's driver's license, he would have discovered the address was that

[15]This quote is from Dr. Krieger's report which Judge Kaplan refused to permit the jury to hear.

of Sallie and Jack Hand, Mr. Marek's last foster parents(1PC-T. 239-41), who lived at the same address at the time of the trial (1PC-T. 245). They were never contacted by trial counsel (1PC-T. 244-45, 320, 322-33). Counsel testified he never "independently" checked out the address on Mr. Marek's driver's license and therefore he had "[n]o idea" whether that address would have led to anyone (1PC-T. 320). He also testified he "[o]bviously" did not know what information the foster parents would have led him to because "I never talked to them" (1PC-T. 323).[16]

Counsel testified that investigation was not conducted in part because of a shortage of time and money (1PC-T. 330-31). In order to investigate, counsel "would have had to request the Court to appoint an investigator for a very oblique reason. I couldn't have given any real reason for it" (1PC-T. 318).

It was clear at the 1988 hearing that counsel did not investigate Mr. Marek's background for the penalty phase, and

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[16]Counsel testified that he got the "impression" that Mr. Marek did not want him to go to Texas (1PC-T. 333), although Mr. Marek did not refuse to cooperate: "he dealt with me as much as I wanted to. . . .[He was] there to answer my questions" (1PC-T. 334). Counsel testified that he had difficulty in getting Mr. Marek to understand what was at stake because Mr. Marek was generally lethargic and apathetic (1PC-T. 333). Although Mr. Marek "wanted the end [of the trial] to be positive," he did not understand the process necessary to reach that end: "I don't think he saw the short-term goals. I don't think he saw each little task as having a good effect upon the whole thing" (1PC-T. 335). Counsel was so concerned about his lack of rapport with Mr. Marek that he sought the assistance of a mental health expert: "I want[ed] the doctor to give me an idea psychologically what I was dealing with" (1PC-T. 338).

Judge Kaplan so ruled (1PC-T. 488). However, Judge Kaplan concluded that "I think Moldof would have been ineffective if he would have called these people. I think he would have" (1PC-T. 487). Yet, Moldof had specifically testified otherwise in 1988. He testified that had he discovered the readily available information summarized herein, he would have presented it at the penalty phase (1PC-T. 395-96). Judge Kaplan said that the evidence of severe abuse, neglect, abandonment, and brain damage would make "any reasonable person[] want to make sure that Mr. Marek never ever walk the streets again" (1PC-T. 488).[17] However as Williams, Wiggins, and Rompilla make clear, this was not the proper analysis to employ in considering whether Mr. Marek was prejudiced by counsel's failure to investigate.

Defense counsel had an "obligation to conduct a thorough investigation of the defendant's background." Williams v. Taylor, 529 U.S. 362, 396 (2000); Rompilla v. Beard, 2005 U.S. LEXIS 4846 (June 20, 2005). Further, "Strickland does not establish that a cursory investigation automatically justifies a

[17]Further, Judge Kaplan's order denying relief and his letter to the Parole Commission show that future dangerousness weighed heavily when Judge Kaplan sentenced Mr. Marek to death and denied his Rule 3.850 motion. However, Florida does not permit consideration of future dangerousness in a capital case. Kormondy v. State, 703 So. 2d 454, 463 (Fla. 1997). Judge Kaplan's comment suggests that contrary to the requirement that courts presume that juries follow the law, Weeks v. Angelone, 120 S.Ct. 727, 733 (2000), in denying Rule 3.850 relief, Judge Kaplan presumed that the jury would disregard the law.

tactical decision with respect to sentencing strategy. Rather, a reviewing court must consider the reasonableness of the investigation said to support that strategy." Wiggins v. Smith, 539 U.S. 510, 527 (2003). Here, as in Wiggins and Williams, trial counsel had leads to information but did not follow those leads. Rather, "counsel abandoned [his] investigation of [Mr. Marek's] background after having acquired only rudimentary knowledge of his history from a narrow set of sources." Wiggins, 539 U.S. at 524.[18] As in Wiggins, "any reasonably competent attorney would have realized that pursuing these leads was necessary to making an informed choice among possible defenses, particularly given the apparent absence of any aggravating factors in petitioner's background." Id. at 525.[19]

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[18]The ABA standards establish that Mr. Marek's counsel's performance did not measure up to prevailing professional norms. In Wiggins, the Court found that counsel's performance "fell short of the standards for capital defense work articulated by the American Bar Association (ABA)--standards to which we long have referred as 'guides to determining what is reasonable.'" 123 S. Ct. at 2536-37, quoting, Strickland, 466 U.S. at 688, and Williams v. Taylor, 529 U.S. 362, 396 (2000). Thus, "the ABA standards for counsel in death penalty cases provide the guiding rules and standards to be used in defining the 'prevailing professional norms' in ineffective assistance cases." Hamblin v. Mitchell, 354 F.3d 482, 486 (6th Cir. 2003).

[19]The duty to investigate is heightened, not limited, when a defendant is emotionally unable to assist trial counsel or when counsel has the "impression" that the defendant did not want counsel to pursue certain matters. "ABA and judicial standards do not permit the courts to excuse counsel's failure to investigate or prepare because the defendant so requested." Hamblin, 354 F.3d at 492. "The investigation for preparation of the sentencing phase should be conducted regardless of any

Trial counsel did not make a strategic decision not to present the records which would illustrate a tortured childhood characterized by neglect, abandonment and severe psychological and emotional problems because, as in Wiggins and Williams, counsel failed to obtain the crucial records. Thus, Judge Kaplan's finding that the records describing Mr. Marek's childhood would have provided "negative aspects" was in error, and counsel's failure to discover these records constituted deficient performance.[20] According to counsel, due to funding constraints, he felt hamstrung and unreasonably failed to collect necessary documentary evidence which should have presented.

Counsel did not make a strategic decision not to introduce mitigating evidence. Counsel tried to introduce the mitigating

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initial assertion by the client that mitigation is not to be offered." ABA Guidelines for the Appointment and Performance of Counsel In Death Penalty Cases 11.4.1© (1989). The commentary to Guideline 11.4.1 explains: "Counsel's duty to investigate is not negated by the expressed desires of a client. . . . The attorney must first evaluate the potential avenues of action and then advise the client on the merits of each. Without investigation, counsel's evaluation and advice amount to little more than a guess" (footnotes omitted). Further, "[c]ounsel and support staff should use all available avenues including signed releases, subpoenas, and Freedom of Information Acts, to obtain all necessary information." ABA Guidelines 11.4.1(D)(7). In discussing client contact, the Guidelines explain, "Any reluctance on the part of the client to disclose needed information must be overcome, not a quick or easy task." ABA Guidelines 11.4.2 (commentary) (footnote omitted).

[20]In Williams, the Court found counsel ineffective for failing to present records even though they contained some negative information about Mr. William's past. In Mr. Marek's case, the records arguably contained no "negative aspects."

evidence he did have available. Counsel attempted to introduce Dr. Krieger's report, but the trial court ruled it inadmissible. Counsel also wanted the jury to consider no significant criminal history mitigating factor, but he was thwarted by the State. Pursuing that mitigator would have opened the door to the only negative bit of information regarding Mr. Marek's past--his conviction for credit card abuse. Finally, counsel testified that he would have presented the testimony of Mr. Marek's mother and documents regarding Mr. Marek's mental health and foster care history if such evidence had been available (1PC-T. 395-96). "When viewed in this light, the 'strategic decision' . . . invoke[d] to justify counsel's limited pursuit of mitigating evidence resembles more a *post-hoc* rationalization of counsel's conduct than an accurate description of [his] deliberations prior to sentencing." Wiggins, 539 U.S. at 526-27.

Had counsel performed reasonably, a wealth of compelling mitigation would have come forth. Literally from birth, Mr. Marek's life was one of abandonment, abuse, and neglect. This pathetic story emerges 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.[21] All of this information is mitigating; none of it

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[21]John Marek was born September 16, 1961, to Margaret and Jesse William Grimm; years later, his name was changed from Grimm to Marek. Margaret and Jesse had been married in 1956. Jesse was a U.S. Army serviceman. Their first child, Mark William Grimm, was born in 1957; their second, J. Michael Grimm, in 1959 (1PC-T. 79-80, 209-10). At the time of John's birth, Jesse was a sergeant and stationed in Germany. The pregnancy was a difficult one: "My body tried to abort him. And I had to spend a lot of time in bed" (1PC-T. 79). During the pregnancy, Margaret took large amounts of diet pills, nerve medications and even birth control pills (1PC-T. 80-81, 210).

After John's birth, Margaret's emotional problems continued. "[She] was the type of mother that cared more for herself and her father and grandmother in the states than she did for the rest of the family" (1PC-T. 210). She kept taking a plethora of medication, from a shoe box filled with birth control pills, darvon, valium, diet pills, and sleeping pills (1PC-T. 107-08). When John was eight or nine months old, his older brother got into the shoe box and fed pills to himself and John. On the way to the hospital, the boys went into convulsions and became "more out than conscious" (1PC-T. 103). John was most affected because he was smaller and had been given more pills, and the doctors said his "mind would be affected by it" (1PC-T. 108, 211-12).

Following this drug overdose there were obvious changes in John's behavior. His father testified that John "could never sleep," cried night and day, did not learn to crawl or walk until much later than normal, and had "slurred speech." John also could not learn how to ride a tricycle or bicycle or how to catch and throw a ball without a great deal of help. "[E]ven into his first years of school he was never able to do what the other children were doing at three or four years old." John's father thought he was retarded and requested extra help for him. John was "[v]ery, very different in every way" from other kids, not even playing with other kids but "always off to the side doing something else or just watching (1PC-T. 213-14).

John was labeled retarded. His mother could not stand to be around him and chased him away from her (1PC-T. 214). Jesse blamed Margaret for John's condition and questioned whether he had fathered John. "[H]e couldn't accept that he could have a child that was like that" (1PC-T. 92). Jesse "was disappointed that John was a special education child and mostly he just did nothing with John. Ignored him" (1PC-T. 85). John was aware of this and asked Margaret "why Daddy didn't play with him. Why Daddy didn't do anything with him. Why Daddy pushed him away" (Id.). Margaret also admitted, "I love John but I was neglectful

was presented to Mr. Marek's sentencing jury.

The available records contain evidence of Mr. Marek's mental condition. As a boy, he was labeled "retarded" and ridiculed as

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[sic] of him" (1PC-T. 85).

John's problems grew worse. He reacted abnormally to events, did not understand cause and effect, and "never could have a good time." Other kids made fun of him because of his speech impediment. He went to special education, never to a regular school, and was evaluated as "trainable but not educable." He had a bladder control problem. He lacked imagination, but "[h]e showed a lot of love. He was precious when he was little (1PC-T. 87-88).

In 1968, Margaret and Jesse divorced. Margaret kept the children. In 1970, Margaret remarried to Arlis Bagley, an alcoholic and "functional illiterate" (1PC-T. 93). Bagley used the family's food, rent and utility money to buy alcohol. He treated the boys "a hundred times worse than what their father had." John got the worst of it because he "was the most forgiving." While the other boys quickly learned to stay away from Bagley, "John always tried again and again and be rejected again and again. He was a very loving child." Bagley usually told John "to get away, retard" (1PC-T. 93-94).

During her marriage to Bagley, while the family lived in Texas, Margaret decided to give up her children. Margaret had lost her dishwashing job because Bagley showed up at her workplace drunk, and the family had nothing. One night, Bagley got angry because the car would not start and fired a gun into the car as John walked between Bagley and the car. Hysterical, Margaret called Jesse and told him he had to take the boys. Jesse agreed to take three of the boys, but not John because he did not believe that John was his. Bagley told John his father would not take him because he was retarded. Child welfare took John away (1PC-T. 97-100).

The Tarrant County Child Welfare Unit obtained custody of John on October 21, 1970. He was placed in foster care. He was enrolled in Saginaw Elementary School on November 16, 1970, and was placed in a class for the emotionally disturbed (1PC-R. D-Ex 1, Tab 29). School records note that John was "put in foster home due to rejection by new stepfather." His teacher commented, "John is in need of a great deal of love and understanding. Needs to feel success and acceptance" (1PC-R. D-Ex 1, Tab 2). On November 30, 1970, John was withdrawn from school when he was moved to a new foster home (Id.).

being a "retard," but he was not retarded. In December 1970, when John was nine years old, a psychological evaluation revealed that he was not retarded as had been believed. His verbal I.Q. was 91, performance I.Q. was 117, and full scale I.Q. was 104. The evaluation said that while in foster care in Saginaw, John was in a class for the "minimally brain injured." John's "most obvious disability" was "a severe speech and language handicap. His speech would be unintelligible to most listeners much of the time,"[22] and was "characterized by severe articulation difficulties, frequent non-fluency, immature grammar and syntax, the use of gesture to aid self-expression, and occasionally the use of devices to get out of talking altogether (a shrug with a 'don't know' response)." "John seems to be a sensitive child who is acutely aware of feelings and perhaps expectation of others toward him -- it may be that he responds in his 'borderline' manner when he thinks this is how the significant person with him feels about him" (1PC-R. D-Ex 1, Tab 4, pp. 2-3).

An evaluation conducted on November 12, 1971, concluded he suffered from "cerebral dysfunction," with testing showing many "organic indicators." John exhibited "a deep sense of inadequacy

[22]At one point, John was placed in a good foster home and a good school for children with learning disabilities and made very good progress with his speech. However, the foster mother's ill health led to his placement with new foster parents who enrolled him in a school where he attended a special class for children with cerebral dysfunction (1PC-R. D-Ex 1, Tab 4, p. 8).

and poor self concept" and was "an oversensitive and easily hurt youngster who tries to hide his sensitivity." John wanted "to change from being a boy who is sad all the time to being a boy who is happy all the time." The report concluded, "this seems to be an immature youngster with rather basic defenses who is probably making some sort of neurotic adjustment to his very real problems. Psychotherapy might be of help, but there are certainly many reality problems confronting this youngster" (1PC-R. D-Ex 1, Tab 4, pp. 5-6).

A psychiatric evaluation conducted on November 17, 1971, by Dr. Henry Burks concluded that John was "an emotionally deprived boy with minimal cerebral dysfunction syndrome and language disability who is having some situational reaction to a difficult foster and school placement." Dr. Burks prescribed Mellaril for John's anxiety and recommended "supportive psychotherapy or casework services, but I don't know where they are available" (1 PC-R. D-Ex 1, Tab 4, p. 7).[23]

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[23]John was placed with foster parents from whom he took the name "Marek." Psychiatric notes indicate that from 1971 to 1974, John was prescribed Dexadrine, Mellaril, and Elavil (1PC-R. D-Ex 1, Tab 4, pp. 12-28). These notes also chronicle John's continuing emotional difficulties. In March, 1972, the foster mother was told that John had been "traumatized so much that it would be expected that he would continue having problems for years to come." At an April 10, 1972, session, John appeared to be "quite angry" and admitted "he was still angry at his step-father, Mr. Bagley, for whipping him each time he wet the bed, which was something that he could not help and could not stop doing it." Mrs. Marek said "that last week [John] had gone to the house where he used to live with his natural parents. After

In April of 1974, John told a story expressing his hopes:

> John's story telling suggests that here is another foster child still fantasizing about and idealizing his natural parents years after he has left the natural home. The boy in the story is afraid of his stepfather who is always hitting him and wishes he were dead. He hates his mother and stepfather, so he goes to the Child Study Center and talks to the psychiatrist who sees that mother and step-father are divorced and mother remarries natural father. Then mother stops "all that marrying and divorcing", and the family lives happily ever after.

John told another story in which "the boy sees himself as ugly looking and rejected by his peers and lacking in abilities and confidence" (1PC-R. D-Ex 1, Tab 4, pp. 10-11).

In the spring of 1974, John was sent to a residential treatment facility paid for by Jesse Grimm's military Champus Insurance. John arrived at Shady Brook Residential Treatment Center for Children in Richardson, Texas, on June 11, 1974 (1PC-R. D-Ex 1, Tab 5). In August 1974, an Academic Progress Report noted that John "appears to lack assertiveness in some peer

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that, during the rest of the week, his behavior was not good. He wet the bed every night and this seems to irritate his foster parents." On April 19, 1972, John said "he feels his foster mother and his foster sister are keeping a secret from him, which is that his natural mother is not taking him back." On June 9, 1972, the notes state that John had been seeing Dr. Serrano because "He has evidences of deprivation, the foster child syndrome, and learning disability which is probably on both psychological and neurological basis." He "had been improving greatly," but Dr. Serrano left, and "there was a fairly massive regression, some self-destructive behavior, and a return of the enuresis." On February 28, 1974, Mrs. Marek said she could no longer cope with John, who continued wetting his pants and had an episode of soiling (1PC-R. D-Ex 1, Tab 4, pp. 15-28).

interactions which results in his being bullied by the more aggressive group members" (1PC-R. D-Ex 1, Tab 8, p. 4). It also explained, "John's weak ego seems to cause him to withdraw when there is any conflict, either with other students or with the teacher." Id. A March 1975 report noted that John had shown much improvement, although his bed wetting continued (1 PC-R. D-Ex 1, Tab 8). On the Stanford Achievement Test administered in April, 1975, John's scores were in the 5.2 to 6.1 grade equivalent levels. This was shortly before John's fourteenth birthday when he should have been near the end of an eighth grade level. In June of 1975, intelligence testing revealed a verbal score of 87, a performance score of 103 and a full scale score of 94. (1PC-R. D-Ex 1, Tab 5).

In September, 1975, Champus announced that funding would soon be terminated for John's placement in Shady Brook.[24] On October 28, 1975, the program director of the Tarrant County Child Welfare Unit wrote Champus, making a last ditch appeal for

[24]The medical director wrote a congressman protesting the funding cut. The letter said John's "family abandoned John a number of years ago for all practical purposes," and "John had reacted to neglect and abandonment primarily by an autistic-like withdrawal into himself and by lack of speech development." The letter said John had received remedial education, speech therapy, individual psychotherapy and group therapy, and his "response has been good." While John still lagged behind in school, "We have seen him relinquish his introverted amateur adjustment in favor of periods of emotional stability, academic achievement, and outgoing peer relations." The letter implored that Champus funding not be cut because "To stop now will negate what has gone before" (1PC-R. D-Ex 1, Tab 8, p. 27).

continued funding:

> John has made substantial progress in his peer relations, speech and educational achievements and has exhibited a higher level of emotional stability and maturity. However, it is the opinion of treatment staff that John has not yet reached a level where he could be sustained in a foster family or sufficiently assisted by existing educational facilities in the community. . . . John will require an additional nine to twelve months of residential treatment before he can successfully reenter the community.

(1PC-R. D-Ex 1, Tab 8, pp. 38-39).

This appeal was not successful. Shady Brook's director of admissions wrote Mrs. Marek and described that John's last meeting with his doctor "was a tearful parting for both of them" (1PC-R. D-Ex 1, Tab 8, p. 34). In December 1975, Shady Brook's last progress report on John said he was learning to deal with his problems realistically, understood the consequences of his actions, and was learning self-control, resulting in fewer behavioral outbursts (1PC-R. D-Ex 1, Tab 8, p. 41).

In June of 1976, John was placed with the Devereux Foundation in Victoria, Texas, under the name John Marek. An admissions psychological evaluation revealed that much of the progress made at Shady Brook was already gone. His full scale IQ now tested at 82, Dull Normal, with a Verbal IQ of 64 and Performance IQ of 104. The report noted:

> This young man at some time in the past was potentially capable of functioning in the Bright Normal range. His longstanding emotional disturbance has significantly lowered his overall intellectual functioning, but his basic cognitive grasp remains average.

John presented "[a] fairly complicated picture with the chief diagnostic impression being ego diffusion/fragility with moderately severe general emotional disturbance. Emotional integration is poor with inability to form goals, frequent outbursts of impulsivity and, perhaps most important, thinking disorganization" (1PC-R. D-Ex 1, Tab 7, pp. 29-30).

In an evaluation conducted on October 19, 1977, John again tested as Dull Normal; the evaluator observed, "[a]t some time in the past this young man was potentially capable of functioning in the Bright Normal range of intelligence, but due to his various problems have been unable to realize this potential." The discrepancy between John's verbal and performance IQS "strongly suggest[s] underlying organicity, reflected in a language/learning disability syndrome. . . . However, in terms of specific etiological contributors, organicity must rate a second place to this young man's severe emotional disturbance."[25] John was developing "an inadequate personality disturbance," accompanied by "a variable morass of underlying depressive feelings. While John is only mildly depressed, his depression extends very far back in time and is fairly well and deeply set"

[25]In May 1978, John still had a bed wetting problem, causing him much embarrassment. "[H]e continue[d] to feel so worthless--feeling that he [was] a nothing." The Devereux staff felt John needed to "find something he can do and find successes and gain more self-confidence to strengthen his feeling of self-worth" (1PC-R. D-ex 1, Tab 7, p. 11).

(1PC-R. D-Ex 1, Tab 7, pp. 17-18).

On September 18, 1978, John was discharged from Devereux at his request. The discharge summary noted "John's feelings of inadequacy among peers and a feeling he would like to return to a Unit where there were younger and smaller children" (1PC-R. D-Ex 1, Tab 7, p. 5).[26] In December, John quit school. In January, the Mareks washed their hands of him. Texas Welfare officials placed John in a shelter. In March of 1979, he was placed with new foster parents, Sallie and Jack Hand (1PC-T. 239).[27]

In May of 1979, John was charged with credit card abuse for attempting to charge $55 on a credit card a customer had left at the gas station where he worked, and was placed on probation (1PC-R. D-Ex 1, Tab 19, p. 8). In 1980, probation was revoked because John had failed to attend a counseling and vocational program, and John was sentenced to two years in state prison. During probation revocation proceedings, a competency evaluation noted that John had developed a substantial drug abuse problem,

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[26]John went to the Marek's where he attended public school and worked at a gas station. In October 1978, Mrs. Marek reported John had "regressed in his enuresis problem after his birthday because his natural father had not called or sent a present to John as he was supposed to. Since his birthday, John ha[d] resumed his bed wetting" (1PC-R. D-Ex 1, Tab 29).

[27]Sallie Hand testified at the 1988 hearing that John "was a shy, I thought sweet type kid that never gave me any trouble." "Did he ever indicate that he had been loved by anyone before you?" "No. I don't think he felt love." "John was searching for love" (1PC-T. 242).

mainlining heroin and using marijuana, cocaine, speed, and downers, but that John had functioned adequately in jail where drugs were not available (1PC-R. D-Ex 1, Tab 18, p. 5). The evaluator recommended that John receive drug treatment in "a strictly enforced and structured environment," which could "reshape [his] behavior permanently" (Id. at 6).[28]

Mr. Marek's early life of abuse, neglect and rejection had a lasting impact on him. Since defense counsel failed to present this important information, Mr. Marek was sentenced to death by a judge and jury who knew virtually nothing about him save what the State told them. This evidence was admissible, valid mitigation. Campbell v. State, 571 So. 2d 415, 419 (Fla. 1990); Holsworth v. State, 522 So. 2d 348 (Fla. 1988).

The background information described above was not only independently mitigating, but also would have prompted a thorough neuropsychological evaluation of Mr. Marek. Such an evaluation would have confirmed what the Texas records indicate: Mr. Marek suffers from organic brain damage and severe psychological disturbances, and has suffered from these conditions throughout

[28]After his release from prison, John had nowhere to go and resumed using drugs and drinking. By the time of the offense, he was consuming vast quantities of alcohol. He drank approximately two cases of beer a day during the trip to Florida. When police officers stopped John and Raymond Wigley on the beach early on June 17, 1983, the bed of Wigley's truck contained eight to ten cases of beer. When John and Wigley were arrested the next day, there were five or six cases of beer in the truck.

his life. Such an evaluation would also have revealed that Mr. Marek's organic brain damage and psychological disturbances interacted with alcohol and drug abuse and with intoxication at the time of the offense to substantially impair Mr. Marek's judgment and ability to control his conduct.[29]

Dr. Pat Fleming conducted the necessary evaluation and testing, demonstrating substantial mitigation. Dr. Fleming's testing established that Mr. Marek suffers from "cerebral dysfunction with the left hemisphere affected more than the right." Mr. Marek's history also demonstrated behaviors "indicat[ing] significant damage to the frontal and/or temporal lobe." Mr. Marek's "brain injury added to the psychic trauma" created by his chaotic, neglectful and abusive childhood and adolescence. If the brain damage and psychological trauma were not enough, "significant alcohol use only added to the poor judgment stemming from brain damage and serious psychological problems (2PC-R. 753-54).

Dr. Fleming diagnosed Mr. Marek as suffering from Organic Brain Syndrome and Dysthmia:

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[29]Dr. Krieger, who evaluated Mr. Marek pre-trial for competency, testified at the 1988 hearing that he was not asked to evaluate for mitigation (1PC-T. 282), that he was concerned about saving taxpayer money and obtaining future court appointments, and that he is not a neuropsychologist and was not qualified to perform neuropsychological testing (1PC-T. 283). Had he been provided with records indicating a history of organicity, Dr. Krieger would have referred defense counsel to someone qualified to conduct such testing (1PC-T. 283).

> John's symptomology meets the criteria of Organic Brain Syndrome as outlined in the Diagnostic and Statistical Manual of Mental Disorders (DSM-III): Affective instability e.g. marked shifts from normal mood to depression, irritability, or anxiety; recurrent outbursts of aggression or rage that are grossly out of proportion to any precipitating psychological stressors; markedly impaired social judgment; marked apathy and indifference.
>
> John was diagnosed as a child as having an underlying depression. The current evaluation supports the diagnosis of Dysthmia (Depressive Neurosis). According to the DSM-III the essential feature is a chronic disturbance of mood involving depressed mood (irritable mood in children) for at least two years. During these periods of depressed mood there are some of the following associated symptoms that John has demonstrated: poor appetite, hypersomnia, low energy or fatigue, low self-esteem, poor concentration or difficulty making decisions, and feelings of hopelessness. John's present level of depression is heightened by his present circumstances but the history indicates that the depression is long standing.

(2PC-R. 755). Dr. Fleming identified substantial mitigation established by Mr. Marek's psychological evaluation and history:

1. Significant physical and psychological trauma during infancy and childhood... drug overdose, head injuries, seizure activity, and recurrent high fevers.

2. Consistent diagnosis of brain dysfunction beginning at one year. Treatment plans were inconsistent and interrupted.

3. Alcohol use beginning at age eleven and increasing at age seventeen. This excessive alcohol use interacted with the existing brain dysfunction and severe psychological problems to significantly interfere with functioning and judgment.

4. Significant family pathology. Abandoned by natural mother, father, step-father and foster family. Unaccepted at home and school due to his behavior and severe language delay.

5. Consistent lack of opportunity to establish stable relationships. Frequent shifts in foster families and treatment centers, with no consistent plan. Failure to refer to in-patient treatment when the circumstances and recommendations warranted more intense treatment.

John Marek is a classic example of a child who was provided too little, too late. From the time of his birth he was a frantic child, seeking acceptance, nurturing, and attention. He was surrounded by inadequate people who did not have the capacity to understand or rear a child who had significant problems.

(2PC-R. 756).

As Dr. Fleming's report also demonstrates, a thorough psychological evaluation which took into account the documentation regarding Mr. Marek's background and history would also have provided substantial mitigation regarding Mr. Marek's mental and emotional disturbances, his history of alcohol and drug abuse, and his intoxication at the time of the offense. Mr. Marek's sentencers knew nothing about his life of abandonment and neglect, of the psychological and emotional abuse he suffered, of the organic brain damage from which he suffered, of his severe substance abuse problems, or of the severe psychological and emotional disorders which plagued him throughout his life and at the time of the offense. Counsel failed his client, and Mr. Marek's death sentence is the resulting prejudice.

The Supreme Court has described the prejudice inquiry:

> [A] court hearing an ineffectiveness claim must consider the totality of the evidence before the judge

> or jury. Some of the factual findings will have been unaffected by the errors, and factual findings that were affected will have been affected in different ways. Some errors will have had a pervasive effect on the inferences to be drawn from the evidence, altering the entire evidentiary picture, and some will have had an isolated, trivial effect. Moreover, a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support. Taking the unaffected findings as a given, and taking due account of the effect of the errors on the remaining findings, a court making the prejudice inquiry must ask if the defendant has met the burden of showing that the decision reached would reasonably likely have been different absent the errors.

Strickland, 466 U.S. at 695-96.

Under Wiggins, Mr. Marek was clearly prejudiced by counsel's failure to investigate. Confidence is undermined in the reliability of the outcome when the evidence in aggravation is considered "against the **totality** of available mitigating evidence." Wiggins, 123 S.Ct at 2542 (emphasis added); see also Williams v. Taylor, 120 S.Ct at 1515 (court is required to conduct an "assessment of the totality of the omitted evidence" and then to "evaluate the totality of the available mitigation evidence–**both** that adduced at trial, **and** the evidence adduced in the habeas proceeding")(emphasis added). If "the available mitigating evidence, taken as a whole, 'might well have influenced the jury's appraisal' of [the defendant's] moral culpability," Wiggins, 123 S.Ct. at 2544 (quoting Williams, 120 S.Ct. at 1515), prejudice has been shown. Every defendant has "a right–indeed a constitutionally protected right–to provide the

jury with the mitigating evidence that his trial counsel either failed to discover or failed to offer," Williams, 120 S.Ct. at 1513, regardless of the strength of the state's case, the heinous nature of the offense, or the severity of the aggravators. Williams, 120 S.Ct. at 1515. For a fact to be mitigating it does not have to be relevant to the crime--any of "the diverse frailties of humankind," Woodson v. North Carolina, 428 U.S. 280, 304 (1976), which might counsel in favor of a sentence less than death, Lockett v. Ohio, 438 U.S. 586 (1978), are mitigating. Williams, 120 S.Ct at 1516.

Mr. Marek has presented a Furman claim in which he cites to the specific prejudice that he suffered as this Court indicated in Rutherford v. State, 940 So. 2d 1112, 1117 (Fla. 2006), was required to establish a basis for relief. The circuit court denied this aspect of the Furman saying:

> This Court also finds that the Defendant's "Second Claim" in both of his motions and also as explained in his Memorandum under Wiggins v. Smith, 539 U.S. 510 (2003), Rompilla v. Beard, 545 U.S. 374 (2005) and Williams v. Taylor, 529 U.S. 362 (2000) in which the Defendant has requested to re-examine his claim of ineffective assistance of penalty phase counsel is speculative and is an improper attempt to re-litigate matters already previously determined.

Order dated April 23, 2009, at 3.[30]

[30]In its decision in Cone v. Bell (announced on April 28, 2009), the United States Supreme Court made it clear that a procedural bar premised upon *res adjudicate* or law of the case is not valid and cannot preclude merits consideration of the federal question. Slip Op. at 17.

The refusal to afford Mr. Marek the benefit of the controlling decisions on the question of ineffective assistance of counsel can only be described as arbitrary. Under these decisions, there can be no question that Mr. Marek would be entitled to relief.[31] Under Furman, Mr. Marek's sentence of death cannot stand. It is a product of system that has failed to assure "rationality in the evenhanded operation of the state law." Proffitt v. Florida, 428 U.S. at 259-60.

D. The standardless clemency process produces arbitrary executions.

Clemency is a critical stage of the capital scheme. It is the only stage permitting correction for the arbitrary factors that infect the system. See Harbison v. Bell, 129 S. Ct. 1481 (2009); Herrera v. Collins, 506 U.S. 390, 412 (1993). In the words of Harbison, clemency is the "failsafe." Yet, Florida's clemency process fails to perform that function as the ABA report noted: "Given the ambiguities and confidentiality surrounding Florida's clemency decision-making process and that fact that clemency has not been granted to a death-sentenced inmate since 1983, it is difficult to conclude that Florida's clemency process is adequate." ABA Report on Florida at vii.

And here, the State has disclosed records showing

[31]Interestingly, the State has not argued otherwise. This is because applying the controlling United States Supreme Court decisions to Mr. Marek's case clearly requires the grant of collateral relief.

correspondence with the Governor's office and the Parole Commission in September of 2008 regarding Mr. Marek and his death sentence. Mr. Marek's counsel was not contacted regarding the possibility of clemency or of the possibility that the Governor would not sign a warrant. It was entirely an *ex parte*, one-sided, arbitrary, standardless process. Out of more than 50 death sentenced individuals who the Governor could have signed a death warrant for on April 20, 2009, the decision to pick Mr. Marek who had proceedings pending in court, smacks of a lottery system. Those who did not receive a death warrant on April 20, 2009, received clemency within the standard meaning of the word. *See* Webster's New World Dictionary ("clemency" is defined as "leniency, or mercy, as toward an offender").

E. Conclusion.

Within the meaning of the Eighth Amendment, Mr. Marek has been struck by lightning. The Florida capital sentencing process has resulted in an arbitrary death sentence and an arbitrary decision to execute Mr. Marek on May 13, 2009. He has been struck by lightning within the meaning of the Eighth Amendment in that there is no principled way to distinguish his case and circumstances from those who have not been sentenced to death or have not been scheduled for execution. Furman has been violated. The circuit court erred in denying Mr. Marek's claim.

ARGUMENT 2: THE EXECUTION OF MR. MAREK WHO HAS HAD NO STAY OF EXECUTION IN EFFECT FOR OVER FOURTEEN YEARS VIOLATES THE EIGHTH

AMENDMENT TO THE UNITED STATES CONSTITUTION.

Here, Mr. Marek's execution has now been scheduled 25 years after his conviction was returned and a sentence of death was imposed. The execution has been scheduled 14 years after Mr. Marek's first round of postconviction litigation was completed. The Eighth Amendment prohibition against cruel and unusual punishment requires that "the sanction imposed cannot be so totally without penological justification that it results in the gratuitous infliction of suffering." Gregg v. Georgia, 428 U.S. 153, 183 (1976). Punishments that entail exposure to a risk that "serves no 'legitimate penological objective'" and that results in gratuitous infliction of suffering violate the Eighth Amendment. Farmer v. Brennan, 511 U.S. 825, 833 (1994) (quoting Hudson v. Palmer, 468 U.S. 517, 548 (1984) (Stevens, J., concurring in part and dissenting in part).

When the U.S. Supreme Court denied certiorari review in Lackey v. Texas, Justice Stevens wrote:

> Though novel, petitioner's claim is not without foundation. In *Gregg v. Georgia*, this Court held that the Eighth Amendment does not prohibit capital punishment. Our decision rested in large part on the grounds that (1) the death penalty was considered permissible by the Framers and (2) the death penalty might serve "two principal social purposes: retribution and deterrence".
>
> It is arguable that neither ground retains any force for prisoners who have spent some 17 years under a sentence of death. Such a delay, if it ever occurred, certainly would have been rare in 1789, and thus the practice of the Framers would not justify a denial of

> petitioner's claim. Moreover, after such an extended time, the acceptable state interest in retribution has arguably been satisfied by the severe punishment already inflicted. Over a century ago, this Court recognized that "when a prisoner sentenced by a court to death is confined in the penitentiary awaiting the execution of the sentence, one of the most horrible feelings to which he can be subjected during that time is the uncertainty during the whole of it." *In re Medley, 134 U.S. 160, 172, 33 L. Ed. 835, 10 S. Ct. 384 (1890)*. If the Court accurately described the effect of uncertainty in *Medley*, which involved a period of four weeks, that description should apply with even greater force in the case of delays that last for many years. Finally, the additional deterrent effect from an actual execution now, on the one hand, as compared to 17 years on death row followed by the prisoner's continued incarceration for life, on the other, seems minimal.

Lackey v. Texas, 514 U.S. 1045 (1995) (J. Stevens, memorandum respecting denial of certiorari) (citations omitted).

In a subsequent denial of certiorari review in another case, Justice Breyer echoed the concerns voiced by Justice Stevens in Lackey. Justice Breyer wrote in a case involving a defendant who had been on Florida's death row over 23 years that: "After such a delay, an execution may well cease to serve the legitimate penological purposes that otherwise may provide a necessary constitutional justification for the death penalty." Elledge v. Florida, 119 S. Ct. 366 (1998) (J. Breyer, dissenting). Justice Breyer asserted that the length of time on death row, extended by a State's mishandling of the case, becomes cruel once the purpose of punishment is no longer served. In yet another case involving an extended stay on Florida's death row, Justice Breyer stated:

> Nor can one justify lengthy delays by reference to constitutional tradition, for our Constitution was written

> at a time when delay between sentencing and execution could be measured in days or weeks, not decades. See *Pratt v. Attorney General of Jamaica, [1994] 2 A. C. 1, 18, 4 All E. R. 769, 773 (P. C. 1993) (en banc)* (Great Britain's "Murder Act" of 1751 prescribed that execution take place on the next day but one after sentence).

Knight v. Florida, 528 U.S. 990, 995 (1999) (J. Breyer, dissenting from the denial of certiorari). Justice Breyer described the psychological impact of a long stay on death row:

> It is difficult to deny the suffering inherent in a prolonged wait for execution -- a matter which courts and individual judges have long recognized....The California Supreme Court has referred to the "dehumanizing effects of . . . lengthy imprisonment prior to execution." In *Furman v. Georgia, 408 U.S. at 288-289* (concurring opinion), Justice Brennan wrote of the "inevitable long wait" that exacts "a frightful toll." Justice Frankfurter noted that the "onset of insanity while awaiting execution of a death sentence is not a rare phenomenon."

Knight, 528 U.S. at 994-995. Justice Breyer, in his dissent from denial of certiorari in Foster v. Florida, observed:

> [T]he Supreme Court of Canada recently held that the potential for lengthy incarceration before execution is "a relevant consideration" when determining whether extradition to the United States violates principles of "fundamental justice." *United States v. Burns, [2001] 1 S. C. R. 283, 353, P123.*

Foster v. Florida, 537 U.S. 990, 992-993 (2002) (Breyer, J., dissenting).

The Framers of the United States Constitution would not have envisioned that a condemned man would spend 25 years awaiting execution. The Eighth Amendment's prohibition on cruel and unusual punishment on the 1776 Virginia Declaration of Rights was

based on the 1689 English Bill of Rights. Harmelin v. Michigan, 501 U.S. 957, 966 (1991). The English Bill of Rights said "excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted" when executions took place within weeks of a death sentence, and if a delay in carrying out the execution was unduly prolonged, it could be commuted to a life sentence. Riley v. Attorney Gen. of Jamaica, 3 All E.R. 469, 478 (P.C. 1983) (Lord Scarsman, dissenting); Pratt v. Attorney General of Jamaica, [1994] 2 A. C. 1, 18, 4 All E. R. 769, 773 (P. C. 1993) (en banc) .

Recent developments in international law strongly suggests that the execution of a condemned individual after over 25 years on death row is not consistent with evolving standards of decency. For example, in 1993 two Jamaican death row inmates challenged their death sentences on the basis that their 14 year incarceration on death row violated the Jamaican Constitution's prohibition against inhuman punishment. The Privy Council of the United Kingdom invalidated their death sentences and indicated that a stay on death row of more than five years would be excessive, and commuted their sentence from death to life in prison. Pratt v. Attorney General of Jamaica, [1994] 2 A. C. 1, 18, 4 All E. R. 769, 773 (P. C. 1993) (en banc). As a result of the prolonged stays on death rows in the United States, combined with the inhumane conditions typical of death row, some foreign

jurisdictions have refused extradition of criminal suspects to the United States where it was likely that a death sentence would result, on the grounds that the experience of years of living on death row would violate international human rights treaties. Soering v. United Kingdom, 11 Eur. H.R. Rep. 439 (1989). In Soering, the European Court of Human Rights held that the extradition of a capital defendant, a German national, to the United States would violate Article 3 of the European Convention on Human Rights, which bars parties to the Convention from extraditing a person to a jurisdiction where they would be at significant risk of torture or inhumane punishment. The Court cited the risk of delay in carrying out the execution, which in Virginia averaged between six and eight years. The Court found that "the condemned prisoner has to endure for many years the conditions on death row and the anguish and mounting tension of living in the ever-present shadow of death." Id. at §106. Since the U.S. government could not assure that the death penalty would not be sought in the Virginia courts, extradition was barred by the United Kingdom.

Here, unlike most of the cases in which Justices of the U.S. Supreme Court have written regarding the Court's denial of certiorari review, there has been no impediment precluding the Assistant Deputy Attorney General from asking the governor to sign a warrant at any time since 1995 (since in 2009 even though

Mr. Marek had a Rule 3.851 motion pending before this Court, the Assistant Deputy Attorney General was successful in advising the governor to sign a warrant). The prolonged delay here has been as a result of the State's choice. The State chose to wait 14 years after the 11th Circuit's decision was final to schedule Mr. Marek's execution. In these circumstances, the Eighth Amendment has been violated by the signing of the death warrant. Mr. Marek' execution cannot be carried out. Mr. Marek' sentence of death if carried out would violate the Eighth Amendment. Rule 3.851 relief is warranted.

Rule 3.852(h) provides that after a death warrant is signed on a defendant, he has ten days to make additional public records requests. Mr. Marek has now made such requests and is entitled to pursue the public records in his Rule 3.851 motion and any claims arising from newly disclosed public records. Accordingly Mr. Marek's scheduled execution violates the Eighth Amendment and constitutes cruel and unusual punishment.

ARGUMENT 3: THE EXECUTION OF MR. MAREK WHILE A CASE IS PENDING IN THE UNITED STATES SUPREME COURT THAT MAY ESTABLISH THAT HE WAS DEPRIVED OF DUE PROCESS VIOLATES THE EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

Marek sought to amend his Rule 3.851 motion in light of the grant of certiorari review in Caperton v. Massey. At issue in this case which was argued on March 3, 2009, is whether the due process clause requires judicial disqualification where a judge has a close relationship with a litigant. Though a ruling has

not yet issued, if the U.S. Supreme Court finds that the due process clause is applicable in such instances and warrants disqualification, then Mr. Marek was deprived of due process in 1988 when Judge Kaplan presided over the evidentiary hearing in Mr. Marek's case to determine whether his good friend Hilliard Moldof had rendered ineffective assistance of counsel at Mr. Marek's trial. Given the pendency of Caperton and the scheduled execution date, Mr. Marek has sought to amend his Rule 3.851 motion to plead that he was deprived of his due process rights in the collateral proceedings conducted in 1988. His execution when such an important issue is pending in the United States Supreme Court would be arbitrary and capricious and violative of the Eighth Amendment.

ARGUMENT 4: EXECUTION BY LETHAL INJECTION VIOLATES THE UNITED STATES AND FLORIDA CONSTITUTIONS.

As to this issue, Mr. Marek argued in circuit court that due process required that he receive the same consideration Ian Lightbourne received, an evidentiary hearing. Mr. Marek argued in circuit court that it would be a violation of due process for the circuit court to deny Mr. Marek an evidentiary hearing on the basis of the outcome in Lightbourne, given that Mr. Marek was not a party to the Lightbourne proceedings. Of course, the touchstone of due process is notice and reasonable opportunity to be heard. The right to due process entails "'notice and

opportunity for hearing appropriate to the nature of the case.'" Cleveland Bd. of Ed. v. Loudermill, 470 U.S. 532, 542 (1985), quoting Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950). "[F]undamental fairness is the hallmark of the procedural protections afforded by the Due Process Clause." Ford v. Wainwright, 477 U.S. 399, 424 (1986)(Powell, J., concurring in part and concurring in the judgment).

In Teffeteller v. Dugger, 676 So. 2d 369 (1996), this Court applied these due process principles in post-conviction proceedings when considering a claim similar to the one at issue here. In Teffeteller, this Court ruled that a criminal defendant's collateral claim could not be denied on the basis of evidence presented when neither he nor his counsel were present for and thus could not challenge and/or confront the evidence. This is precisely the circumstances presented here when this Court refused to give Mr. Marek the opportunity to present his case, and instead denied his claim on the basis of evidence presented in another case for which Mr. Marek was not present and not able to challenge or confront the State's case.

In its order denying Mr. Marek's Rule 3.851 motion, the circuit court overlooked Mr. Marek's due process claim and did not address it. Mr. Marek has sought to invoke his own due process right to be fully and fairly heard on his claim and seeks to present evidence not presented in Lightbourne. As Mr. Marek

does not base his claim merely on the basis of the evidence presented by Lightbourne, the circuit court's refusal to grant an evidentiary hearing on the claim is error that cannot be harmless.

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, 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 April 29, 2009.

CERTIFICATE OF FONT

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

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COUNSEL FOR APPELLANT

IN THE CIRCUIT COURT OF THE SEVENTEENTH JUDICIAL CIRCUIT IN AND FOR BROWARD COUNTY, FLORIDA

STATE OF FLORIDA,

Plaintiff,

vs.

JOHN RICHARD MAREK,

Defendant.

_____/

FLORIDA SUPREME COURT: SC65821

CASE NO.: 83-7088CF10B

JUDGE: PETER M. WEINSTEIN

CASE UNDER ACTIVE DEATH WARRANT-EXECUTION SCHEDULED ON MAY 13, 2009

ORDER DENYING DEFENDANT'S MOTION FOR REHEARING/MOTION TO AMEND MOTION TO VACATE

THIS CAUSE comes before this Court upon the Defendant's April 27, 2009 "Motion for Rehearing [of this Court's Order of April 24, 2009]/Motion to Amend Motion to Vacate." Having considered the Defendant's Motion for Rehearing and the Defendant's Motion to Amend Motion to Vacate, the State's Response, arguments of counsel, the Court file and applicable law and being otherwise duly advised in the premises, this Court finds as follows:

As to the Defendant's claim (1) of disparate treatment of the co-defendant, this Court finds that the claim is without merit. In *Marek v. State,* 462 So.2d 10554, 1058 (Fla. 1986), the Florida Supreme Court already decided the issue against the Defendant. Additionally, the Defendant's reliance on *Bradshaw v. Stumpf,* 545 U.S. 175 (2005) and *Raleigh v. State,* 932 So.2d 1054 (Fla. 2006) is misplaced. The law of the case as set forth in *Marek, supra,* controls as does the law in the case of *Gore v. State,* 964 So.2d 1257 (Fla. 2007), *cert. den.* 128 S. Ct. 1250 (U.S. Fla. 2008).

As to the Defendant's claim (2) that *Caperton v. Massey,* Case No. 08-22 United State's Supreme Court applies to the facts in the instant case, this Court finds that the facts in the *Marek* case are distinguishable. A case pending before the United State Supreme Court is not legal precedent. *See, Schwab v. State,* 973 So.2d 427 (Fla. 2007), concurring opinion, Pariente, Justice. This Court also finds that any issue regarding the disqualification of Judge Kaplan was *de minimis.*

As to the Defendant's claim (3) that *Lackey v. Texas,* 514 U.S. 1045 (Fla. 1995) applies to the instant case, this Court finds that *Gore, supra, Elledge v. State,* 911 So.2d 57 (Fla. 2005) and *Tompkins v. State,* 994 So.2d 1072 (Fla. 2008) all reject the Defendant's claim.

As to the Defendant's remaining claim which is intertwined with the other claims, this Court finds that the Defendant is not entitled to his own "Lightbourne v. McCollum, 969 So.2d 326 (Fla. 2007)" hearing. *See, also* cases cited in this Court's Order of April 24, 2009.

This Court also finds that as to the Motion for Rehearing there was no misapplication of the facts nor was there a misapprehension of the law. This Court also adopts the reasoning set forth in the State's Response to Amended Post-Conviction Motion, which is incorporated by reference herein. Accordingly, it is

ORDERED AND ADJUDGED that the Defendant's Motion for Rehearing/Motion to Amend Motion to Vacate is respectfully DENIED.

THE DEFENDANT HAS THIRTY (30) DAYS FROM THE DATE OF THIS ORDER TO FILE AN APPEAL.

DONE AND ORDERED on this 27th day of April, 2009, in Chambers, Broward County Courthouse, Fort Lauderdale, FL 33301.

_____

PETER M. WEINSTEIN
CIRCUIT COURT JUDGE

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IN THE CIRCUIT COURT OF THE SEVENTEENTH JUDICIAL CIRCUIT, IN AND FOR BROWARD COUNTY, FLORIDA

CASE NO. 83-7088CF-B

STATE OF FLORIDA,

Plaintiff,

v.

JOHN MAREK,

Defendant.

_____/

AMENDED MOTION TO VACATE JUDGMENTS OF CONVICTION AND SENTENCES WITH REQUEST FOR LEAVE TO AMEND

JOHN MAREK, Defendant in the above-captioned action, submits this Motion to Vacate Judgments of Conviction and Sentences with Special Request for Leave to Amend pursuant to Florida Rule of Criminal Procedure 3.850 and 3.851 and respectfully moves this Court for an Order, pursuant to Rule 3.850, vacating and setting aside his conviction and sentence of death, imposed upon him by this Court.

Alternatively, in the event the Court determines that the issue presented below is not a factual one requiring evidentiary development, Mr. Marek respectfully moves this Court for an Order, pursuant to Florida Rule of Criminal Procedure 3.800 (a), to correct an illegal sentence imposed upon him by this Court. Rule 3.800 provides that "A court may at any time correct an illegal sentence imposed by it". Following the decision in Furman v. Georgia, 408 U.S. 238, 310 (1972)(per curiam), the Florida Attorney General filed a motion in the Florida Supreme Court asking that Court to vacate 40 death sentences because in light of Furman the death sentences were illegal. As the Florida Supreme Court noted, "The Attorney General relies upon Rule 3.800, *F. R. Cr. P., 33* F.S.S., which authorizes the Court at any time to correct an illegal sentence imposed by it." Anderson v. State, 267 So. 2d 8, 9 (Fla. 1972). The Florida Supreme

Court noted that though it "ha[d] never declared the death penalty to be unconstitutional, we nevertheless recognized and follow the consensus determination of the several opinions rendered by the United States Supreme Court in Furman v. Georgia, supra." Accordingly, the Florida Supreme Court applied Furman, which involved three petitioners (two from Georgia and one from Texas) challenging the death sentences imposed upon them, to the Florida statutory scheme and concluded that it was unconstitutional in light of opinions rendered in Furman. The Florida Supreme Court ultimately concluded "it is our opinion that we should correct the illegal sentences previously imposed without returning the prisoners to the trial court." Id. at 10. There was absolutely no analysis of whether the forty individuals sentenced to death had timely objected to Florida's death penalty nor of whether the error was either harmless or prejudicial. It was simply accepted that if the statute was unconstitutional, the resulting death sentences were illegal within the meaning of Rule 3.800.

The Florida Supreme Court has stated: "A sentence that patently fails to comport with statutory or constitutional limitations is by definition 'illegal'." State v. Mancino, 714 So. 2d 429, 433 (Fla. 1998). Accordingly, Rule 3.800 is available to a criminal defendant whose sentence is "illegal". See Hopping v. State, 708 So. 2d 263 (Fla. 1998) ("where it can be determined without an evidentiary hearing that a sentence has been unconstitutionally enhanced in violation of the double jeopardy clause, the sentence is illegal and can be reached at any time under rule 3.800."). As the Florida Supreme Court has explained: "A rule 3.800 motion can be filed at any time, even decades after a sentence has been imposed, and as such, its subject matter is limited to those sentencing issues that can be resolved as a matter of law without an evidentiary determination." State v. Callaway, 658 So. 2d 983, 988 (Fla. 1995).[1]

In support of his motion, Mr. Marek, through counsel, respectfully submits as follows:

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[1]The Florida Supreme Court receded from certain aspects of Callaway, but not this principle cited herein. Dixon v. State, 730 So. 2d 265, 266 (Fla. 1999).

PROCEDURAL HISTORY

1. The Circuit Court of the Seventeenth Judicial Circuit, Broward County, entered the judgments of conviction and sentence under consideration.

2. On July 6, 1983, Mr. Marek and his co-defendant, Raymond Wigley, were charged by indictment in the Circuit Court of the Seventeenth Judicial Circuit, Broward County, Florida, with first degree murder, kidnapping, burglary, and two counts of sexual battery. Wigley was tried first, was found guilty as charged on all counts, and was sentenced to life imprisonment.

3. Mr. Marek's trial began on May 22, 1984, before Judge Stanton Kaplan. On June 1, 1984, the jury found Mr. Marek guilty of first degree murder (on a felony murder theory), kidnapping, attempted burglary with an assault (a lesser included offense), and two counts of battery (lesser included offenses of sexual battery).

4. The penalty phase was conducted on June 5, 1984. By a 10-2 vote, the jury recommended death. On July 3, 1984, Judge Kaplan imposed death, finding no mitigating circumstances and four aggravating circumstances: (1) prior violent felony based upon Mr. Marek's contemporaneous conviction of kidnapping; (2) murder committed while engaged in burglary; (3) murder committed for pecuniary gain; (4) heinous, atrocious or cruel (R.1472). Judge Kaplan also found that Mr. Marek and Wigley "acted in concert from beginning to end"(R. 1471).

5. Mr. Marek appealed.[2] The Florida Supreme Court affirmed the convictions and death sentence. Marek v. State, 492 So. 2d 1055 (Fla. 1986).

6. On October 10, 1988, Mr. Marek filed a motion under Rule 3.850, Fla. R. Crim.

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[2]The direct appeal raised the following issues: 1) denial of motion for mistrial when policeman who arrested Wigley testified he found a gun in the truck; 2) denial of the motion for judgment of acquittal; 3) jury panel's viewing of film called "You, the Juror"; 4) disparate sentencing; 5) challenges to all four aggravating factors; 6) denial of jury instruction on Wigley's life sentence; 7) electrocution is cruel and unusual punishment.

P. The motion presented twenty-two claims, including, *inter alia*, trial counsel failed to investigate and present mitigating evidence (Claims V, VI), the defense mental health expert provided inadequate assistance (Claim II), the jury's death recommendation was tainted by invalid aggravators (Claims XI, XII, XIII, XIV), the death sentence rests upon an unconstitutional automatic aggravating circumstance (Claim XX), the jury's sense of responsibility for sentencing was diluted (Claim XVII), and the jury was prevented from considering the co-defendant's life sentence and a mental health evaluation of Mr. Marek as mitigation (Claim IX)(1PC-R.1-118).

7. An evidentiary hearing was conducted on November 3 and 4, 1988 under the pendency of a death warrant. This Court denied Mr. Marek's claims of penalty phase ineffective assistance of counsel and inadequate mental health evaluation(1PC-R. 262-64, 487-88), found that the prior violent felony aggravator must be struck, but denied relief(1PC-R. 266).

8. Mr. Marek appealed. The Florida Supreme Court. The Court affirmed the circuit court's order denying relief. Marek v. Dugger, 547 So. 2d 109 (Fla. 1989). Mr. Marek also filed a habeas corpus petition in the Florida Supreme Court. The Court denied that petition as well. Marek v. Dugger, 547 So. 2d 109 (Fla. 1989).

9. In 1989, Mr. Marek filed a federal petition for a writ of habeas corpus. The district court denied relief, and Mr. Marek appealed. On August 14, 1995, the Eleventh Circuit affirmed. Marek v. Singletary, 62 F.3d 1295 (11th Cir. 1995).[3]

10. In 1992, Mr. Marek filed a second habeas corpus petition in the Florida Supreme Court, alleging violations of Espinosa v. Florida, 112 S. Ct. 2926 (1992), and Sochor v. Florida, 112 S. Ct. 2114 (1992). The Court denied relief. Marek v. Dugger, 626 So. 2d 160 (Fla. 1993).

11. While his Eleventh Circuit appeal was pending, Mr. Marek discovered new

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[3]The issues raised in these proceedings included: 1) ineffective assistance of counsel at the penalty phase; 2) trial court precluded presentation of mitigating evidence; 3) erroneous jury instructions on aggravating and mitigating factors; 4) ineffective assistance of counsel on direct appeal; 5) trial counsel failed to provide background information to mental health expert.

information and filed a second Rule 3.850 motion on July 22, 1993(Supp. 2PC-R. 1-98).[4] The 1993 Rule 3.850 motion presented claims from the first Rule 3.850 motion because the prior "proceedings were tainted by the conflict" of interest regarding funding(Supp. 2PC-R. 1). The motion pointed out that in the prior proceedings, "Mr. Marek challenged the adequacy of the [trial] mental health evaluation and the adequacy of his [trial] representation. Evidence was presented that investigation and mental health testing were not conducted in order to save taxpayers money and insure future court appointments"(Supp. 2PC-R. 4).

12. On June 3, 1996, this Court Kaplan ordered the State to respond to Mr. Marek's Rule 3.850 motion by September 6, 1996 (2PC-R. 290). On August 29, 1996, the State requested a 90-day extension of time for filing its response, and the motion was granted (2PC-R. 291-93, 438).

13. On December 2, 1996, Mr. Marek had filed a Supplemental Motion to Vacate raising a public records claim(Supp. 2PC-R. 139-46). On March 7, 1997, Mr. Marek filed a Motion to Compel public records compliance(Supp. 2PC-R. 162-64). On March 5, 1997, the State requested that the order requiring it to respond to the Rule 3.850 motion be held in abeyance because Mr. Marek would be permitted to amend the motion once the public records litigation was completed (Supp. 2PC-R. 158-61). The court granted the State's motion (Supp. 2PC-R. 169-70).[5]

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[4]This motion raised the following claims: 1) Broward County's system for funding special assistant public defenders created a conflict of interest; 2) ineffective assistance of counsel at the penalty phase; 3) invalid aggravating factors; 4) automatic aggravating factor; 5) diminishment of jury's sense of responsibility for sentencing; 6) exclusion of mitigating evidence. In January of 1994, Mr. Marek supplemented this motion with a Claim 7 alleging he was denied due process in post-conviction when he was required to litigate his initial post-conviction motion under the time exigencies created by a death warrant.

[5]Mr. Marek filed additional motions to compel(Supp. 2PC-R. 176-262 [filed 2/17/98]; Supp. 2PC-R. 333-419 [filed 7/21/99]; 2PC-R. 633-38 [filed 10/12/00]; 2PC-R. 692-95 [filed 4/9/01]). From 1996 into 2001, Mr. Marek litigated public records issues (See 2PC-R. 533-670, 671-95, 700-01; Supp. 2PC-R. 162-64, 171-73, 176-302, 327-464, 465-67, 553-63, 569-78; 2PC-T. Vols. 1, 2). After this litigation concluded, the court ordered Mr. Marek to amend his Rule 3.850 motion by September 28, 2001(2PC-T. 66).

14. Mr. Marek's amended Rule 3.850 motion was filed on September 27, 2001(2PC-R. 702-841). The motion raised twelve claims: 1) access to public records; (2) the conflict of interest created by Broward County's system for funding special assistant public defenders and expert witnesses; (3) ineffective assistance provided by trial counsel and the trial mental health expert at the penalty phase; (4) jury recommendation was tainted by invalid aggravators; (5)unconstitutional automatic aggravator; (6) dilution of jury's sense of responsibility for penalty; (7) exclusion of mitigating evidence; (8) due process violated by litigating prior Rule 3.850 motion under death warrant; (9) newly discovered evidence regarding Wigley; (10) Judge Kaplan's bias tainted the trial, penalty phase and prior post-conviction proceedings; (11) capital sentencing statute violates Sixth Amendment; (12) lethal injection violates Eighth Amendment.

15. The State filed a supplemental response on April 2, 2002 (2PC-R. 940-1045). This response deleted the allegations from the first response that the entirety of Claim X was procedurally barred. Mr. Marek filed a reply to the State's supplemental response (2PC-R. 1046-60).

16. On September 30, 2003, this Court denied Rule 3.850 relief (Supp. 2PC-R. 650-64). In sum, the court ruled, "this Court finds that the Defendant's claims fail to state facts which must be resolved in an evidentiary hearing, fail to state grounds for relief that are cognizable in this proceeding, and that his motion may be resolved as a matter of law"(Supp. 2PC-R. 651).

17. Mr. Marek appealed (2PC-R. 1264-65). The Florida Supreme Court issued a summary order affirming the denial of relief. Marek v. State, 2006 Fla. LEXIS 1425 (Fla. June 16, 2006).

18. In May of 2005, Mr. Marek had filed a third petition for a writ of habeas corpus in the Florida Supreme Court. This petition raised claims under Roper v. Simmons, 125 S.Ct. 1183 (2005), Wiggins v. Smith, 123 S. Ct. 2527 (2003), and Crawford v. Washington, 124 S. Ct. 1354 (2004). The Florida Supreme Court also denied that petition. Marek v. State, 2006 Fla. LEXIS

1425 (Fla. June 16, 2006).

GROUNDS FOR POSTCONVICTION RELIEF

By his motion for Rule 3.850 relief, Mr. Marek asserts that his conviction and sentence of death were obtained in violation of the Fifth, Sixth, Eighth, and Fourteenth amendments to the United States Constitution and the corresponding provisions of the Florida Constitution for the reasons set forth below.

CLAIM I

THE EXISTING PROCEDURE THAT THE STATE OF FLORIDA UTILIZES FOR LETHAL INJECTION VIOLATES THE EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION AS IT CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT.

1. All other factual allegations contained in this motion are fully incorporated herein by specific reference.

2. Following the imposition of Mr. Marek's sentence of death, Florida adopted lethal injection as its method of execution. In Sims v. State, 754 So. 2d 657 (Fla. 2000), the Florida Supreme Court first addressed an Eighth Amendment challenge to the then newly adopted method of execution, *i.e.* lethal injection. The chemical process utilized in executions in Florida that was at issue in Sims provided as explained by the Florida Supreme Court:

> In all, a total of eight syringes will be used, each of which will be injected in a consecutive order into the IV tube attached to the inmate. The first two syringes will contain "no less than" two grams of sodium pentothal, an ultra-short-acting barbiturate which renders the inmate unconscious. The third syringe will contain a saline solution to act as a flushing agent. The fourth and fifth syringes will contain no less than fifty milligrams of pancuronium bromide, which paralyzes the muscles. The sixth syringe will contain saline, again as a flushing agent. Finally, the seventh and eighth syringes will contain no less than one-hundred-fifty milliequivalents of potassium chloride, which stops the heart from beating.

Sims, 754 So. 2d at 666 (footnote added). The Florida Supreme Court rejected the claim that Florida's lethal injection procedure violated the Eighth Amendment because it constituted cruel and unusual punishment. The Florida Supreme Court explained:

> Sims' reliance on Professor Radelet and Dr. Lipman's testimony concerning the list of horribles that could happen if a mishap occurs during the execution does

> not sufficiently demonstrate that the procedures currently in place are not adequate to accomplish the intended result in a painless manner. Other than demonstrating a failure to reduce every aspect of the procedure to writing, Sims has not shown that the DOC procedures will subject him to pain or degradation if carried out as planned. Sims' argument centers solely on what may happen if something goes wrong. From our review of the record, we find that the DOC has established procedures to be followed in administering the lethal injection and we rely on the accuracy of the testimony by the DOC personnel who explained such procedures at the hearing below. Thus, we conclude that the procedures for administering the lethal injection as attested do not violate the Eighth Amendment's prohibition against cruel and unusual punishment.

Id. at 668 (note omitted).

3. The basis for the Florida Supreme Court's conclusion that "Sims has not shown that the DOC procedures will subject him to pain or degradation if carried out as planned" is now outdated. Evidence does now exist to show that the DOC procedures will not prevent the infliction of unnecessary pain or degradation. Moreover, the Florida Supreme Court's reliance upon "the accuracy of the testimony by the DOC personnel who explained such procedures at the hearing below" has now been demonstrated to have been misplaced.

4. On December 13, 2006, Angel Diaz was executed by the State of Florida. Diaz's execution was carried out under a revised lethal injection protocol adopted in secret on August 16, 2006. This new protocol was not made public until counsel for a condemned inmate learned on October 17, 2006, of the protocol on the eve of that inmate's execution.

5. Newspaper accounts of the execution described it as follows:

> [Mr. Diaz] was executed by lethal injection Wednesday, grimacing in pain before dying 34 minutes after receiving the first dose of chemicals.

Ron Word, "Man Executed for Miami bar slaying takes 34 minutes to die," *Gainesville Sun*, December 13, 2006 (emphasis added).

> He appeared to move for 24 minutes after the first injection. His eyes were open, his mouth opened and closed and his chest rose and fell.

The Associated Press, "Connecticut Escapee Executed in Florida," *The Hartford Courant*, December 13, 2006.

> What happened to him next looked agonizing. Grimacing, Diaz took 34 minutes to die from the drugs pumped through him. At times he seemed to be squinting and at other times he appeared to be flexing his jaw.

Phil Long and Marc Caputo, "Lethal injection takes 34 minutes to kill inmate," *Miami Herald*, December 14, 2006.

6. On December 15, 2006, the medical examiner who performed an autopsy of the body publicly made preliminary findings. He found that the IV's were not inserted properly:

> The doctor who performed Diaz's autopsy refused to say if he thought Diaz was in pain. Alachua County Medical Examiner William F. Hamilton said the needles in both arms punctured straight through his veins, dissipating the lethal chemicals.
>
> "The main problem with the conduct of this execution procedure was that the fluids to be injected were not going into a vein, but were going into small tissues in the arm," Hamilton said. His examination found "evidence of chemical damage" at the injection wound for six inches above and below the right elbow, and nearly the same pattern around the left elbow.

Gary Fineout and Marc Caputo, "Governor Bush Orders Hold on Executions," *Miami Herald*, December 16, 2006 (emphasis added). As a result of the medical examiner's findings, the Governor suspended all executions in Florida:

> Gov. Jeb Bush has once again suspended all executions in Florida after an autopsy showed needles tore through an inmate's veins Wednesday night, causing chemicals to severely burn his flesh.
>
> Angel Diaz took 34 minutes to die, an unusually long time, because the drugs weren't circulating in his blood.
>
> Corrections officials initially attributed Diaz's slow death to liver disease, but the preliminary autopsy results showed no outward signs of damage to the organ.
>
> The problems prompted Bush to form a four-person team to investigate the execution. On Friday, Bush ordered the assembly of a second team to study whether the lethal injection protocols used in Florida should be revised.

Chris Tisch, "Governor Bush Halts Executions," *St. Petersburg Times*, December 16, 2006 (emphasis added).

7. In the wake of the botched Diaz execution, the Department of Corrections completed its own internal investigation of the botched Diaz execution on December 20, 2006. This internal investigation clearly revealed that the protocol was not followed as had been

promised; Mr. Diaz was neither rendered unconscious nor paralyzed.

8. The administration of potassium chloride is painful. The whole purpose of the administration of sodium pentothal is to render the condemned unconscious and unable to feel the known pain that results from the passage of potassium chloride through the bloodstream. In the Diaz execution, it was apparent that Mr. Diaz was not rendered unconscious by the administration of sodium pentothal. Yet in disregard of this obvious fact, the execution proceed with the administration of a drug that was known would cause pain.

9. The DOC execution team had difficulty inserting the IV's into Mr. Diaz's arms. The IV's in both of Mr. Diaz's arms penetrated clear through the vein. As a result, the drugs administered through the IV's did not enter the blood stream. Because of noted difficulty push the drugs through the IV in Diaz's left arm, the execution team then switched to an IV line in Diaz's right arm. The execution team then decided to simultaneously use the first line for a second round of drugs. Dr. David Varlotta, a member of the Commission, has "said he couldn't explain the medical staff's decision: 'It's not likely it would fix itself,' he said." Nathan Crabbe, "Expert says IV mistakes were made in execution," *Gainesville Sun*, February 6, 2007. Dr. Denis Clark, an Orlando specialist in vein therapy, has advised that from her review of the DOC internal investigation, "the medical staff should have recognized that problems injecting the drugs meant the first IV line was likely dislodged. 'If it's in the proper place, it shouldn't require a lot of force,' she said." Nathan Crabbe, "Expert says IV mistakes were made in execution," *Gainesville Sun*, February 6, 2007.

10. According to the lead executioner in the Diaz execution, "the team had to empty 14 syringes of chemicals and saline solution into Angel Diaz. The executioner [has indicated] that they pumped the cocktail into both of Diaz's arms. He surprised some observers by saying he had gone to the second arm in other executions as well." Chris Tisch, "Executioner's words disturb panel," *St. Petersburg Times*, February 10, 2007. The execution also reported that he "lacks medical qualifications and last received training to administer lethal chemicals seven years

ago." Nathan Crabbe, "Executioner admits lack of training," *Gainesville Sun*, February 10, 2007. However, according to the executioner's opinion, "when the execution begins the executioner is in charge." The nurse who inserted the IV's has reported that she had difficulty inserting one of the IV lines. "The nurse got the needle into the vein on a second attempt, but officials didn't tell the warden of the problem." Chris Tisch, "Executioner's words disturb panel," *St. Petersburg Times*, February 10, 2007.

11. The medical examiner who performed the autopsy on Diaz's body concluded that the IV needles inserted into Diaz's arms tore through his veins and sprayed the three drug cocktail into his flesh. "None of the materials went to the right place." Chris Tisch, "Doctor: Execution flawed at start," *St. Petersburg Times*, February 13, 2007. As a result, footlong blisters were found on both of Diaz's arms during the autopsy. Dr. Hamilton "said one of the chemicals used in the process is known for its caustic effect." Nathan Crabbe, "Experts testify on botched execution," *Gainesville Sun*, February 13, 2007.

12. Having reviewed the Diaz execution and what went awry, the former Secretary of the Department of Corrections, Harry K. Singletary, who was a member of the Commission said, "We know for sure that this is going to happen again." Nathan Crabbe, "Lethal injection changes proposed," *Gainesville Sun*, February 25, 2007.

13. In May of 2007, a new protocol was adopted for carrying executions in Florida. However, this protocol failed to correct the problem with the lethal injection procedure revealed by the Diaz execution. In fact, as former Secretary Singletary said, "We know for sure that this is going to happen again."

14. At the conclusion of an evidentiary hearing in July of 2007, a circuit court judge in State v. Lightbourne concluded that the revised protocol failed satisfy the Eighth Amendment. Unlike Mr. Lightbourne, Mr. Marek has not been permitted to litigate his Eighth Amendment challenge to Florida's lethal injection protocol.

15. After the initial ruling in Lightbourne, DOC issued yet another revised lethal

injection protocol on July 31, 2007. The circuit court judge in Lightbourne found that this additional revisions satisfied the Eighth Amendment. On appeal, the Florida Supreme Court concluded that the circuit court judge's factual conclusions were supported by substantial and competent evidence and affirmed. Lightbourne v. McCollum, 969 So. 2d 326 (Fla. 2007).

16. Subsequently, the United States Supreme Court announced the Eighth Amendment standard by which a method of execution challenge must be measured. Baze v. Rees, 2008 U.S. LEXIS 3476 (2008). It is clear from Baze that the question of whether a Eighth Amendment violation exists is a factual one. Under Baze, the factual question is whether a condemned prisoner establishes that the State's lethal injection protocol creates a demonstrated risk of severe pain. Mr. Marek alleges that the Diaz execution and the factual allegations set forth hear demonstrate a clear risk of severe pain. Certainly, an examination of the DOC internal memorandum dated August 15, 2006, as well as the memorandum dated June 16, 2006, supports this claim.[6] It is also clear from the discussions that DOC personnel have had concerning these

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[6]The June 16, 2006, memorandum set forth:

> Regarding the sequence in which the chemicals are administered, and the timing thereof, Warden Bryant informed me yesterday that once he affirmatively instructs the executioner to begin the process (by walking into the executioner's booth, placing his hand on the executioner's shoulder, and verbally instructing him/her to begin), the executioner selects the first syringe from a wooden rack containing all eight syringes numbered in sequence from one to eight. The executioner inserts the blunt syringe needle into the IV port, which has a one-way valve that prevents the chemicals from flowing up the tube into the saline bag, and slowly, but steadily, pushes the chemical into the tube. Once the syringe is empty, the executioner either places the empty syringe into a biohazard container or hands it to the alternate executioner (there are always two executioners for redundancy purposes) for disposal. The executioner then selects the second syringe and continues the same slow, deliberate process of pushing the chemicals into the IV line until all eight of the syringes and select the next, there is no break in the process. If, for example, the executioner drops the syringe or something happens render any one or all of the syringes unusable, there is an entire second set of syringes prepared and numbered and available for use.

The August 15, 2006, memorandum set forth:

> As you know, death row inmates around the country have been challenging the three-drug sequence used in lethal injection procedures, alleging, in part, that the administration of pancuronium bromide and/or potassium chloride may cause the "unnecessary and wanton infliction of pain" if the sodium pentothal has failed to produce a sufficient level of unconsciousness prior to their administration. In response to this argument, courts in California and Missouri have required

memoranda with the media. For example, these memoranda have been discussed by the Secretary McDonough in his interview with a *Gainesville Sun* reporter, an interview that is discussed in the "watchdog blog" that appeared on the *Gainesville Sun* website. September 20, 2007, posting by Nate Crabbe.[7] As Secretary McDonough told the *Gainesville Sun* reporter, the bispectral index monitor discussed in the August 15th memorandum was rejected because the manufacturer did not want it used in executions. Even though DOC was aware of the need to for a medical determination of unconsciousness following the administration of sodium pentothal

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the presence of anesthesiologists at the execution to monitor the inmate's level of conciousness. To date, after exhaustive attempts, neither state has been able to secure an anesthesiologist willing to participate in executions. In fact, the American Society of Anesthesiologists has recently adopted the position of the American Medical Association that medical professionals should not participate in any way in executions, as it would violate their Hippocratic Oath and their Code of Ethics.

So that the Department does not find itself in a similar situation, i.e., with a court order requiring the presence of an anesthesiologist, it has been my legal opinion (and continues to be my legal opinion) that the Department should incorporate into its existent lethal injection procedure the use of a bispectral monitor, which can assess the inmate's level of unconsciousness at all times, but especially following the administration of the sodium pentothal and preceding the administration of the pancuronium bromide. The BIS monitor has been used by North Carolina in a previous execution and has withstood significant litgation, most frequently in Flippen v. Beck, case no. 5:06-CT-3062-H (E.D.N.C. July 25, 2006)(Mr. Flippen is scheduled to be executed on August 18, 2006). I have spoken on numerous occasions with North Carolina Deputy Attorney General Thomas Pittman (919-7-6-6500), who has been lead counsel in all of their litigation, about the BIS monitor, and he wholeheartedly endorses the use of this monitor.

[7]Nate Crabbe reported that:

> Before a prolonged execution last year, the Florida Department of Corrections decided against using a machine to ensure an is fully unconscious before lethal chemicals are injected.
>
> An Aug. 15, 2006, memo from department attorney Sara Dyehouse receommended the use of a bispectral index monitor in executions. The monitor can ensure a condemned inmate is unconscious and does not experience pain during the lethal injection process, she wrote in the memo.
>
> The department rejected the advice. Four months later, Angel Diaz appeared to writhe in pain in an execution that lasted about 20 minutes longer than usual.
>
> Department secretary, Jim McDonough, in an interview this week, said the company that makes the monitor didn't want it used in executions.
>
> "The people that make it were not inclined t sell it to us," he said.

and before the execution procedure continued to the next step and the administration of the two remaining drugs in the three drug cocktail, DOC did not provide for such a determination. In August of 2006, it was recognized that provision should be made for either an anesthesiologist or a bispectral index monitor to monitor the inmate's level of consciousness. Obviously, had DOC followed through on the memorandum identification of the problem and the proposed solution the difficulties occurring during the Diaz execution would likely have been caught and possibly remedied. Nevertheless, despite the identification of both the problem and two possible solutions in August of 2006, DOC has refused to adopt either of these suggested solutions in any of the revisions of the protocol that have followed the Diaz execution. Further, the decision not to follow the recommendation of the August 15th memorandum was also discussed on the record in the recent oral argument in the Florida Supreme Court in Lightbourne v. McCollum, Case No. 06-2391. During the oral argument, Justice Pariente asked Ken Nunnelley, Assistant Attorney General, about the decision to not employ the bispectral index monitor as recommended in the August 15th. The reason offered by Mr. Nunnelley violates the Eighth Amendment under the most favorable standards that are at issue in Baze.[8]

17. Though the circuit court in Lightbourne did not find the July 31st revised protocol violative of the Eighth Amendment, that ruling cannot possible be binding on Mr. Marek since he was not a party to those proceedings. Despite having filed a challenge to Florida's method of execution, Mr. Marek has not been given the opportunity extended to Mr. Lightbourne - the due process right of notice and opportunity to be heard. The State was aware that Mr. Marek had filed a lethal injection challenge, but never notice Mr. Marek of his right to participate in the Lightbourne proceedings, nor that he would be bound be factual findings made in his absence.

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[8]Interestingly, the judge in the Lightbourne proceedings did not allow Mr. Lightbourne's counsel to present evidence regarding DOC's awareness in August of 2006 of the need for a medical determination of unconsciousness. Accordingly, relevant and material evidence that Mr. Marek would present in support of his lethal injection was not heard at the Lightbourne evidentiary hearing. As result, the conclusion reached by the presiding judge there did not address the evidence that Mr. Marek relies upon in his Eighth Amendment challenge to Florida's lethal injection procedures.

18. Surely, there is no dispute that a decision in one civil lawsuit against a tobacco company is not binding as to any other plaintiffs who were not a party to the proceeding. Just because similar factual issues are involved in numerous cases with different parties does not mean that the factual resolution in one case is binding as to those parties who were not joined and/or represented in the first case to go to trial.

19. The Florida Supreme Court's decision in Lightbourne was premised upon findings of fact. This Court made that clear when it indicated that substantial and competent evidence supported the circuit court's decision. As this Court explained in its opinion in that case, the decision in Lightbourne was not a legal ruling that this Court reviewed *de novo*. Since the decision was a factual one, and since Mr. Marek was given no notice and opportunity to be heard and present evidence in support of his claim, this Court's application of the Lightbourne decision to deny Mr. Marek the very right that was extended to Mr. Lightbourne violates due process. The touchstone of due process is notice and reasonable opportunity to be heard. The right to due process entails "'notice and opportunity for hearing appropriate to the nature of the case.'" Cleveland Bd. of Ed. v. Loudermill, 470 U.S. 532, 542 (1985), quoting Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950). "[F]undamental fairness is the hallmark of the procedural protections afforded by the Due Process Clause." Ford v. Wainwright, 477 U.S. 399, 424 (1986)(Powell, J., concurring in part and concurring in the judgment). Mr. Marek was not a party to at the proceedings in Lightbourne on August 28, 2007; he was not given the opportunity to present evidence in support of his claim or to make argument as to why his claim was meritorious. The decision there cannot be binding as to him.

20. It is clear that Florida's procedure for carrying out executions creates a demonstrated risk of severe pain. Deficiencies in the protocol employed by DOC create risk of the infliction of unnecessary pain, a risk that DOC was aware of in August of 2006, but which it decided to ignore. Certainly, during the execution of Angel Diaz there was a risk of the infliction of unnecessary pain that was totally ignored by DOC employees. There is a likelihood that Mr.

Diaz, who all agree was not rendered unconscious before the pain inducing second and third drugs were injected, felt severe pain when those chemicals were sprayed into his flesh producing footlong blisters.

21. But beyond the issue of the need for a medical determination of unconsciousness, there is the question of whether the three drug protocol employed by DOC comports with the Eighth Amendment. The protocol creates a demonstrated risk of severe pain since the use of drugs that are known to be painful in the lethal injection procedure and Florida's history with lethal injection has demonstrated the risk of severe pain. Given this history, Mr. Marek specifically challenges Florida's use of the three-drug cocktail as violative of the Eighth Amendment.[9] There are drugs that are not painful that can be administered in a lethal dosage and thus eliminate any risk of unnecessary pain. The question of the constitutionality of the three drug protocol employed by the Florida Department of Corrections is different that the question presented in Baze where there was no history of botched executions.

22. Given former Secretary Singletary's statement, "We know for sure this is going to happen again", Florida's method of carrying out executions violates the Eighth Amendment and constitutes cruel and unusual punishment. Likewise, it violates the Florida Constitution's prohibition on cruel or unusual punishment. Rule 3.851 relief is warranted.[10]

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[9]In Lightbourne, the Assistant Attorney General argued to the Florida Supreme Court that Mr. Lightbourne did not include a challenge to the three-drug cocktail and so that issue which is included in the Baze case before the United States Supreme Court was not before the Florida Supreme Court in Lightbourne. Accordingly, as the State argued there the outcome in Lightbourne cannot address or decide the issue that is contained in Baze and is presented by Mr. Marek in this motion to vacate.

[10]In Schwab v. State, 32 Fla. L. Weekly S 697 (Fla. November 1, 2007), the Florida Supreme Court addressed an Eighth Amendment challenge to Florida's lethal injection procedures. The Court clearly stated that "when an inmate presents an Eighth Amendment claim which is based primarily upon facts that occurred during a recent execution, the claim is not procedurally barred." Schwab, 2007 Fla. LEXIS 2011, *3-4. Thus, it is clear that its decisions predating the execution of Angel Diaz, in no way preclude a capital defendant from raising an Eighth Amendment challenge based upon the facts and circumstances surrounding the recent botched execution, nor determine the outcome. The Florida Supreme Court indicated that Mr. Schwab, who had presented his lethal injection claim in a Rule 3.851 motion, had been entitled to have the circuit court either 1) take judicial notice of the evidence presented in the Lightbourne proceedings, or 2) conduct an evidentiary hearing on the claim:

23. Mr. Marek proffers that he would call Sara Dyehouse as a witness to discuss the memoranda that she wrote in June through August of 2006 concerning the revisions to the lethal injection protocol.[11] Mr. Marek proffers that he expects Ms. Dyehouse to testify that she had through her interviews of the execution team and examination of events at prior executions determined that an unconsciousness determination was necessary following the administration of sodium pentothal and that the procedures that had been followed in Florida did not provide for such a determination. Mr. Marek proffers that Ms. Dyehouse would testify that she advised the Department of Corrections that such a determination was necessary to eliminate the risk of unnecessary pain that would result from the administration of painful drugs to a conscious condemned inmate during an execution. Ms. Dyehouse would testify that not only was this an unnecessary risk of pain, it was an entirely foreseeable risk of unnecessary pain. Ms. Dyehouse would testify that despite her identification of this specific defect in the lethal injection

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> Under the unique circumstances of this case and based on the court's other ruling summarily denying relief, we hold that the postconviction court erred in failing to take judicial notice of the record in Lightbourne. **Since Schwab's allegations were sufficiently pled, the postconviction court should have either granted Schwab an evidentiary hearing, or if Schwab was relying upon the evidence already presented in Lightbourne, the court should have taken judicial notice of that evidence.**

Schwab, 2007 Fla. LEXIS 2011, *7-8 (emphasis added). In Schwab, Mr. Schwab asked for the circuit court to take judicial notice of the evidence presented in Lightbourne. The circuit court's refusal to take judicial notice of that evidence or to alternatively grant Mr. Schwab his own evidentiary hearing was found to be harmless error "because Schwab has not presented any argument as to specific evidence he wanted to present in this case that had not been presented in the Lightbourne proceeding." Schwab, 2007 Fla. LEXIS 2001, *8, n. 2.

Like Mr. Schwab, Mr. Marek has filed a facially sufficient lethal injection challenge based upon the circumstances of the Angel Diaz execution and the subsequent changes to Florida's lethal injection procedures. Unlike Mr. Schwab, Mr. Marek does not ask this Court to take judicial notice of the evidence presented in Lightbourne, but has asked that this Court conduct an evidentiary hearing at which he is able to present evidence in support of his claim. Unlike Mr. Schwab, Mr. Marek invokes his due process right to notice and reasonable opportunity to be heard. Unlike Mr. Schwab, Mr. Marek asks for his own evidentiary hearing at which he can present evidence, confront evidence presented by the State, and make his own challenge to Florida's lethal injection procedures. Unlike Mr. Schwab, Mr. Marek seeks the opportunity to present evidence not presented at the Lightbourne evidentiary hearing.

[11]The State is in possession of Ms. Dyehouse's address. In the Lightbourne proceedings she was contacted by the State and instructed that she was bound by the attorney-client privilege and could not converse with attorneys representing inmates challenging lethal injection.

procedures, the Department of Corrections decided to ignore her warnings and did not adopt a procedure for making any kind of unconsciousness determination.

24. Mr. Marek also proffers that he expects to call Secretary McDonough to testify regarding Ms. Dyehouse's memoranda.[12] Though Secretary McDonough did testify during the Lightbourne proceedings, he did not testify about Ms. Dyehouse or the memoranda that she prepared. In fact, Secretary McDonough when asked who on his legal staff worked on preparing the revised protocols in the summer of 2006, did not recall Ms. Dyehouse's involvement and thus gave no testimony in the Lightbourne proceedings regarding Ms. Dyehouse or her memoranda or the content and recommendations contained therein. Mr. Marek proffers that the Secretary will testify in conformity with his statements to newspaper reporters following the conclusion of the Lightbourne evidentiary hearing that the decision to ignore Ms. Dyehouse's recommendation was premised upon matters totally unrelated to whether the risk of unnecessary pain had been eliminated or ameliorated in some fashion.

25. Similarly, Mr. Marek would call Gretl Plessinger to testify.[13] Though she testified during the Lightbourne proceedings, she did not testify about the Dyehouse memoranda or the recommendations contained therein. Subsequent to the Lightbourne hearing she too has made statements to the media regarding the decision not to provide for an unconsciousness determination. According to Plessinger's statements the decision to reject the recommendation was made for the Department's convenience and not because there had been a determination that no risk of unnecessary pain existed.

26. Mr. Marek would also call Dr. David Varlotta, an anesthesiologist, who was on the Lethal Injection Commission that was put together after the Diaz execution to investigate

[12]The State is in possession of Secretary McDonough's address.

[13]The State is in possession of Gretl Plessinger's address.

what happened and make recommendations as to what changes were warranted.[14] Following the decision in Lightbourne finding that there was sufficient evidence in the record to support the circuit court's conclusion that employees of the Department of Corrections with no medical training could make an unconsciousness determination, Dr. Varlotta advised the St. Petersburg Times: "I cannot agree that individuals without advanced medical training would have the ability to adequately assess the level of anesthetic depth." Dr. Varlotta was not called as a witness during the Lightbourne proceedings. Most assuredly Mr. Marek will present his testimony that procedures currently in place are not adequate.

27. Mr. Marek seeks an evidentiary hearing on his Eighth Amendment challenge to Florida's lethal injection procedure. He seeks to be heard in conformity with due process and to present the evidence that supports his claim. The evidence he seeks to present establishes that the Department of Corrections has not been concerned with adopting a procedure that eliminates the risk of unnecessary pain, but instead with cost or convenience to the Department in violation of the Eighth Amendment. Rule 3.851 relief is warranted.

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[14]The State is in possession of Dr. Varlotta's address since he was appointed by the Governor to sit on the Commission appointed to investigate the Diaz execution and make recommendations as to any desirable changes in the lethal injection procedures. Dr. Varlotta has provided Mr. Marek's counsel with the following statement:

> I understand and appreciate the fact that the DOC has adopted procedures that limit physician involvement in capital punishment by lethal injection. It would be a violation of ethical principles for a physician to participate. Maintaining high ethical standards are extremely important in the medical profession.
>
> However, as a practicing anesthesiologist I cannot agree that individuals without advanced medical training would have the ability to adequately assess the level of anesthetic depth.
>
> At a minimum physicians who are considered competent to assess anesthetic depth have completed the following: premedical course work and have received an undergraduate degree (4yrs), graduated medical school (4yrs), completed an internship (1yr), completed a residency in anesthesiology (3yrs), and is licensed to practice medicine.
>
> It is important to point out that even with this level of training scientific studies have been published in peer reviewed medical journals that cite the incidence of unintended awareness to be as high as one in five hundred to one in one thousand anesthetics. If the incidence of awareness is that high when anesthesia is administered by fully trained and qualified individuals, one would have to be concerned that the incidence would be significantly higher in lesser trained hands.

CLAIM II

NEWLY AVAILABLE INFORMATION DEMONSTRATES THAT MR. MAREK'S CONVICTIONS AND SENTENCE OF DEATH CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

1. All other factual allegations contained in this motion are fully incorporated herein by specific reference.

A. Introduction

2. Over thirty years ago, the United States Supreme Court announced that under the Eighth Amendment, the death penalty must be imposed fairly, and with reasonable consistency, or not at all. Furman v. Georgia, 408 U.S. 238, 310 (1972)(per curiam).[15] At issue in Furman were three death sentences: two from Georgia and one from Texas. Relying upon statistical analysis of the number of death sentences being imposed and upon whom they were imposed, it was argued that the death penalty was cruel and unusual within the meaning of the Eighth Amendment. Five justices agreed, and each wrote a separate opinion setting forth his reasoning.

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[15]The previous year, the Supreme Court in McGautha v. California, 402 U.S. 183 (1971), had addressed whether:

> the absence of standards to guide the jury's discretion on the punishment issue is constitutionally intolerable. To fit their arguments within a constitutional frame of reference petitioners contend that to leave the jury completely at large to impose or withhold the death penalty as it sees fit is fundamentally lawless and therefore violates the basic command of the Fourteenth Amendment that no State shall deprive a person of his life without due process of law.

McGautha, 402 U.S. at 196. In the majority opinion written by Justice Harlan, no due process violation was found, noting the impossibility of cataloging the appropriate factors to be considered:

> Those who have come to grips with the hard task of actually attempting to draft means of channeling capital sentencing discretion have confirmed the lesson taught by the history recounted above. To identify before the fact those characteristics of criminal homicides and their perpetrators which call for the death penalty, and to express these characteristics in language which can be fairly understood and applied by the sentencing authority, appear to be tasks which are beyond present human ability . . . . For a court to attempt to catalog the appropriate factors in this elusive area could inhibit rather than expand the scope of consideration, for no list of circumstances would ever be really complete.

Id. at 204, 208. When Furman reached the Court the next year and the Petitioners presented an argument that the statutory schemes for imposing a sentence of death violated the Eighth Amendment, Justice Stewart and Justice White joined the dissenters from McGautha and found that the death penalty statutes were indeed unconstitutional.

Each found the manner in which the death schemes were then operating to be arbitrary and capricious. Furman, 408 U.S. at 253 (Douglas, J., concurring) ("We cannot say from facts disclosed in these records that these defendants were sentenced to death because they were black. Yet our task is not restricted to an effort to divine what motives impelled these death penalties. Rather, we deal with a system of law and of justice that leaves to the uncontrolled discretion of judges or juries the determination whether defendants committing these crimes should die or be imprisoned. Under these laws no standards govern the selection of the penalty. People live or die, dependent on the whim of one man or of 12."); Id. at 293 (Brennan, J., concurring) ("it smacks of little more than a lottery system"); Id. at 309 (Stewart, J., concurring) ("[t]hese death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual"); Id. at 313 (White, J., concurring) ("there is no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not"); Id. at 365-66 (Marshall, J., concurring)("It also is evident that the burden of capital punishment falls upon the poor, the ignorant, and the underprivileged members of society. It is the poor, and the members of minority groups who are least able to voice their complaints against capital punishment. Their impotence leaves them victims of a sanction that the wealthier, better-represented, just-as-guilty person can escape. So long as the capital sanction is used only against the forlorn, easily forgotten members of society, legislators are content to maintain the status quo, because change would draw attention to the problem and concern might develop.")(footnote omitted). Thus, as explained by Justice Stewart, Furman means that: "The Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be . . . wantonly and . . . freakishly imposed" on a "capriciously selected random handful" of individuals. Id. at 310.[16]

[16]The decision in Furman did not turn upon proof of arbitrariness as to one individual claimant. Instead, the Court looked to systemic arbitrariness. Furman involved a macro analysis of a death penalty scheme and a determination as to whether the scheme permitted the death penalty to be imposed in an arbitrary and/or capricious manner.

3. In the wake of Furman, all death sentences were vacated. Proof of individual harm or the lack of such proof was irrelevant. Thereafter, the State of Florida (as well as others states) sought to adopt a death penalty scheme that would pass scrutiny under Furman. Florida's newly adopted scheme was reviewed in Proffitt v. Florida, 428 U.S. 242 (1976). In Gregg v. Georgia, 428 U.S. 153 (1976), a companion case to Proffitt, the United States Supreme Court explained: "the concerns expressed in Furman that the penalty of death not be imposed in an arbitrary or capricious manner can be met by a carefully drafted statute that ensures that the sentencing authority is given adequate information and guidance." Gregg v. Georgia, 428 U.S. at 195 (plurality opinion).[17] Applying this principle to Florida's newly-adopted capital sentencing scheme, the Supreme Court concluded:

> Florida, like Georgia, has responded to *Furman* by enacting legislation that passes constitutional muster. That legislation provides that after a person is convicted of first-degree murder, there shall be an informed, focused, guided, and objective inquiry into the question whether he should be sentenced to death. If a death sentence is imposed, the sentencing authority articulates in writing the statutory reasons that led to its decision. Those reasons, and the evidence supporting them, are conscientiously reviewed by a court which, because of its statewide jurisdiction, can assure consistency, fairness, and rationality in the evenhanded operation of the state law. As in Georgia, this system serves to assure that sentences of death will not be "wantonly" or "freakishly" imposed.

Proffitt, 428 U.S. at 259-60. The Supreme Court has since explained that Furman required that a capital sentencing scheme produce constitutional reliability and "a reasoned moral response to the defendant's background, character, and crime." Penry v. Lynaugh, 492 U.S. 302, 319, (quoting California v. Brown, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring) (emphasis

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[17]The plurality in Gregg noted:

> In view of *Furman, McGautha* can be viewed rationally as a precedent only for the proposition that standardless jury sentencing procedures were not employed in the cases there before the Court so as to violate the Due Process Clause. We note that *McGautha*'s assumption that it is not possible to devise standards to guide and regularize jury sentencing in capital cases has been undermined by subsequent experience. In view of that experience and the considerations set forth in the text, we adhere to *Furman*'s determination that where the ultimate punishment of death is at issue a system of standardless jury discretion violates the Eighth and Fourteenth Amendments.

Gregg at 195 n. 47

deleted).[18]

4. However over time, various Supreme Court Justices have expressed concern whether the capital sentencing schemes approved in Gregg and Proffitt actually delivered the promised and requisite reliability. Justice Scalia observed an inherent inconsistency between the narrowing requirement and the broad discretion to consider mitigation requirement:

> My initial and my fundamental problem, as I have described it in detail above, is not that *Woodson* and *Lockett* are wrong, but that *Woodson* and *Lockett* are rationally irreconcilable with *Furman*. It is that which led me into the inquiry whether either they or *Furman* was wrong. I would not know how to apply them -- or, more precisely, how to apply both them and *Furman* -- if I wanted to. I cannot continue to say, in case after case, what degree of "narrowing" is sufficient to achieve the constitutional objective enunciated in *Furman* when I know that that objective is in any case impossible of achievement because of *Woodson-Lockett*. And I cannot continue to say, in case after case, what sort of restraints upon sentencer discretion are unconstitutional under *Woodson-Lockett* when I know that the Constitution positively *favors* constraints under *Furman*. *Stare decisis* cannot command the impossible. Since I cannot possibly be guided by what seem to me incompatible principles, I must reject the one that is plainly in error.

Walton v. Arizona, 497 U.S. 639, 672-73 (1990).

5. Thereafter, Justice Blackmun concluded that the Furman promise could not be delivered, and accordingly the death penalty should be declared unconstitutional:

> Twenty years have passed since this Court declared that the death penalty must be imposed fairly, and with reasonable consistency, or not at all, see *Furman v. Georgia, 408 U.S. 238 (1972),* and, despite the effort of the States and courts to devise legal formulas and procedural rules to meet this daunting challenge, the death penalty remains fraught with arbitrariness, discrimination, caprice, and mistake. This is not to say that the problems with the death penalty today are identical to those that were present 20 years ago. Rather, the problems that were pursued down one hole with procedural rules and verbal formulas have come to the surface somewhere else, just as virulent and pernicious as they were in their original form. Experience has taught us that the constitutional goal of eliminating arbitrariness and discrimination from the administration of death, see *Furman v. Georgia, supra,* can never be achieved without compromising an equally essential component of fundamental fairness -- individualized sentencing. See *Lockett v. Ohio, 438 U.S. 586 (1978).*

Callins v. Collins, 510 U.S. 1141, 1143-44 (1994)(Blackmun, J., dissenting from the denial of

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[18]As a result, a capital sentencing scheme must: 1)"narrow" the capital sentencer's discretion, see Godfrey v. Georgia, 446 U.S. 420 (1980); Maynard v. Cartwright, 486 U.S. 356 (1988); and 2) permit the sentencer to consider "*as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." Lockett v. Ohio, 438 U.S. 586, 604 (emphasis in original). See also Penry v. Lynaugh, 492 U.S. 302, 324 (1989).

cert.).

6. Most recently, Justice Souter wrote in an opinion joined by three other Justices:

> Decades of back-and-forth between legislative experiment and judicial review have made it plain that the constitutional demand for rationality goes beyond the minimal requirement to replace unbounded discretion with a sentencing structure; a State has much leeway in devising such a structure and in selecting the terms for measuring relative culpability, but a system must meet an ultimate test of constitutional reliability in producing "'a reasoned moral response to the defendant's background, character, and crime,'" [Citations] The *Eighth Amendment*, that is, demands both form and substance, both a system for decision and one geared to produce morally justifiable results.
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> * * *
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> Today, a new body of fact must be accounted for in deciding what, in practical terms, the *Eighth Amendment* guarantees should tolerate, for the period starting in 1989 has seen repeated exonerations of convicts under death sentences, in numbers never imagined before the development of DNA tests. We cannot face up to these facts and still hold that the guarantee of morally justifiable sentencing is hollow enough to allow maximizing death sentences, by requiring them when juries fail to find the worst degree of culpability: when, by a State's own standards and a State's own characterization, the case for death is "doubtful."
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> * * *
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> We are thus in a period of new empirical argument about how "death is different," *Gregg, 428 U.S., at 188, 96 S. Ct. 2909, 49 L. Ed. 2d 859* (joint opinion of Stewart, Powell, and STEVENS, JJ.): not only would these false verdicts defy correction after the fatal moment, the Illinois experience shows them to be remarkable in number, and they are probably disproportionately high in capital cases. While it is far too soon for any generalization about the soundness of capital sentencing across the country, the cautionary lesson of recent experience addresses the tie-breaking potential of the Kansas statute: the same risks of falsity that infect proof of guilt raise questions about sentences, when the circumstances of the crime are aggravating factors and bear on predictions of future dangerousness.

Kansas v. Marsh, 126 S.Ct. 2516, 2542, 2544, 2545-46 (2006) (Souter, J., dissenting).

7. On September 17, 2006, the American Bar Association's Death Penalty Moratorium Implementation Project and the Florida Death Penalty Assessment Team published its comprehensive report of Florida's death penalty system. See American Bar Association, **Evaluating Fairness and Accuracy in the State Death Penalty Systems: The Florida Death Penalty Assessment Report**, September 17, 2006 (hereinafter ABA Report on Florida). On September 25, 2006, the United States District for the Middle District of Florida issued an Order of Dismissal in Thomas v. McDonough, Case No. 3:03-cv-237 in which that court detailed the failings of collateral counsel to timely seek collateral relief and which precluded the court from

hearing condemned's claims regardless of their merit.[19] The information, analysis and ultimate conclusions contained in the Lawrence amicus brief, the ABA Report, the Order in Thomas v. McDonough make clear: Florida's death penalty system is so seriously flawed and broken that it does not meet the constitutional requisite of being fair, reliable or accurate. Id. at iii ("The team has concluded, however, that the State of Florida fails to comply or is only in partial compliance with many of these recommendations and that many of these shortcomings are substantial.").[20] Thus, "the imposition and carrying out of the death penalty in [Mr. Marek's] case[] constitute[s] cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments." Furman, 408 U.S. at 239-40.

B. Background about the ABA Report

8. The ABA has always believed that "[f]airness and accuracy together form the foundation of the American criminal Justice system" and that "these goals are particularly important in cases in which the death penalty is sought." ABA Report on Florida at 1. In 1997, the ABA responded to the growing concern that the capital jurisdictions did not provide fairness and accuracy in the administration of justice and called for a moratorium on executions until the states had an opportunity to study and implement changes to their systems.[21] Id. Florida did not

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[19]The District Court expressed deep concern over the systemic failing: "I would be remiss if I did not share my deep concern that in these cases our federal system of justice fell short in the very situation where the stakes could not be higher." Order at 4.

[20]The flaws and defects identified by the ABA Report demonstrate that Florida's capital sentencing scheme does not deliver on the Furman promise. The identified flaws and defects inject arbitrariness into the capital sentencing process. Who in fact gets executed in Florida does not depend upon the facts of the crime or the character of the defendant, but upon the flaws and defects of the capital sentencing process. Who gets executed in Florida turns upon such factors as who represented the condemned; what objections he did or did not make; what investigation he did or did not undertake; whether counsel was diligent in finding evidence demonstrating that the condemned was innocence; at what point in time did the Florida Supreme Court review the case; did the condemned get the benefit of new law identifying constitutional or statutory error in his case; did the State preserve the physical evidence containing DNA material that would prove innocence; what procedural bars were applied by the courts to preclude consideration of meritorious claims; etc.

[21]In 2001, the ABA created the Death Penalty Moratorium Implementation Project to, among other things, collect and monitor data on death penalty developments, as well as analyzing responses from government and courts to death penalty issues. Id. And, "[t]o assist the majority of capital jurisdiction that have not yet conducted

heed the ABA's advice and no moratorium was imposed, nor any comprehensive study conducted. Instead, Florida continued to impose the death penalty and carry out executions.

9. The ABA's assessment team was charged with "collecting and analyzing various laws, rules, procedures, standards and guidelines relating to the administration of the death penalty." Id.[22] The team identified a number of the areas in the report "in which Florida's death penalty system falls short in the effort to afford every capital defendant fair and accurate procedures" ABA Report at iii. Recommendations were made to assist Florida in fixing the system. But, the team cautioned that the apparent harms in the system "are cumulative" and must be considered so; "problems in one area can undermine sound procedures in others." Id. at iii-iv. A review of the areas identified in the report as falling short makes apparent that Florida's death penalty scheme is deficient for the many of the same reasons the schemes at issue in Furman were found to be unconstitutional.[23] Death sentences, like Mr. Marek's, are a product of an arbitrary and capricious system. Who is executed in Florida is determined by a myriad of factors unrelated to the facts of the crime or the character of the defendant.

C. Florida – An Arbitrary and Capricious Death Penalty System

1. The Number of Executions

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comprehensive examinations of their death penalty systems, the Project decided in February 2003 to examine several U.S. jurisdictions' death penalty systems and preliminarily determine the extent to which they achieve fairness and provide due process." Id. Florida was one such jurisdiction.

[22]As set forth in the report's table of contents, the team concentrated on thirteen distinct areas: 1) death row demographics, 2) DNA testing and testing and preservation of biological evidence; 3) law enforcement tools and techniques; 4) crime laboratories and medical examiners; 5) prosecutorial professionalism; 6) defense services; 7) direct appeal process; 8) state postconviction proceedings; 9) clemency; 10) jury instructions; 11) judicial independence, 12) racial and ethnic minorities; and 13) mental retardation and mental illness.

[23]For example, the opinions written in Furman noted the same evidence of arbitrary factors unrelated to the crime or the defendant's character that were at work in the capital process that is set forth in the ABA Report. Furman, 408 U.S. at 256 n. 21 (whether counsel timely objected to error was on occasion a decisive, though arbitrary factor in the imposition of a death sentence); Id. at 290 (the manner in which retroactivity rules operate injected arbitrariness); Id. at 293, 309-10, 313 (the number of executions in comparison to the number of murders suggested a lottery); Id. at 364-66 (evidence that racial prejudices and/or classism and/or sexism infected sentencing decisions); Id. at 366-67 (likelihood that an innocent may be executed suggested arbitrariness); Id. at 368 n. 158 (the failure to apply scientific developments in criminal cases fast enough to enhance reliability of outcome of process created arbitrary results).

10. Since 1972, Florida has carried out a total of 61 executions; while between 1972 and 1999, there were 857 defendants sentenced to death (obviously since 1999, there have been more death sentences imposed). ABA Report at 7. In fact, the most recent statistics show that in 2002 there were 911 murder, but only 9 death sentences – less than one percent; in 2003 there were 924 murders and only 9 death sentences – less than one percent; in 2004 there were 946 murders and 9 death sentences– less than one percent; and in 2005 there were 883 murders and 16 death sentences – 1.8 percent. History shows that the odds are that well less than half of the death sentences imposed will result in an execution. The percentage of Florida murderers actually executed since 1972 shows its imposition is unusual.[24] The ABA Report demonstrates the same flaws and defects condemned in the Furman once again infect Florida's capital sentencing scheme.

2. The Exonerated[25]

11. In Florida, since 1972, twenty-two (22) people have been exonerated and another individual has been exonerated posthumously, while sixty-one (61) people have been executed. ABA Report at iv, 8 ("[T]he proportion exonerated exceeds thirty percent of the number executed."). "Since the reinstatement of the death penalty in 1972, Florida has led the nation in death row exonerations." Id. at 45.[26] There has been no effort to learn what defects and flaws

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[24]The percentage of Florida murderers executed since 1972 is minuscule. Furman, 408 U.S. at 293 (Brennan, J., concurring) ("it smacks of little more than a lottery system"); Id. at 309 (Stewart, J., concurring) ("[t]hese death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual"); Id. at 313 (White, J., concurring) ("there is no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not").

[25]A plethora of factors contribute to an innocent individual being convicted of a capital crime. Given the number of exonerations so far, undoubtedly a risk that an innocent has been or will be executed in Florida is great. Certainly, such an occurrence would be itself violative of the Eighth Amendment. However also important under Furman are the systemic safeguards in place and their likely effectiveness in rescuing the innocent.

[26]Justice Souter noted in his dissent in Kansas v. Marsh, 126 S.Ct. at 2544-45, when Illinois had 13 exonerations between 1977 and 2000, a moratorium was imposed and investigation launched. During the investigation, 4 more individuals were determined to be innocent. As a result, the Illinois capital sentencing scheme was reformed and all death sentences imposed under the old scheme were vacated. Yet, as the ABA Report notes, Florida has had more capital exonerations than Illinois had. The rate of exonerations certainly suggest that Florida's system is just as

have led to this.[27] The number of men released from Florida's death row with their presumption of innocence restored shows a broken system that violates Furman.[28]

a. The arbitrariness in the treatment of evidence of actual innocence.

12. While the State of Florida has recently passed legislation to allow capital defendants the opportunity to seek DNA testing,[29] most of the exonerated defendants' cases had no connection to favorable post-verdict DNA results.[30] Yet, the State of Florida has not made any substantive or procedural improvements for those who have no DNA evidence in their case, but could show innocence through the use of other evidence. Indeed, while the State of Florida has now removed the time limitation for bringing a motion seeking DNA testing, see Fla. Stat. § 925.11 (1)(b) (2006); Fla. R. Crim. P. 3.853, capital postconviction defendants, like Mr. Marek, must prove due diligence in bringing their claims of innocence.

13. Indeed, the Florida Supreme Court has held that it would not consider evidence of innocence presented in a successive collateral motion where the circuit court had found that the capital defendant's attorney had not been diligent in uncovering and presenting the evidence that

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broken as Illinois' was – that politics, race, prosecutorial misconduct and deficient lawyering afflict the system. Yet in Florida, there has been no moratorium. There has been no investigation. There has been no reform.

[27]On at least one occasion (Juan Melendez) be all the way through a first round and second round of state postconviction proceedings before prevailing in a third motion for postconviction relief and being released from death row after 17 years. Surely what happened to Mr. Melendez was "cruel and unusual in the same way that being struck by lightning is cruel and unusual." Furman 408 U.S. at 309 (Stewart, J., concurring). The unanswered question is whether Mr. Melendez's exoneration was a second lightning strike. Did his luck finally turn so that he was able to finally demonstrate that his conviction was wrongful? Since no investigation has been conducted into how 22 innocent men ended up on death row, we have no knowledge as to whether the exonerated men simply had a remarkable change of luck which led to the exoneration.

[28]Mr. Melendez served 17 years on death row, Rudolph Holton served 16 years before his release, and Frank Lee Smith served 15 years before dying of cancer a few months before DNA evidence cleared of murder.

[29]While the ABA Report on Florida notes the progress in DNA testing, it is equally clear that the other burdens and requirements will certainly cause arbitrariness in determining who is granted the opportunity to test evidence and show proof of innocence. See ABA Report on Florida at 51-3.

[30]DNA testing established Frank Lee Smith's innocence posthumously. DNA testing did produce evidence in Rudolph Holton's case that while assisting in establishing his innocence, was not dispositive.

demonstrated innocence. Swafford v. State, 828 So. 2d 966, 977-78 (Fla. 2002).[31] In yet another case, the Florida Supreme Court deferred to the circuit court's conclusion that Leo Jones had failed to prove his diligence in uncovering certain pieces of newly discovered evidence, and excluded evidence of another man's confession as inadmissible hearsay. Jones v. State, 709 So. 2d 512, 519-20, 525 (Fla. 1998).[32] A system that says evidence of innocence is too late unless its in the form of DNA testing injects arbitrariness and randomness into the process in violation of Furman.[33] It simply defies logic to require an innocent man to be executed because his attorney failed to prove diligence in discovering the evidence that proves his innocence.[34]

14. As was noted in Furman, any judicial system with procedural and substantive protections for an accused will result in errors; innocent individuals will be convicted. Furman, 408 U.S. at 366 ("Our 'beyond a reasonable doubt' burden of proof in criminal cases is intended to protect the innocent, but we know it is not foolproof. Various studies have shown that people

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[31]In fact in Swafford, three justices dissented on the grounds that the new evidence would have probably produced an acquittal had it been presented to the jury. Id. at 978-79 (Anstead, J., dissenting) ("This case represents one of those truly rare instances where this Court has summarily brushed aside on wholly speculative grounds a colorable claim of actual innocence and a possible serious miscarriage of justice. There has been absolutely no focus here on the reality of what actually happened.").

[32]In Jones, two justices dissented. See Id. at 527 (Anstead, J. dissenting) (this case "is troubling because of the sheer volume of evidence present in the record that another person committed the murder, and, yet, none of this evidence was heard by the jury that tried and convicted Jones"); Id. at 535-36 (Shaw, J., dissenting) ("The collateral process in Florida's capital sentencing scheme is a constitutional safety net designed above all to prevent the execution of an innocent man or woman. The present case is a classic example of that safety net working properly--up to the present point. Although Jones was tried and convicted in 1981, much of the present evidence did not--could not--come to light until now, more than a decade later--after Officer Smith and Schofield's accusers came forward. This evidence vastly implicates Schofield and casts serious doubt on Jones' guilt. The case that stands against Leo Jones today is a horse of a different color from that which was considered by the jury in 1981. 'Fairness, reasonableness and justice'--and indeed, the integrity of Florida's capital sentencing scheme--dictate that a jury consider the complete case.").

[33]Indeed, the reasons for removing the time limit for bringing a motion for new trial on the basis of the results of DNA testing apply with equal force to any evidence in whatever form that demonstrates that an innocence man is under sentence of death. The distinction that has been drawn is likely to result in the execution of innocents.

[34]Several states have now created systems of review in cases where claims of factual innocence are made. ABA Report at x. This type of system is necessary because of the "perception that procedural defaults and inadequate lawyering sometimes prevent claims of factual innocence from receiving full consideration." Id. The state assessment team recommends that such a system be created in Florida.

whose innocence is later convincingly established are convicted and sentenced to death."). Not only does empirical evidence now show that Florida has the highest exoneration rate in capital cases of any state, but nothing has been done to fix the system beyond eliminating the time limit on DNA testing.[35]

15. While DNA is a means of proving innocence, the recantation of witness testimony, confession by someone else to a third-party, and new scientific technology may be equally significant. See House v. Bell, 126 S.Ct. 2064 (2006). It is simply arbitrary to place a diligence requirement when dealing with a particular type of evidence of diligence, but not another. See Jones; Swafford.

16. Florida's decision to ignore the need for an actual innocence exception which allows an individual to defeat procedural bars and to demonstrate innocence has created a system that tolerates and accepts the risk of executing an innocent individual. Though it has made an exception for new evidence in the form of the results of DNA testing, Florida has refused to apply the rationale for such an exception to its procedural bars (*i.e.* innocent people should not be locked up in prisons) across the board to all evidence of innocence. As a result, Florida's capital sentencing scheme violates the principles enunciated in Furman.

b. DNA.

17. Florida has now decided that DNA evidence will not be subjected to the procedural bars that apply to other evidence of innocence. Overlooked are those cases in which evidence was destroyed by the State before DNA testing could be conducted, thereby depriving some of the means to show their innocence through DNA testing.[36] As the ABA Report makes

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[35]Having such knowledge and experiencing such a situation first-hand in Florida, the courts and government have ignored the arbitrariness that accompanies the determinations that one type of proof of innocence is less valuable than another; one type qualifies for less procedural restrictions than another; and one type imposes less hurdles to be cleared before consideration of the evidence on the merits.

[36]Often the destruction is itself evidence of sloppy police work which itself calls into question the reliability of law enforcement's techniques used to build the case for guilt. See Kyles v. Whitley, 514 U.S. 419 (1995). Assuming that the evidence was lost in good faith, the destruction or loss of the evidence may be more likely where sloppy

clear: "Many who have been wrongfully convicted cannot prove their innocence because states often fail to adequately preserve material evidence." ABA Report at 43.[37] The distinction between the case where the evidence was retained and the testing shows innocence and the case where the evidence would have established innocence, but was destroyed, can only be called arbitrary. Furman, 408 U.S. at 310.

3. Representation

18. The ABA Report identified several problems concerning the representation of indigent capital defendants that leads to the arbitrary imposition of the death penalty. These problems occur at all levels of capital litigation. Indeed, the team considered counsel's competence to be perhaps the most critical factor determining whether a capital offender/defendant received a death sentence. ABA Report at 135. See Furman, 408 U.S. at 256 n. 21 (whether counsel timely objected to error was on occasion a decisive arbitrary factor in whether a death sentence was imposed).

a. Trial level representation.

19. The team found that there was inadequate compensation for trial counsel in capital cases. ABA Report at iv. The administration of the funding and timing of counsel's ability to seek payment severely hamper obtaining qualified counsel who has adequate funding for a death penalty case. Yet, Florida is obligated to provide effective counsel at the trial under the Sixth Amendment. Strickland v. Washington, 466 U.S. 668 (1984).[38] The purpose of the

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police work or scientific techniques led to the conviction of an innocent man. Of course, if the evidence was lost in bad faith and the defendant is unable to get the evidence necessary to show the bad faith, the likelihood that the intentionally lost evidence would have exonerated the defendant would seemingly be high.

[37]Indeed, "the State of Florida did not require the preservation of physical evidence in death penalty cases until October 1, 2001." Id. at 56. There is no protection for defendants who fall into this category. Thus, depending on whether an agency of the State of Florida had the space to store evidence, the weather, and other extraneous factors, evidence of innocence will be available to some, but not others. There are no ramifications for the State or protections for defendants who encounter such a situation.

[38]Certainly, the United States Supreme Court's decision in Strickland was and is binding upon the Florida Supreme Court as determining the meaning of the Sixth Amendment. Yet as discussed *infra*, the Florida Supreme

constitutional obligation is insure that the trial is an adequate adversarial testing that produces a reliable result. Recently, the United States Supreme Court not only recognized that the ABA had promulgated a set of guidelines devoted to setting forth the obligations of defense counsel in capital cases, but found that those guidelines served as a benchmark for evaluating counsel's performance. Rompilla v. Beard, 545 U.S. 374 (2005).[39] But Florida has failed to bring its system in line with the ABA standards and taken steps to insure the appointment of "qualified and properly compensated counsel." Id. at 174.[40] Florida has not lived up to its obligation to minimize, if not remove, arbitrary factors from the capital process.

b. Postconviction representation

20. Another failure under Furman arises in the context of Florida's capital postconviction representation. The quality of Florida's capital postconviction representation system has steadily declined over the past ten years when the federal funding for resource centers was eliminated.[41] The past ten years have demonstrated a consistent pattern of turmoil and chaos

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Court has acknowledged its failure to properly apply one aspect of Strickland in a number of cases. Stephens v. State,748 So. 2d 1028, 1032 n. 2 (Fla. 1999). Despite this acknowledgment, the Florida Supreme Court refused to correct its error and reconsider those cases in which the error had been committed. Certainly, this injected arbitrariness into Florida's capital sentencing scheme that violated the principle of Furman.

[39]Even though the United States Supreme Court has explained that its decisions finding ineffective assistance in Rompilla v. Beard, Wiggins v.Smith, 539 U.S. 510 (2003), and Williams v. Taylor, 529 U.S. 362 (2000), were all dictated by its decision in Strickland and date back to Strickland, the Florida Supreme Court has failed to re-examine its decisions premised on its erroneous understanding of Strickland pre-dating Rompilla, Wiggins, and/or Williams. Thus, individuals on Florida's death row who have meritorious claims under any one of these three decisions do not get the benefit of those three decisions if the Florida Supreme Court had denied a Strickland claim before the United States Supreme Court issued these decisions. This injected arbitrariness into capital cases in violation of Furman.

[40]The team recommended that this guarantee include "[a]t least two attorneys" with access to investigators and mitigation specialists. One member of the defense team should be trained in mental health screening. Id. at 175-76.

[41]The decline began when complaints were made that the Office of the Capital Collateral Representative (CCR) had in essence brought the death penalty in Florida to a halt through abusive pleading practices. A committee was formed to consider these complaints. This lead to a number of changes including: the creation of the Commission on Capital Cases, the partition of CCR into three separate entities, and ultimately the creation of the "Registry" and the elimination of one of three entities created out of CCR that handled cases generally out of the northern part of the State. What is most interesting about this sequence of events are the complaints about CCR's actions in slowing, if not stopping, the pace of executions in Florida. No parallel interest has arisen in light of the 22 exonerations and the prosecutorial misconduct or the inadequate representation that cause innocent men to spend parts of their lives living

in the representation of capital postconviction defendants.[42] At that part of the capital process at which errors are sought to be caught and corrected,[43] qualifications to be appointed to a capital postconviction case are minimal, oversight is non-existent, and funding is inadequate. Id. at v. Compensation is capped.[44] This is not the only monetary limitation, funds for investigative, expert, travel and other costs is limited. Moreover, there is no provision for compensation for successor proceedings.

21. Despite recognizing the statutorily created right to effective collateral counsel,

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on Florida's death row. The obvious lesson is that within the politics of Florida, there is much more support for a demonstration of the State's power to execute than in investigating erroneous convictions in order to eliminate arbitrary factors from infecting the process.

[42]In 1988, the Florida Supreme Court recognized that the creation of CCR extend to all Florida capital defendants the right to have effective representation in all collateral proceedings in both state and federal court. Spalding v. Dugger, 526 So. 2d 71, 72 (Fla. 1988) ("each defendant under sentence of death is entitled, as a statutory right, to effective legal representation by the capital collateral representative in all collateral relief proceedings. This statutory right was established to alleviate problems in obtaining counsel to represent Florida's death-sentenced prisoners in collateral relief proceedings."). The state-funded agency responsible for representing postconviction defendants was overwhelmed with cases, absorbing those cases that the federally funded organization had represented, and a large number of cases in the mid-90s when death sentences spiked and rule changes caused initial motions to be filed much quicker than in previous years. That the location of the agency was split into three regional offices but still managed under the auspices of a single agency. The agency was then officially separated into three regional offices with the creation of the Registry system to handle conflict and overflow cases. A few years later, the Florida Legislature eliminated one of the regional offices and sent the Registry sixty-plus cases.

[43]"Very significant percentages of capital convictions and death sentences have been set aside in such proceedings . . . " ABA Report at 214. Juan Melendez was exonerated in the course of his third motion for post-conviction relief. Yet, the funding of the registry makes no provision for even a second motion, let alone a third.

[44]Though the Florida Supreme Court has recognized that the cap may be breached in extraordinary circumstances, the fact that the determination of whether the cap was properly breached is made after the fact. Fla. Dept.of Financial Services v. Freeman, 921 So. 2d 598 (Fla. 2006). Requiring attorneys who find that the requisite work exceeds the statutory cap to litigate their compensation after the fact has a chilling effect. Within the Registry system, statutorily funding is only available for 840 attorney hours for those represent capital collateral defendants on the registry when research suggests that 3,300 attorney hours are actually necessary. ABA Report at v.

While Registry counsel are restricted in funding, the Capital Collateral Regional Counsel (CCRC) offices are not. CCRC attorneys can exceed the 840 hours without the consequence of non-payment. CCRC attorneys can hire experts, pay investigators and incur other costs associated with litigating a capital postconviction case without consequence of non-payment. There is no valid basis for distinction between death row defendants represented by Registry counsel and those represented by CCRC attorneys. Undoubtedly, this disparity in funding will impact the representation and arbitrarily effect the ultimate success of capital postconviction motion challenging a conviction and/or sentence of death. Some capital defendants went from being represented by the CCRC office in Tallahassee to representation on the Registry. These capital defendants were arbitrarily stripped of their right to have counsel working on their behalf outside the stricture of a cap. See *e.g.* Florida Dept. Of Financial Services v. Freeman.

the Florida Supreme Court has generally found that no remedy exists for a breach of the statutorily created right. Lambrix v. State, 698 So. 2d 247, 248 (Fla. 1996) ("claims of ineffective assistance of postconviction counsel do not present a valid basis for relief").[45] The Florida Supreme Court did recognize an exception to the Lambrix rule where state-provided collateral counsel due to neglect failed to file a timely notice of appeal. Porter v. State, 788 So. 2d 917 (Fla. 2001).[46]

22. Beyond the narrow circumstance identified in Porter v. State, a capital defendant has no remedy when state-provided counsel either through negligence or a lack of diligence fails to provide effective representation. This has injected arbitrariness in Florida's capital sentencing process. As noted in the ABA Report, the performance of Registry counsel has been openly criticized, even by members of the Florida Supreme Court:

> This lack of appellate experience may account for the questionable performance of some registry attorneys. For example, a number of registry attorneys have missed state post-conviction and federal habeas corpus filing deadlines possibly precluding their clients from having their claims heard. Specifically, registry attorneys in at least twelve separate cases filed their clients' state post-conviction motions or federal habeas corpus petitions between two months to three years after the applicable filing deadline.
> Performance like this has led two Florida Supreme Court Justices to publicly comment on the quality, or lack thereof, of registry attorneys. Justice Cantero stated that the representation provided by some registry attorneys is "[s]ome of the worst lawyering" he has ever seen. Specifically, "some of the registry counsel have little or no experience in death penalty cases. They have not raised the right issues . . . [and] [s]ometimes they raise too many issues and still haven't raised the right ones." Chief Justice Barbara Pariente reiterated the concerns of Justice Cantero by stating that "[a]s for registry counsel, we have

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[45]However, in the non-capital context not involving the statutory right to effective collateral counsel, the Florida Supreme Court held that when a convicted defendant establishes that he or she missed the deadline to file a rule 3.850 motion because his or her attorney had agreed to file the motion but failed to do so in a timely manner, due process requires that the convicted defendant be authorized to file a belated motion to vacate. Steele v. Kehoe, 747 So. 2d 931, 934 (Fla. 1999) ("we [have] made clear that 'postconviction remedies are subject to the more flexible standards of due process announced in the Fifth Amendment, Constitution of the United States.'"). Accordingly, the Florida Supreme Court ordered that Fla. R. Crim. Pro. 3.850, a rule which addresses post conviction motions filed by non-capital defendants, be amended to provide that an untimely motion could be filed if "the defendant retained counsel to timely file a 3.850 motion and counsel, through neglect, failed to file the motion." Fla. R. Crim. Pro. 3.851 was not amended in a corresponding fashion.

[46]Otherwise, state-provided collateral counsel's failure to exercise diligence in investigating and timely presenting evidence of innocence or of a constitutional deprivation operates as a bar to a court's consideration of the resulting claims for relief. See Swafford v. State, 828 So. 2d 966, 977-78 (Fla. 2002).

> observed deficiencies and we would definitely endorse the need for increased standards for registry counsel, as well as a continuing system of screening and monitoring to ensure minimal levels of competence." The questionable performance of these attorneys, as well as the lack of requisite qualifications, is particularly troublesome in light of the fact that death-sentenced inmates do not have a state of federal constitutional right to assert a claim of ineffective assistance of post-conviction counsel.
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> The performance of these attorneys has also led many legal experts as well as some Democratic and Republican Legislators to criticize the closure of CCRC-North Office in 2003. In fact, many legal experts, including Justice Cantero and the Executive Director of the Commission on Capital Cases, have cautioned against proposals to eliminate the two other CCRC Offices.

ABA Report at 183-84. Thus, it is well recognized by state officials in the legislative and judicial branches of government that a number of the post-conviction attorneys provided by the State are incompetent, *i.e.* some of the worst lawyering ever seen. Yet, the capital defendants provided some of the worst lawyering ever seen must accept the incompetent representation without recourse.

23. A system that knowingly provides capital defendants with "some of the worst lawyers" that a Justice of the Florida Supreme Court has ever seen, and strips the capital defendant of the right to complain and seek redress, simply does not comport with the Furman promise that states with capital sentencing schemes must affirmatively take steps to eliminate the risk that an execution will be as random as a bolt of lightning.[47] The outcome of the collateral process, directly linked to whether state-appointed counsel is incompetent, is a purely arbitrary.

4. Issues Related to the Jury's Role in Sentencing

a. Jury Instructions.

[47]Undeniably with 22 exonerations, Florida's trial system warrants "a constitutional safety net." Jones v. State, 709 So. 2d. at 535-36 (Shaw, J., dissenting). Yet, it is well-recognized, as the Appendices document, that the "safety net" has been stripped away. As Justice Marshall explained in Furman, "the measure of a country's greatness is its ability to retain compassion in time of crisis. No nation in the recorded history of man has a greater tradition of revering justice and fair treatment for all its citizens in times of turmoil, confusion, and tension than ours." 408 U.S. at 371. Yet here, Florida seems bereft of concern for those condemned to receive "some of the worst lawyering." Those capital postconviction defendants who receive "some of the worst lawyering" that a Florida Supreme Court justice has ever seen and who may have meritorious claims for relief and who in fact may be innocent, have been arbitrarily denied any real chance of obtaining relief by Florida's knowing willingness to provide incompetent counsel. The situation "smacks of little more than a lottery system." Furman, 408 U.S. at 293 (Brennan, J., concurring).

24. The ABA Report gathered evidence showing that capital jurors, i.e., those individuals largely involved in the decision of whether a defendant get death, do not understand "their role or responsibilities when deciding whether to impose a death sentence." ABA Report at vi.[48] The presence of an identified arbitrary factor, *i.e.* juror confusion, warrants action. But instead, as red flags are waved, as alarm bells go off, as identified arbitrary factors are identified, nothing is done. The system tolerates it. This violates the promise of Furman.

b. Unanimity.

25. "Florida is now the only state in the country that allows a jury to find that aggravators exist *and* to recommend a sentence of death by a mere majority vote." State v. Steele, 921 So. 2d 538, 548-49 (Fla. 2005)(emphasis in original).[49] It is obvious that the requirement of a unanimous verdict at the guilt phase is consistent with the presumption of innocence, the State's burden to prove guilt beyond a reasonable doubt, and the general desire to ensure greater certainty of the reliability of a finding of guilt.[50] It should then follow that

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[48]Indeed, "[i]n one study, over 35 percent of interviewed Florida capital jurors did not understand that they could consider any evidence in mitigation and 48.7 percent believed that the defense had to prove mitigating factors beyond a reasonable doubt." Id. The same study found that over thirty-six percent (36%) "believed that they were *required* to sentence the defendant to death if they found the defendant's conduct to be 'heinous, vile or depraved'". Id. (emphasis in original). Over twenty-five percent (25%) considered future dangerousness, even though such a factor is not a legitimate sentencing factor under Florida law . Id. Based on these disturbing results, the ABA Report recommended that Florida redraft its capital jury instructions in order to prevent common juror misconceptions, misconceptions that inject arbitrariness to the process. Id. at x.

[49]The ABA Report cites a study which permitting capital sentencing recommendations by a majority vote reduces the jury's deliberation time and may diminish the thoroughness of the deliberation. ABA Report at vi-vii.

[50]As the Supreme Court explained when discussing the constitutional right to a jury guilt phase determination:

> The framers of the constitutions strove to create an independent judiciary but insisted upon further protection against arbitrary action. Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge. If the defendant preferred the common-sense judgment of a jury to the more tutored but perhaps less sympathetic reaction of the single judge, he was to have it. Beyond this, the jury trial provisions in the Federal and State Constitutions reflect a fundamental decision about the exercise of official power -- a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges. Fear of unchecked power, so typical of our State and Federal Governments in other respects, found expression in the criminal law in this insistence upon community participation in the determination of guilt or innocence.

permitting a less than unanimous verdict during the penalty phase reflects a choice that the guilt phase concerns warranting unanimity are not then present. The ABA Report recommended that Florida require a unanimous jury verdict. Id. at x.

26. In Florida where death recommendations have been permitted on less than a unanimous vote, 22 exonerations of death sentenced individuals has occurred since 1972. Though the cause for the highest rate of capital exonerations in the nation has not been investigated, it is recognized that Florida has held that a sentencing jury is precluded from consideration of residual or lingering doubt as to guilt as a mitigating factor that may warrant a life sentence. ABA Report at 311 ("the Florida Supreme Court has consistently rejected 'residual' or 'lingering doubt' as a non-statutory mitigating circumstance").[51] It is certainly logical that an innocent man or woman may have less to argue in the way of mitigation than a guilty one. See Cheshire v. State, 568 So. 2d 908, 912 (1990) ("Events that result in a person succumbing to the passions or frailties inherent in the human condition necessarily constitute valid mitigation under the Constitution and must be considered by the sentencing court.").[52]

27. The coupling of a simple majority verdict with the preclusion of consideration of lingering doubt as a basis for a sentence of less than death certainly add to the risk that an innocent will be sentenced to death. Given that Florida is the only state to have coupled these things together and given that Florida leads the nation in capital exoneration, there exists an argument that the synergistic effect of the choices made in structuring Florida's capital scheme has produced a system that "smacks of little more than a lottery system." Furman, 408 U.S. at 293 (Brennan, J., concurring).

Duncan v. Louisiana, 391 U.S. 145, 156 (1968).

[51]The Supreme Court has passed up opportunities to declare it unconstitutional to preclude residual or lingering doubt as a mitigating factor warranting the imposition of life sentence. Oregon v. Guzek, 126 S.Ct. 1226 (2006).

[52]Where the defendant is innocent, there were no "events" that led to a murder that he did not commit. There is only the mitigation inherent in any individual's life story. Thus, the exclusion of lingering doubt as a basis for a sentence of less than death clearly increases the odds that an innocent defendant will receive a death sentence.

c. **Judicial Overrides.**

28. In Florida, the judge who presides in a capital case has the ability to override a jury's advisory verdict. ABA Report at 31. The standard to be employed for a judicial override is found in Tedder v. State, 322 So. 2d 908, 910 (Fla. 1975). But, the manner that Tedder has been applied has been problematic. Justice Shaw said in 1988 that this uneven application had created Furman error:

> This presents a serious *Furman* problem because, if *Tedder* deference is paid, both this Court and the sentencing judge can only speculate as to what factors the jury found in making its recommendation and, thus, cannot rationally distinguish between those cases where death is imposed and those where it is not.

Combs v. State, 525 So. 2d 853, 859 (Fla. 1988) (Shaw, J., specially concurring) (footnote omitted).[53] In 1989, a majority of the Florida Supreme Court admitted that the vigorousness of the Tedder standard had waxed and waned over the years:

> Finally, we agree with the dissent that "legal precedent consists more in what courts do than in what they say." However, in expounding upon this point to prove that *Tedder* has not been applied with the force suggested by its language, the dissent draws entirely from cases occurring in 1984 or earlier. This is not indicative of what the present court does, as Justice Shaw noted in his special concurrence to *Grossman v. State*, 525 So.2d 833, 851 (Fla. 1988) (Shaw, J., specially concurring):
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> During 1984-85, we affirmed on direct appeal trial judge overrides in eleven of fifteen cases, seventy-three percent. By contrast, during 1986 and 1987, we have affirmed overrides in only two of eleven cases, less than twenty percent. This current reversal rate of over eighty percent is a strong indicator to judges that they should place less reliance on their independent weighing of aggravation and mitigation. . . .
>
> Clearly, since 1985 the Court has determined that *Tedder* means precisely what it says,that the judge must concur with the jury's life recommendation unless "the facts suggesting a sentence of death [are] so clear and convincing that virtually no reasonable person could differ." *Tedder*, 322 So.2d at 910.

Cochran v. State, 547 So. 2d 928, 933 (Fla. 1989). A clearer example of arbitrariness infecting the decision making process is hard to imagine.

29. Three dissenters recently noted the variability of the Tedder standard:

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[53] As noted by Justice Shaw, the use of the override and the use of the Tedder "present[ed] a serious Furman problem" – this has simply been ignored. Combs v. State, 525 So. 2d at 859 (Shaw, J., specially concurring).

> In the final analysis, the majority's tenuous reliance on Garcia simply underscores its abandonment, with no compelling rationale, of our principled and well-reasoned caselaw in Tedder and its progeny.
>
> * * *
>
> Hence, in addition to the unprecedented mitigation presented, the majority has itself identified another substantial basis for the jury's recommendation by pointing out that the jury could have reasonably concluded, because the evidence was in conflict, that Anna was not aware of her impending death. In that event, for example, the jury would also not have found the HAC aggravator for Anna's death since that aggravator requires a finding of consciousness of impending death. So, the majority opinion has demonstrated a number of reasonable bases for the life recommendation.
>
> As we approach the 21st century of our civilization, do we really want to take a law (the trial judge's sentencing discretion) that was intended to act as a rational check on a jury possibly voting for death based upon an emotional appeal, and twist that law so as to use it as a sword for the judiciary to emotionally trump a jury acting with reasoned mercy?

Zakrzewski v. State, 717 So. 2d 488, 498 n. 6 (Fla. 1998) (Anstead, J., dissenting).

30. In Parker v. Dugger, 498 U.S. 308 (1991), the Supreme Court reviewed the Florida Supreme Court's application of the Tedder standard and its resulting affirmance of a judicial override of a life recommendation. The Supreme Court found:

> What the Florida Supreme Court could not do, but what it did, was to ignore the evidence of mitigating circumstances in the record and misread the trial judge's findings regarding mitigating circumstances, and affirm the sentence based on a mischaracterization of the trial judge's findings.

Parker, 498 U.S. at 320. In reversing, the Supreme Court explained:

> We have emphasized repeatedly the crucial role of meaningful appellate review in ensuring that the death penalty is not imposed arbitrarily or irrationally. * * * The Florida Supreme Court did not conduct an independent review here. In fact, there is a sense in which the court did not review Parker's sentence at all.

Parker, 498 U.S. at 321.

31. The erratic application of the Tedder standard has again injected arbitrariness into Florida's capital sentencing scheme in violation of Furman.

5. Racial and Geographic Disparities

32. Racial and geographic disparities plague Florida's death penalty scheme.

a. Racial Disparities.

33. The ABA Report noted that studies concerning race and the death penalty, as

well as an analysis of current statistics, showed race continued to play an improper role.[54] Race is an impermissible factor in Florida's death penalty scheme. Such a factor causes the death penalty to be arbitrary and capricious. Furman, 408 U.S. at 364-66 (Eighth Amendment violated where racial prejudices and/or classism and/or sexism infected sentencing decisions). Despite Florida's knowledge of the disparities of race on its death penalty scheme, it has ignored it. Florida's action permits the death penalty "to be . . . wantonly and . . . freakishly imposed" on a "capriciously selected random handful" of individuals. Furman, 408 U.S. at 310.

b. Geographic Disparities.

34. Geographic disparities also contribute to the arbitrariness of Florida's death penalty scheme. In 2000, 20 percent of the death sentences imposed that year came from the panhandle, while in 2001, 30 percent of the death sentences imposed that year came from the panhandle. ABA Report at 9. Thus, death sentences are significantly influenced by the county where a crime occurred.[55] The geographic disparity violate Furman and allows death sentences to be premised upon arbitrary factors.

6. Prosecutorial Misconduct

35. "The prosecutor plays a critical role in the criminal justice system." ABA

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[54]In 1991, the Florida Supreme Court's Racial and Ethnic Bias Commission found that "the application of the death penalty is not colorblind." ABA Report at vii-viii. In 1991, a criminal defendant in a capital case was 3.4 times more likely to receive the death penalty if the victim is white that if the victim is African American. Id. 7-8. This statistic has not changed. "[A]s of December 10, 1999, of the 386 inmates on Florida's death row, 'only five were whites condemned for killing blacks. Six were condemned for the serial killings of whites and blacks. And three other whites were sentenced to death for killing Hispanics.' Additionally, since Florida reinstated the death penalty there have been no executions of white defendants for killing African American victims." Id. at viii.

Governor Bush commissioned a study of race and its impact on the justice system in 2000, and those involved expressed concern and recommended an additional study. Yet, no steps have been taken find a remedy for the injection of a improper factor into the sentencing process. ABA Report at xi.

[55]Geographic disparities clearly show that a factor unrelated to the circumstances of the crime or the character of the defendant are at work in the decision to seek and impose a death sentence. Recognizing that the geographic disparity is problematic, the ABA Report urges the State to "sponsor a study to determine the existence or non-existence of unacceptable disparities, whether they be racial, socio-economic, geographic, or otherwise in its death penalty system." ABA Report at xi.

Report at 107. And, even more so in a capital case, where the prosecutor had "enormous discretion" in determining whether to seek the death penalty. Id. There should be a higher ethical obligation because the prosecutor carries with him power derived from his position which must be held in check, just as each branch of government is subject to checks and balances.[56]

36. But prosecutorial misconduct is prevalent as the Florida Supreme Court regularly orders new trials in capital cases because of it. Floyd v. State, 902 So. 2d 775 (Fla. 2005); Mordenti v. State,894 So. 2d 161 (Fla. 2004); Cardona v. State, 826 So.2d 968 (Fla. 2002); Hoffman v. State, 800 So.2d 174 (Fla. 2001); Rogers v. State, 782 So.2d 373 (Fla. 2001); State v. Huggins, 788 So.2d 238 (Fla. 2001); State v. Gunsby, 670 so. 2d 920 (Fla. 1996); Gorham v. State, 597 So.2d 782 (Fla. 1992); Roman v. State, 528 So.2d 1169 (Fla. 1988); Arango v. State, 497 So. 2d 1161 (Fla. 1986).[57] On occasion, the Florida Supreme Court has found the prosecutorial misconduct was only sufficiently prejudicial at the penalty phase to warrant the grant of sentencing relief. Young v. State, 739 So. 2d 553 (Fla. 1999); Garcia v. State, 622 So. 2d 1325 (Fla. 1993).[58] But often, the Florida Supreme Court has determined that the prosecutor acted improperly, but prejudice was insufficiently established

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[56]The Supreme Court has recognized that a prosecutor is:

> the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.

Berger v. United States, 295 U.S. 78, 88 (1935).

[57]New trials on the basis of prosecutorial error have been ordered by the federal courts in course of federal habeas proceedings. Agan v. Singletary, 12 F.3d 1012 (11th Cir. 1993); Smith v. Wainwright, 799 F.2d 1442 (11th Cir. 1986). New trials have also been ordered on prosecutorial misconduct for which there is no reported decision. Ernest Miller and William Jent both received new trials from the federal district court in light evidence that the State withheld exculpatory information from the defense. Similarly, Juan Melendez received a new trial from the state circuit court on the basis of his claim that the State improperly withheld exculpatory information..

[58]There are also cases where, because sentencing relief was found on other grounds, the issue of the prosecutorial misconduct was rendered moot as to the penalty phase. State v. Riechmann, 777 So. 2d 342 (Fla. 2000).

to warrant relief from either the conviction or the death sentence. Guzman v. State, 2006 Fla. LEXIS 1398 (Fla. June 29, 2006); Smith v. State, 931 So. 2d 790 (Fla. 2006); Ventura v. State, 794 So. 2d 553 (Fla. 2001); Duest v. Dugger, 555 So. 2d 849 (Fla. 1990).[59]

37. Despite the numerous instances of prosecutorial misconduct in Florida capital cases, no investigation has been launched nor program instituted to stamp out such misconduct.[60] Florida by its conduct has shown that the situation is acceptable, and that the risks that an innocent will be convicted, or that the guilty will receive an undeserved death sentence are okay.[61]

38. The ABA Report concluded that to stop prosecutorial abuses, "there must be meaningful sanctions, both criminal and civil, against prosecutors who engage in misconduct."[62] ABA Report at 108. Florida's willingness to tolerate prosecutorial misconduct in capital cases violates Furman.[63] The capital process should be a search for

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[59]This is not an exhaustive list of the cases wherein prosecutorial misconduct was present in capital cases.

[60]The trial prosecutor in Mordenti v. State was sanctioned, not for her misconduct in Mordenti by for her actions as federal prosecutor during a non-capital proceeding. Florida Bar v. Cox, 794 So. 2d 1278 (Fla. 2001).

[61]The ABA Report noted that the arbitrariness of the death penalty scheme begins with the charging process, noting that "[i]n spousal killings, [prosecutors sought the death penalty 3 1/2 times more often in cases with white victims than those involving black or Hispanic victims." ABA Report at 124. Also, "[i]n cases in which the victims and accused killers were friends or relatives, prosecutors in Orange and Seminole Counties asked for the death penalty four times more often when the victim was white." Id. The ABA Report recommends that each prosecutor's office have written polices governing the exercise of prosecutorial discretion. Id at 125. This is necessary given Florida's history to try to eradicate arbitrary factors from not just the trial, but in the exercise of prosecutorial discretion to seek death in the first instances. Without such policies or guidelines, Florida's death penalty scheme "smacks of little more than a lottery system." Furman, 408 U.S. at 293 (Brennan, J., concurring).

[62]Time and time again, prosecutors have violated the rules – the rules of discovery, the rules of evidence, the rules of due process. The Florida Supreme Court often identifies capital cases where the prosecutor went to far, or was guilty of a discovery violation, yet, it refuses to grant relief saying the defense failed to object and/or the error was "harmless" or insufficiently prejudicial. The failure to act and in essence excuse the misconduct because of an apparent "no harm no foul" rule, actually encourages prosecutors to convert the Berger limiting principle into a perversion of itself, making it a self-righteous justification that because winning is justice, winning is everything, and therefore, the ends justify the means. The acceptance of prosecutorial misconduct as merely a kind of error, like a deficient jury instruction, certainly offers a ready explanation for Florida's leadership in death row exonerations.

[63]In instances where a new trial is ordered or penalty phase relief is granted, the cost to the State undoubtedly warrants sanctions against the prosecutor whose misconduct led to the grant of relief. But the fact of the matter is

truth or for justice or for the objectively right result, but through the tolerance of prosecutorial misconduct it has become a game of relativity, where all that matters is winning, and the rules of law amount to no more that the rules found inside a board game - a means to an ends, *i.e.* getting a death sentence.

7. **The Direct Appeal Process**

39. The Florida Supreme Court reviews all of the cases where a death sentence was imposed. It has the obligation to decide whether death is a proportionate penalty. But because the Florida Supreme Court only reviews cases "where the death penalty was not imposed in cases involving multiple co-defendants", the proportionality review is skewed. ABA Report at xxii. "Because of the role that meaningful comparative proportionality review can play in eliminating arbitrary and excessive death sentences, states that do not engage in the review, or that do so only superficially, substantially increase the risk that their capital punishment system will function in an arbitrary and discriminatory manner." Id. at xxii, 208. The limited scope of the proportionality review, only looking at other cases in which death has been imposed, skews the review in favor of death and undercuts its "meaningfulness".[64] But in addition to this, the ABA Report noted a disturbing trend in the Florida Supreme Court's proportionality review: "Specifically, the study found that the Florida Supreme Court's average rate of vacating death sentences significantly decreased from 20 percent for the 1989-1999 time period to 4 percent for the 2000-2003 time period." ABA Report at 212.[65]

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that the misconduct should be sanctionable regardless of whether relief is granted to the capital defendant. Under Berger, the prosecutor's position merits sanctions for his misconduct, whether the misconduct is found to have been sufficiently prejudicial to warrant collateral relief or not.

[64]The ABA Report recommended that the Court review cases where the death penalty was not sought and was not imposed in order to conduct a meaningful proportionality review. Id. at xxiii.

[65]The ABA Report noted "that this drop-off resulted from the Florida Supreme Court's failure to undertake comparative proportionality review in the 'meaningful and vigorous manner' it did between 1989 and 1999." ABA Report at 213. The ABA Report noted "that, since 1999, the Florida Supreme Court is no longer holding true to its

40. The shift in the affirmance rate and in the manner in which the proportionality review was conducted is an arbitrary factor. Whether a death sentence was or is affirmed on appeal depends upon what year the appellate review was or is conducted. This variable is not related to the facts of the crime or the character of the defendant. It is an arbitrary factor, not a "meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not." Furman, 408 U.S. at 313 (White, J., concurring).[66]

8. Retroactivity

41. Problems with the appellate review process show in the whether retroactive application is given to decision of from the United States Supreme Court.[67] The Florida

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own rule that proportionality review should be a 'qualitative review . . . of the underlying basis for each aggravator and mitigator' and not simply a comparison between the number of aggravating and mitigating circumstances." ABA Report on Florida at 213. The ABA Report noted that its "study attributed this drop-off in vacations of death sentences on proportionality grounds to the political pressure from the executive and legislative branches regarding the disposition of death penalty appeals and the changing composition of the Court." Id. at fn.53, 213.

[66]As noted previously, the shift in the Florida Supreme Court's proportionality review commencing since the year 2000, reflects a reoccurring pattern in the appellate process. The Florida Supreme Court's review of judicial overrides of life recommendations has shifted repeatedly. Even though the majority of the Court always cites Tedder v. State as establishing the standard, dissenting justices who were previously in other cases in the majority repeatedly assert that the manner in which the Tedder is applied has shifted. See Combs v. State; Cochran v. State; Zakrzewski v. State. Moreover, the affirmance rate of judicial overrides also waxes and wanes in a fashion supporting dissenting justices claim that the manner in which the standard was applied has altered. Even the United States Supreme Court has noted deficiencies in the Florida Supreme Court's appellate review. See Parker v. Dugger, 498 U.S. 308, 320 (1991)("What the Florida Supreme Court could not do, but what it did, was to ignore the evidence of mitigating circumstances in the record and misread the trial judge's findings regarding mitigating circumstances, and affirm the sentence based on a mischaracterization of the trial judge's findings.").

[67]For example, the United States Supreme Court has explained that its decisions finding ineffective assistance in Rompilla v. Beard, Wiggins v.Smith, and Williams v. Taylor, were all dictated by its decision in Strickland and therefore each of those decisions, while issuing between 2000 and 2005, actually date back to Strickland, and reflect what the decision in Strickland the very day it was issued in 1984. Between 1984 and 2000, the Florida Supreme Court addressed ineffective assistance of counsel claims under Strickland in virtually every capital post conviction case that it heard. It is clear from analyzing those opinions that the Florida Supreme Court did not read Strickland the way it was read and applied in Rompilla, Wiggins, and Taylor. Of course, the lower courts in each of those cases had also not read Strickland in the fashion that the United States Supreme Court said it was meant to be read. For example in Williams, the issue addressed by the United States Supreme Court was the failure of the Virginia Supreme Court to properly read and apply the standards enunciated in Strickland. Thus, the ruling in Williams was quite simply that Strickland meant what the United States Supreme Court said in Williams it meant., and any court who not read and applied Strickland in the fashion explained Williams had erroneously applied the constitutional principle at stake.

Supreme Court has refused to re-examine its decisions predicated upon its erroneous reading Strickland prior to the decisions in Rompilla, Wiggins, or Williams exposing the error Thus, individuals on Florida's death row who have meritorious claims under any one of these three decisions and who presented those claims to the Florida Supreme Court before the issuance of these three opinions since the year 2000, will not get the benefit of those three decisions. In essence, the Florida Supreme Court has stripped those death row inmates of their Sixth Amendment rights as defined by the United States Supreme Court.[68] Since the very purpose of Strickland (and of Rompilla, and of Wiggins, and of Williams) was to insure that a constitutionally adequate adversarial testing occurred and that it produced a constitutionally reliable result, the Florida Supreme Court's action has defeated that purpose. It again injected arbitrariness into Florida's death penalty system.[69]

42. Because the Florida Supreme Court has used retroactivity rules to preclude

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[68]Of course, many of the individuals who submitted the ineffectiveness claim to the Florida Supreme Court prior to 2000 have also submitted the ineffective assistance claim to the federal courts in a federal habeas petition. Just as the federal courts in Rompilla, Wiggins, and Williams, had failed to properly to read Strickland or failed to note that the state court reading was in fact contrary to Strickland, the Eleventh Circuit denied many ineffective assistance of counsel arguable meritorious under Rompilla, Wiggins, and Williams. But by virtue, the Anti-Terrorism and Effective Death Penalty Act of 1996, the ability to file a second habeas and obtain review of the previously, albeit wrongly, denied ineffective assistance claim. Thus, numerous individuals are now stuck with a meritorious claim in light of Rompilla, Wiggins, or Williams, but with no court in which to have the claim properly evaluated.

[69]Another example of arbitrariness injected into the capital process by the Florida Supreme Court's erratic action in applying decisions retroactively can be seen in the manner in which it has handled the fallout from its decision in Delgado v. State, 776 So. 2d 233 (Fla. 2000). There, Mr. Delgado had been convicted of first degree murder on the basis that the homicide occurred in the course of a burglary in 1990. On appeal, the issue concerned whether Mr. Delgado, who had entered the victims' home with consent, committed a burglary by "remaining in" the residence. The Florida Supreme Court concluded that the "remaining in" language only applied where the "remaining in" was done surreptitiously. In reaching this conclusion, the Florida Supreme Court overturned a number of prior decisions, including Jimenez v. State, 703 So. 2d 437, 441 (Fla. 1997)("Jimenez argues that the burglary was not proven because there was no proof of forced entry, or that Minas refused entry, or that she demanded that he leave the apartment."). The alleged burglary in Mr. Jimenez's case happened in 1992 and involving the same criminal statute at issue in Delgado. Yet, the Florida Supreme Court refused to apply its construction of legislative intent as to the meaning of a criminal statute that it applied to a 1990 crime, to a criminal case occurring in 1992 involving the same statute. Subsequently, the Florida Supreme Court gave the benefit of the Delgado construction to a defendant who was charged with a 1980 burglary in which a homicide occurred. Fitzpatrick v. State, 859 So. 2d 486 (Fla. 2003), and give the benefit of the Delgado construction to a defendant who was charged with a 1994 burglary in which a homicide occurred. Raleigh v. State, 932 So. 2d 1054 (Fla. 2006).

consideration of meritorious claims, the ABA Report recommended that Florida courts "should give full retroactive effect to United States Supreme Court decisions in all proceedings, including second and successive post-conviction proceedings, and should consider in such proceedings the decisions of federal appeals and district courts." ABA Report at 241. The manner in which the Florida's retroactivity rules have been applied has been arbitrary and in violation of Furman.

9. Procedural Default

43. Further, the Florida Supreme Court frequently has relied upon procedural defaults to create procedural bars that preclude consideration of meritorious issues that go to the reliability of the conviction and sentence of death. See Swafford v. State, 828 So. 2d 966, 977-78 (Fla. 2002); Jones v. State, 709 so. 2d 512, 519-20, 525 (Fla. 1998). Certainly, the refusal to consider issues that go towards the reliability of the conviction and/or the sentence of death increase the risk that the innocent or the legally undeserving will be executed. It decreases a "meaningful basis for distinguishing the few cases in which [death] is imposed from the many cases in which it is not" Furman, at 313 (White, J., concurring). The ABA Report recommended that "State courts should permit second and successive post-conviction proceedings in capital cases where counsels' omissions or intervening court decisions resulted in possibly meritorious claims not previously being raised, factually or legally developed, or accepted as legally valid." ABA Report at 241. As it is, the Florida death penalty scheme violates Furman.

10. Clemency

44. Clemency is a critical stage of the capital process.[70] However, the ABA Report found Florida's clemency process to be lacking: "Given the ambiguities and confidentiality surrounding Florida's clemency decision-making process and that fact that

[70]It is the only stage at which factors like lingering doubt of innocence, remorse, rehabilitation, racial and geographic influences and factors can be considered. See Herrera v. Collins, 506 U.S. 390, 412 (1993).

clemency has not been granted to a death-sentenced inmate since 1983, it is difficult to conclude that Florida's clemency process is adequate."[71] ABA Report at vii. See Furman, 408 U.S. at 253 (Douglas, J., concurring) ("Under these laws no standards govern the selection of the penalty. People live or die, dependent on the whim of one man or of 12.").

11. Politics

45. Undoubtedly politics is a factor that causes arbitrariness in Florida's death penalty scheme. In fact, the state assessment team noted that judicial elections and appointments are influenced by consideration of judicial nominees' or candidates views on the death penalty. ABA Report at xxxi. The team also cited the Florida Supreme Court's recent quantitative approach to proportionality review, which has been caused by political pressures and the change of composition of the Court. Id at 213. Florida's death penalty scheme is infected by politics and decisions made for political gain rather than in fairness.

12. Mental Disabilities

46. The ABA Report concluded: "The State of Florida has a significant number of people with severe mental disabilities on death row, some of whom were disabled at the time of the offense and others of whom became seriously ill after conviction and sentence." ABA Report at ix. And, while Florida has recently excluded individuals suffering from mental retardation from the death penalty, it has not extended its logic to those suffering from severe mental disabilities. Id. at xi. The ABA Report concluded that the logic regarding those with mental retardation applied equally to those with severe mental disabilities, noting that mental illness can effect every stage of a capital trial. Id at xxxviii. The distinction between the mental impairment of the mental retarded and the mental impairment of the mental ill and

[71] The clemency process is entirely arbitrary; there are no rules or guidelines "delineating the factors that the Board should consider, but not to be limited to" in considering clemency. For all practical purposes, the clemency process is dead. It does not appear that any serious consideration is given. It certainly does not function in the manner that is suggested it should in Herrera. The clemency process, as part and parcel of Florida's capital sentencing process, only provides more arbitrariness in the decision making as to who is to be executed.

corresponding culpability of those inflicted with each condition is arbitrary.

47. Furthermore, even in the case of the mentally retarded, Florida has created a procedure that will produce arbitrary results, as the ABA Report noted. The legislation and rule governing mental retardation procedures makes a distinction between those individuals whose cases are final and those who are not. See Fla. Stat. § 921.137; Fla. R. Crim. P. 3.203. Those whose cases are final receive none of the protections as those whose cases are not final, including, but not limited to a jury's consideration of the issue and the sixth amendment guarantee to effective assistance of counsel.[72] These distinction depending on where a defendant is in his criminal process are arbitrary.

13. Crime Laboratories and Medical Examiner's Offices

48. The ABA Report also described many of the problems in the crime laboratories and medical examiner's offices in the State of Florida. The report said: "The deficiencies in crime laboratories and the misconduct and incompetence of technicians have been attributed to the lack of proper training and supervision, the lack of testing procedures and the failures to follow such procedures, and inadequate funding." Id at 83. The result of these problems is errors – errors that go unchallenged and uncorrected before the jury. This is yet another factor, unrelated to the circumstances of the crime or the character of the defendant, injecting arbitrariness into Florida's capital process in violation of Furman.

D. Conclusion

49. When all of the arbitrary factors are fully explored, it is clear that the Florida capital process does not deliver and/or produce sufficiently reliable results under the Eighth Amendment. The conclusion is inescapable - "it smacks of little more than a lottery system."

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[72]The ABA Report also took issue with the burden of proof imposed on those who raise their retardation. The report argued that the State be required to disprove a defendant's substantial showing that he is mentally retarded. ABA Report at xxxviii. The imposition of the burden of proof on the defendant will undoubtedly cause the decision as to who is mental retarded and does not get executed and who is not retarded and gets executed to turn on arbitrary factors, such as whether records demonstrating onset before the age of 18 exist, are family members still alive who can advise mental health experts as to the defendant's adaptive skills, etc.

Furman, 408 U.S. at 293 (Brennan, J., concurring). "[T]here is no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not" Furman, 408 U.S. at 313 (White, J., concurring). The Florida capital process cannot "assure consistency, fairness, and rationality" and it cannot "assure that sentences of death will not be "wantonly" or "freakishly" imposed." Proffitt, 428 U.S. at 259-60. Florida's death penalty statute violates the Eighth Amendment.

50. Unlike the defendant in Rutherford v. State, ___ So. 2d ___, FSC Case No. SC06-1931 (Fla. October 12, 2006), Mr. Marek alleges herein "how . . . the conclusions reached in the ABA Report would render his individual death sentence unconstitutional." Slip Op. at 11. First, if Mr. Marek's death sentence was imposed pursuant to an unconstitutional statute, his sentence would be unconstitutional. Anderson v. State, 267 So. 2d 8, 9 (Fla. 1972). But beyond that, Mr. Marek's case was infected by many if not most of the areas of concern detailed in the ABA Report. The State in prosecuting Mr. Marek and his co-defendant took different positions as to who had killed one of the victims. In sentencing Mr. Marek to death the judge found that he and his co-defendant had acted in concert through the crime. Since Mr. Marek's co-defendant received a life sentence, the disparate sentences can only be described as arbitrary. Mr. Marek's allegations of ineffective assistance of counsel were not evaluated under the proper standards enunciated in United States Supreme Court decisions rendered after the Florida Supreme Court's reject of his claim in collateral proceedings. *See* Rompilla; Wiggins, and Williams. Nor was retroactive effect was not given to Ring v. Arizona and Crawford v. Washington.

51. Rule 3.850 relief is warranted in light of the fact that Florida's capital sentencing scheme violates the Eighth Amendment and the principles outlined in Furman v. Georgia.

CONCLUSION AND RELIEF SOUGHT

Mr. Marek prays for the following relief, based on his prima facie allegations

demonstrating violation of his constitutional rights:

1. That he be allowed leave to amend this motion should new claims, facts, or legal precedent become available to counsel;

2. that he be granted an evidentiary hearing at a reasonable time; and

3. that his convictions and sentences, including his sentence of death, be vacated.

I HEREBY CERTIFY that a true copy of the foregoing motion has been furnished by U.S. Mail, postage prepaid, to all counsel of record on July 18, 2008.

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IN THE CIRCUIT COURT OF THE SEVENTEENTH JUDICIAL CIRCUIT, IN AND FOR BROWARD COUNTY, FLORIDA

CASE NO. 83-7088CF-B

STATE OF FLORIDA,

Plaintiff,

v.

JOHN MAREK,

Defendant.

_____/

MOTION FOR REHEARING/MOTION TO AMEND MOTION TO VACATE

COMES NOW, **JOHN MAREK**, by and through undersigned counsel and respectfully moves this Court to rehear its order summarily denying Mr. Marek's Rule 3.851 motion and to allow Mr. Marek to amend the Rule 3.851. In support of this motion, Mr. Marek states:

1. On May 11, 2007, Mr. Marek filed his Rule 3.851 motion with this Court. On June 14, 2007, this Court ordered the State to file a response to the motion. On July 2, 2007, the State served its Response.[1] This Court conducted a hearing on the motion on June 18, 2008, and

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[1]Carolyn Snurkowski, Assistant Deputy Attorney General, signed the response. The response indicates in the procedural history that Mr. Marek filed a "1993/1994 motion for postconviction relief" that went unprosecuted, and that seven years later in 2001 Mr. Marek filed another motion for postconviction relief. This is a falsehood which Ms. Snurkowski was forced to acknowledge on the record at a February 19, 2002 hearing. At that time, undersigned counsel pointed out that the representation in a 2001 pleading written by Ms. Snurkowski that Mr. Marek had not prosecuted his 1993 Rule 3.850 motion was premised on the erroneous omission of five years of litigation:

> And in Mr. Marek's case, when I was getting ready for this hearing today, I was gathering the papers and I was reading the state's response. And the state's response which was filed, I guess, November of 2001, I was sort of troubled by the fact that within it there is just a certain sort of representation or it's based on certain representations that's just not true.
>
> * * *
>
> The problem is that this misrepresentation is underneath the entire things. For example, footnote 11 of the state's response which appears on page 39 indicates

granted Mr. Marek leave to file an amendment to the Rule 3.851 motion within 30 days. On July 18, 2008, Mr. Marek filed his amended Rule 3.851 motion. On August 18, 2008, the State served its Response to the amended motion. The State attempted to call the case up for a status hearing on January 30, 2009. However, the hearing was delayed until February 6, 2009. In light of supplemental authority served by the State at that time, Mr. Marek's counsel requested the opportunity to address the supplemental authority in a memorandum of law. This Court granted the request and gave Mr. Marek until February 23, 2009, to submit the memorandum. The memorandum was in fact filed on February 23, 2009.

2. On April 20, 2009, the governor signed a death warrant scheduling Mr. Marek's execution for May 13, 2009. The governor signed Mr. Marek's death warrant after consulting with Ms. Snurkowski, Assistant Deputy Attorney General, who represents the State in these proceedings. Despite the pendency of Mr. Marek's Rule 3.851 before this Court, Ms. Snurkowski successfully encouraged the governor to sign a death warrant for Mr. Marek. Following the signing of the death warrant, this Court entered an order denying Mr. Marek's

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> that as to claim 9, the information surfaced in July of 1996, but Mr. Marek had not filed anything on this claim until the year 2001 and was time barred in reference to claim 10.

(2PC-R. 73-74). In responding at the 2002 Huff hearing, Ms. Snurkowski acknowledged the error, explaining "we don't have full access to the records that apparently the CCR - - and I'm going to look to make sure on this one, but I don't believe that we were given service. It was not. It was just to [the State Attorney]" (2PC-R. 92). Accordingly, the Assistant Attorney General asked at the end of the Huff hearing for permission to supplement the response in light of the 5 years of litigation omitted from the State's November 27, 2001, response (2PC-R. 123). However, despite admitting that the representation was false and despite filing a supplement to the response correcting the false representation, Ms. Snurkowski repeated the falsehood in the Florida Supreme Court and the argument premised upon it. She refused to correct the false representations when undersigned counsel pointed it out, and instead continued to rely on the false representations to advance her argument that the failure to prosecute the 1993 motion to vacate erected procedural bars. Then when she filed a motion to dispense with oral argument, Ms. Snurkowski again premised her argument on her false assertion that Mr. Marek had failed to prosecute his 1993 motion to vacate.

The Florida Bar rules require candor towards a tribunal. However, Ms. Snurkowski has repeatedly failed to honor that rule when she has repeatedly lied to this Court and the Florida Supreme Court regarding Mr. Marek and his efforts to prosecute his 1993 motion to vacate in the six years proceeding his 2001 amendment.

pending Rule 3.851 motion on April 23, 2009.

3. Rule 3.851 provides that a motion for rehearing is to be filed within fifteen (15) days of the rendition of the trial court's order. This motion is filed within the time permitted and is thus timely.

4. The governor's action in signing a death warrant created new claims to be presented in a Rule 3.851 motion. Accordingly, within this motion Mr. Marek seeks to amend his Rule 3.851 motion to include his claims arising from the governor's action.

5. Within his amended motion to vacate, Mr. Marek had argued that the disparate treatment accorded him and his co-defendant, Raymond Wigley, and the disparate arguments made by the prosecutor at the two separate trials was constitutional error. This was explained in his memorandum of law as follows:

> Further, the State's use of inconsistent theories in Mr. Marek's penalty phase and his co-defendant's trial violated Mr. Marek's right to due process. See Bradshaw v. Stumpf, 545 U.S. 175, 187-88 (2005)(case remanded for consideration of the impact that the prosecutor's inconsistent theories had on Stumpf's sentence and to determine whether the death penalty violated due process). The State in prosecuting Mr. Marek and his co-defendant took different positions as to who had killed one of the victims. The information that the State relied upon at the co-defendants's trial that the co-defendant killed one of the victims was not heard by Mr. Marek's jury. Mr. Marek's allegations of prosecutorial misconduct were not evaluated under the proper standards enunciated in United States Supreme Court decisions rendered after the Florida Supreme Court's rejection of his claim in collateral proceedings. Prosecutorial misconduct was tolerated in Mr. Marek's case, and Mr. Marek was prejudiced.

Memorandum at 6-7.

6. This Court addressed this claim in its order denying the motion saying: "This Court further finds that the Defendant's claim regarding the prosecutor's use of inconsistent theories is refuted by *Walton v. State, supra*." Order at 4. In rejecting Mr. Marek's claim, this Court overlooked Raleigh v. State, 932 So. 2d 1054, 1066 (Fla. 2006).

7. The State's use of inconsistent theories in Mr. Marek's trial and his codefendant's trial violated Mr. Marek's right to due process. In Raleigh v. State, 932 So. 2d at 1066, the Florida Supreme Court explained:

> In *Stumpf*, the state first tried Stumpf under the theory that he was the principal actor in the shooting death of the victim. *Id. at 2403-04*. Then, based upon new evidence that came to light after Stumpf had been tried and convicted, the state tried Stumpf's codefendant under the inconsistent theory that the codefendant was the principal actor in the shooting death of the same victim. *Id*. The United States Supreme Court held that the use of such inconsistent theories warranted remand to determine what effect this may have had on Stumpf's sentence and to determine whether the death penalty violated due process.

In denying relief in Raleigh, the Florida Supreme Court found no error because:

> the State did not take an inconsistent position as the prosecution did in *Stumpf*. In Figueroa's trial, the State never contradicted the position it took at Raleigh's trial regarding Raleigh's culpability. It did not change course by seeking to prove that Figueroa, not Raleigh, was the principal actor in Eberlin's death. Therefore, the due process concerns raised in *Stumpf* do not apply.

Raleigh, 932 So. 2d at 1066.

8. Here, unlike the situation in Raleigh, it is clear that the State took inconsistent positions regarding the culpability of Mr. Marek and his codefendant, Raymond Wigley.[2] For instance, during Wigley's case, the prosecutor asserted that Wigley was equally or even more culpable than Mr. Marek:

> 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**.

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[2]Moreover, it is clear that Mr. Marek was prejudiced by the State's actions. In affirming Mr. Marek's death sentence on direct appeal, the Florida Supreme Court stated:

> 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.

Marek v. State, 492 So. 2d 1055, 1058 (Fla. 1986).

(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).

9. Contrary to his position in Wigley's trial, the prosecutor asserted in Mr. Marek's trial that Mr. Marek was the leader and dominant actor. During his opening statement, the prosecutor stated:

> 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).

* * *

> 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.

(R. 430)(emphasis added).

Subsequently, during his 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).[3]

During his closing argument at the 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

[3]In Mr. Marek's trial, the prosecutor failed to emphasize to the jury, as he did in Wigley's trial, that Mr. Marek was doing the talking through a pre-arranged agreement.

> 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).

10. What is perhaps even more problematic than the prosecutor's inconsistent argument is the fact that the prosecutor molded the testimony of his witnesses toward the detriment of whichever defendant was on trial. For example, during Wigley's trial, Dennis Satink testified that while Wigley appeared to have been drinking the most (WR. 603), he was cognizant of what was going on (WR. 604). Further, Satink testified that Wigley showed no fear of Marek (WR. 608-09). And, Satink testified that he did in fact have some conversations with Wigley (WR. 627).

11. Yet during Mr. Marek's trial, Satink's testimony portrayed a much different scenario. In this version, Wigley was so intoxicated that he was unable to stand without support, he was staggering, and his speech was slurred (R. 672-73). In this version, whenever Wigley tried to speak, Marek interrupted and stopped him from talking (R. 670-71). And in this version, Satink stated that Marek was the more dominant of the two (R. 671).

12. Additionally, it is clear that the prosecutor manipulated the testimony of Jean Track in each trial. In Wigley's trial, 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.

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). The prosecutor emphasized to the jury that it was Wigley who frightened Jean Trach:

> 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. 423-24)(emphasis added). Conversely, in Mr. Marek's trial, the prosecutor utilized the same situation to assert that Mr. Marek was in fact the leader, and that he was in control (R. 423-24).

13. In Berger v. United States, 295 U.S. 78, 88 (1935), the United States Supreme Court explained that a prosecutor is:

> the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.

Here, the State disregarded this principle and instead did whatever it had to in order to secure a death sentence.[4] The State's actions violated Mr. Marek's right to due process. Relief is

[4]In Wigley's case, the jury recommended and the court imposed a life sentence. During Wigley's sentencing hearing, the prosecutor complained that "[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). Of course, because Wigley received a life sentence, the court record was not before the Florida Supreme Court at the time of Mr. Marek's direct appeal and the Florida Supreme Court and Mr. Marek's direct appeal attorney would have been unaware of the different position the State took at Wigley's trial.

warranted.

14. In its order, this Court also found Mr. Marek's proffer of evidence in support of his challenge to Florida's lethal injection procedures insufficient to warrant an evidentiary hearing on the claim. In the course of reaching this conclusion, this Court relied upon the decision in Lightbourne v. McCollum, 969 So. 2d 326 (Fla. 2007). However, Mr. Marek filed his claim alleging that Florida's current method of execution violates the Eighth Amendment in light of the Angel Diaz execution and the subsequent revisions to the execution day protocol. In other words, Mr. Marek presented this Court with the same claim that Lightbourne presented in Lightbourne v. McCollum, 969 So. 2d 326 (Fla. 2007), only he presented it before the evidentiary hearing was conducted in Lightbourne, and before the matter was litigated. Mr. Marek sought what Lightbourne sought, an evidentiary hearing. An evidentiary hearing was required and was conducted on Lightbourne's challenge. In fact in Schwab v. State, 969 So. 2d 318 (Fla. 2007), the Florida Supreme Court addressed the Eighth Amendment challenge to Florida's lethal injection procedures that was presented by Schwab. The Court clearly stated that "when an inmate presents an Eighth Amendment claim which is based primarily upon facts that occurred during a recent execution, the claim is not procedurally barred." Schwab, 2007 Fla. LEXIS 2011, *3-4. Thus, it is clear that its decisions predating the execution of Angel Diaz in no way preclude a capital defendant from raising an Eighth Amendment challenge based upon the facts and circumstances surrounding the recent botched execution, nor determine the outcome. The Florida Supreme Court indicated that Schwab, who had presented his lethal injection claim in a Rule 3.851 motion, had been entitled to have the circuit court either 1) take judicial notice of the evidence presented in the Lightbourne proceedings, or 2) conduct an evidentiary hearing on the claim:

> Under the unique circumstances of this case and based on the court's other ruling summarily denying relief, we hold that the postconviction court erred in failing to take judicial notice of the record in Lightbourne. **Since Schwab's allegations were sufficiently pled, the postconviction court should have either granted Schwab an evidentiary hearing, or if Schwab was relying upon the evidence**

already presented in Lightbourne, the court should have taken judicial notice of that evidence.

Schwab, 2007 Fla. LEXIS 2011, *7-8 (emphasis added). In Schwab, the defendant asked for the circuit court to take judicial notice of the evidence presented in Lightbourne. The circuit court's refusal to take judicial notice of that evidence or to alternatively grant Schwab his own evidentiary hearing was found to be harmless error "because Schwab has not presented any argument as to specific evidence he wanted to present in this case that had not been presented in the Lightbourne proceeding." Schwab, 2007 Fla. LEXIS 2001, *8, n. 2.

15. What Mr. Marek argued was that due process required that he receive the same consideration Lightbourne received. Like Lightbourne, he, Mr. Marek, was entitled to an evidentiary hearing on his claim. Moreover, Mr. Marek argued that it would be a violation of due process for this Court to deny Mr. Marek an evidentiary hearing on the basis of the outcome in Lightbourne, given that Mr. Marek was not a party to the Lightbourne proceedings. Of course, the touchstone of due process is notice and reasonable opportunity to be heard. The right to due process entails "'notice and opportunity for hearing appropriate to the nature of the case.'" Cleveland Bd. of Ed. v. Loudermill, 470 U.S. 532, 542 (1985), quoting Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950). "[F]undamental fairness is the hallmark of the procedural protections afforded by the Due Process Clause." Ford v. Wainwright, 477 U.S. 399, 424 (1986)(Powell, J., concurring in part and concurring in the judgment). In Teffeteller v. Dugger, 676 So. 2d 369 (1996), the Florida Supreme Court applied these due process principles in post-conviction proceedings when considering a claim similar to the one at issue here. In Teffeteller, the Florida Supreme Court ruled that a criminal defendant's collateral claim could not be denied on the basis of evidence presented when neither he nor his counsel were present for and thus could not challenge and/or confront the evidence. This is precisely the circumstances presented here when this Court refused to give Mr. Marek the opportunity to present his case, and instead denied his claim on the basis of evidence presented in another case

for which Mr. Marek was not present and not able to challenge or confront the State's case.

16. In its order denying Mr. Marek's Rule 3.851 motion, this Court overlooked Mr. Marek's due process claim and did not address it. Mr. Marek has sought to invoke his own due process right to be fully and fairly heard on his claim and seeks to present evidence not presented in Lightbourne. As Mr. Marek does not base his claim merely on the basis of the evidence presented by Lightbourne, this Court's refusal to grant an evidentiary hearing on the claim is not and cannot be harmless. Rehearing is warranted.

17. Besides seeking rehearing, Mr. Marek also seeks to amend his Rule 3.851 motion to include claims arising in light of the governor's action in signing a death warrant.

18. Here, Mr. Marek's execution has now been scheduled 25 years after his conviction was returned and a sentence of death was imposed. The execution has been scheduled 14 years after Mr. Marek's first round of postconviction litigation was completed. The Eighth Amendment prohibition against cruel and unusual punishment requires that "the sanction imposed cannot be so totally without penological justification that it results in the gratuitous infliction of suffering." Gregg v. Georgia, 428 U.S. 153, 183 (1976). Punishments that entail exposure to a risk that "serves no 'legitimate penological objective'" and that results in gratuitous infliction of suffering violate the Eighth Amendment. Farmer v. Brennan, 511 U.S. 825, 833 (1994) (quoting Hudson v. Palmer, 468 U.S. 517, 548 (1984) (Stevens, J., concurring in part and dissenting in part).

19. When the U.S. Supreme Court denied certiorari review in Lackey v. Texas, Justice Stevens wrote:

> Though novel, petitioner's claim is not without foundation. In *Gregg v. Georgia*, this Court held that the Eighth Amendment does not prohibit capital punishment. Our decision rested in large part on the grounds that (1) the death penalty was considered permissible by the Framers and (2) the death penalty might serve "two principal social purposes: retribution and deterrence".
>
> It is arguable that neither ground retains any force for prisoners who have spent some 17 years under a sentence of death. Such a delay, if it ever occurred, certainly would have been rare in 1789, and thus the practice of the Framers

> would not justify a denial of petitioner's claim. Moreover, after such an extended time, the acceptable state interest in retribution has arguably been satisfied by the severe punishment already inflicted. Over a century ago, this Court recognized that "when a prisoner sentenced by a court to death is confined in the penitentiary awaiting the execution of the sentence, one of the most horrible feelings to which he can be subjected during that time is the uncertainty during the whole of it." *In re Medley, 134 U.S. 160, 172, 33 L. Ed. 835, 10 S. Ct. 384 (1890)*. If the Court accurately described the effect of uncertainty in *Medley*, which involved a period of four weeks, that description should apply with even greater force in the case of delays that last for many years. Finally, the additional deterrent effect from an actual execution now, on the one hand, as compared to 17 years on death row followed by the prisoner's continued incarceration for life, on the other, seems minimal.

Lackey v. Texas, 514 U.S. 1045 (1995) (J. Stevens, memorandum respecting denial of certiorari) (citations omitted).

20. In a subsequent denial of certiorari review in another case, Justice Breyer echoed the concerns voiced by Justice Stevens in Lackey. Justice Breyer wrote in a case involving a defendant who had been on Florida's death row over 23 years that: "After such a delay, an execution may well cease to serve the legitimate penological purposes that otherwise may provide a necessary constitutional justification for the death penalty." Elledge v. Florida, 119 S. Ct. 366 (1998) (J. Breyer, dissenting). Justice Breyer asserted that the length of time on death row, extended by a State's mishandling of the case, becomes cruel once the purpose of punishment is no longer served. In yet another case involving an extended stay on Florida's death row, Justice Breyer stated:

> Nor can one justify lengthy delays by reference to constitutional tradition, for our Constitution was written at a time when delay between sentencing and execution could be measured in days or weeks, not decades. See *Pratt v. Attorney General of Jamaica, [1994] 2 A. C. 1, 18, 4 All E. R. 769, 773 (P. C. 1993) (en banc)* (Great Britain's "Murder Act" of 1751 prescribed that execution take place on the next day but one after sentence).

Knight v. Florida, 528 U.S. 990, 995 (1999) (J. Breyer, dissenting from the denial of certiorari). Justice Breyer described the psychological impact of a long stay on death row:

> It is difficult to deny the suffering inherent in a prolonged wait for execution -- a matter which courts and individual judges have long recognized....The California Supreme Court has referred to the "dehumanizing effects of . . . lengthy imprisonment prior to execution." In *Furman v. Georgia, 408 U.S. at 288-289* (concurring opinion), Justice Brennan wrote of the "inevitable long wait" that

> exacts "a frightful toll." Justice Frankfurter noted that the "onset of insanity while awaiting execution of a death sentence is not a rare phenomenon."

Knight, 528 U.S. at 994-995. Justice Breyer, in his dissent from denial of certiorari in Foster v. Florida, observed:

> [T]he Supreme Court of Canada recently held that the potential for lengthy incarceration before execution is "a relevant consideration" when determining whether extradition to the United States violates principles of "fundamental justice." *United States v. Burns, [2001] 1 S. C. R. 283, 353, P123.*

Foster v. Florida, 537 U.S. 990, 992-993 (2002) (Breyer, J., dissenting).

21. The Framers of the United States Constitution would not have envisioned that a condemned man would spend 25 years awaiting execution. The Eighth Amendment's prohibition on cruel and unusual punishment on the 1776 Virginia Declaration of Rights was based on the 1689 English Bill of Rights. Harmelin v. Michigan, 501 U.S. 957, 966 (1991). The English Bill of Rights said "excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted" when executions took place within weeks of a death sentence, and if a delay in carrying out the execution was unduly prolonged, it could be commuted to a life sentence. Riley v. Attorney Gen. of Jamaica, 3 All E.R. 469, 478 (P.C. 1983) (Lord Scarsman, dissenting); Pratt v. Attorney General of Jamaica, [1994] 2 A. C. 1, 18, 4 All E. R. 769, 773 (P. C. 1993) (en banc) .

22. Recent developments in international law strongly suggests that the execution of a condemned individual after over 25 years on death row is not consistent with evolving standards of decency. For example, in 1993 two Jamaican death row inmates challenged their death sentences on the basis that their 14 year incarceration on death row violated the Jamaican Constitution's prohibition against inhuman punishment. The Privy Council of the United Kingdom invalidated their death sentences and indicated that a stay on death row of more than five years would be excessive, and commuted their sentence from death to life in prison. Pratt v. Attorney General of Jamaica, [1994] 2 A. C. 1, 18, 4 All E. R. 769, 773 (P. C. 1993) (en banc). As a result of the prolonged stays on death rows in the United States, combined with the

inhumane conditions typical of death row, some foreign jurisdictions have refused extradition of criminal suspects to the United States where it was likely that a death sentence would result, on the grounds that the experience of years of living on death row would violate international human rights treaties. Soering v. United Kingdom, 11 Eur. H.R. Rep. 439 (1989). In Soering, the European Court of Human Rights held that the extradition of a capital defendant, a German national, to the United States would violate Article 3 of the European Convention on Human Rights, which bars parties to the Convention from extraditing a person to a jurisdiction where they would be at significant risk of torture or inhumane punishment. The Court cited the risk of delay in carrying out the execution, which in Virginia averaged between six and eight years. The Court found that "the condemned prisoner has to endure for many years the conditions on death row and the anguish and mounting tension of living in the ever-present shadow of death." Id. at §106. Since the U.S. government could not assure that the death penalty would not be sought in the Virginia courts, extradition was barred by the United Kingdom.

23. Here, unlike most of the cases in which Justices of the U.S. Supreme Court have written regarding the Court's denial of certiorari review, there has been no impediment precluding the Assistant Deputy Attorney General from asking the governor to sign a warrant at any time since 1995 (since in 2009 even though Mr. Marek had a Rule 3.851 motion pending before this Court, the Assistant Deputy Attorney General was successful in advising the governor to sign a warrant). The prolonged delay here has been as a result of the State's choice. The State chose to wait 14 years after the 11th Circuit's decision was final to schedule Mr. Marek's execution. In these circumstances, the Eighth Amendment has been violated by the signing of the death warrant. Mr. Marek' execution cannot be carried out. Mr. Marek' sentence of death if carried out would violate the Eighth Amendment. Rule 3.851 relief is warranted.

24. Rule 3.852(h) provides that after a death warrant is signed on a defendant, he has ten days to make additional public records requests. Mr. Marek has now made such requests and is entitled to pursue the public records in his Rule 3.851 motion and any claims arising from

newly disclosed public records. Accordingly Mr. Marek seeks to amend his Rule 3.851 to follow through on his public records requests and any new information that they turn up.

25. Mr. Marek also seeks to amend his Rule 3.851 motion in light of the grant of certiorari review in Caperton v. Massey. At issue in this case which was argued on March 3, 2009, is whether the due process clause requires judicial disqualification where a judge has a close relationship with a litigant. Though a ruling has not yet issued, if the U.S. Supreme Court finds that the due process clause is applicable in such instances and warrants disqualification, then Mr. Marek was deprived of due process in 1988 when Judge Kaplan presided over the evidentiary hearing in Mr. Marek's case to determine whether his good friend Hilliard Moldof had rendered ineffective assistance of counsel at Mr. Marek's trial. Given the pendency of Caperton and the scheduled execution date, Mr. Marek seeks to amend his Rule 3.851 motion to plead that he was deprived of his due process rights in the collateral proceedings conducted in 1988.

WHEREFORE, Mr. Marek respectfully suggests that this Court overlooked or misapprehended his claims and the evidence proffered in support of them warranting a rehearing, and that in light of the governor's recent action in signing a death warrant Mr. Marek seeks to amend his Rule 3.851 motion to include claims arising from the governor's action.

I HEREBY CERTIFY that a true copy of the foregoing Motion for Rehearing/Motion to Amend Motion to Vacate has been furnished to all counsel of record on April 27, 2009.

MARTIN J. MCCLAIN
Florida Bar No. 0754773
McClain & McDermott, P.A.
Attorneys at Law
141 N.E. 30th St.
Wilton Manors, FL 33334

Attorney for Mr. Marek

Copies furnished to:

Carolyn Snurkowski
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Office of the Attorney General
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Tallahassee, FL 32399-1050

Susan Bailey
Assistant State Attorney
Broward County Courthouse
201 SE 6th Street
Room 675
Ft. Lauderdale, FL 33301-3304

IN THE CIRCUIT COURT OF THE 17TH JUDICIAL CIRCUIT,
IN AND FOR BROWARD COUNTY, FLORIDA

STATE OF FLORIDA	:	Case No. 83-7088CF10B
Plaintiff,		Judge PETER M. WEINSTEIN
	:	
v.		
	:	**EMERGENCY MOTION, CAPITAL CASE**
JOHN MAREK,		**DEATH WARRANT SIGNED;**
Defendant.	:	**EXECUTION SET FOR MAY 13, 2009.**

STATE'S NOTICE OF COMPLIANCE WITH DEFENDANT'S DEMAND FOR PRODUCTION OF ADDITIONAL PUBLIC RECORDS

Undersigned counsel hereby represents that the Office of the State Attorney, Seventeenth Judicial Circuit has complied with Defendant's Demand for Production of Additional Public Records dated April 24, 2009.

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served on Honorable Peter M. Weinstein, Circuit Court Judge, Broward County Courthouse; Carolyn Snurkowski, Assistant Deputy Attorney General, Department of Legal Affairs, Office of the Attorney General, The Capitol, Tallahassee, FL 32399; and to Martin McClain, Esquire, McClain & McDermott, 141 NE 30th Street, Wilton Manors, FL 33334, this 27th day of April, 2009..

Respectfully submitted

MICHAEL J. SATZ
State Attorney

CAROLYN V. McCANN
Assistant State Attorney
Bar No. 380393
Broward County Courthouse
201 SE 6th Street, Suite 660
Ft. Lauderdale, Florida 33301
Telephone: (954) 831-7913

IN THE CIRCUIT COURT OF THE 17TH JUDICIAL CIRCUIT IN AND FOR BROWARD COUNTY, FLORIDA

SC-65821

STATE OF FLORIDA
Plaintiff

vs.

JOHN RICHARD MAREK
Defendant

CASE NO: 83-7088 CF10B; 84-1525

JUDGE: Peter M. Weinstein

CASE UNDER ACTIVE DEATH WARRANT.
EXECUTION SCHEDULED FOR MAY 13, 2009 AT 6:00 P.M.
NOTICE OF HEARING

YOU ARE HEREBY NOTIFIED that the Court calls up before the undersigned,

The following matter:	SPECIAL SET EMERGENCY HEARING DEFENDANT'S DEMAND FOR ADDITIONAL PUBLIC RECORDS BROUGHT PURSUANT TO FLA.R.CRIM. P. 3.852 (h)(3)
DATE:	MONDAY, APRIL 27, 2009
TIME:	10:15 A.M.
PLACE:	Broward County Courthouse Chambers 905B / Courtroom 950 954-831-5506
JUDGE:	Peter M. Weinstein

DONE and ORDERED at Fort Lauderdale, Broward County, Florida, this 24th day of April, 2009.

PETER M. WEINSTEIN
CIRCUIT JUDGE

If you are a person with a disability who needs any accommodation in order to participate in this proceeding, you are entitled, at no cost to you, to the provision of certain assistance. Please contact **954-**

CERTIFICATE OF SERVICE: Via Fax and E-Mail and U.S. Mail

SC65821
STATE OF FLORIDA V. JOHN RICHARD MAREK
83-70888 CF10B, 84-1525

Terrance Lynch, Esquire on behalf of B.S.O. and Dania Police Department
Broward County Sheriff's Office, Legal Department
Public Safety Building
2601 W. Broward Boulevard
Fort Lauderdale, FL 33312

Susan Bailey, Esquire
A.S.A., 17TH Judicial Circuit

Carolyn McCann, Esquire
A.S.A., 17th Judicial Circuit

Carolyn Snurkowski, Esquire (appear via telephone)
Asst. Deputy Attorney General
Department of Legal Affairs
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Chief Donn G. Peterson
Dania Beach Police Dept
c/o Terrance Lynch, Esq

Walter A. McNeil, Secretary (appear via telephone)
Alan Dakan, Esq., Assistant Legal Counsel (appear via telephone)
Florida Department of Corrections, Department of Legal Affairs
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Tallahassee, FL 32399-2500

Gerald M. Bailey, Commissioner (appear via telephone)
James D. Martin, Esq. (appear via telephone)
Florida Department of Law Enforcement
Post Office Box 1489
Tallahassee, FL 32302-1489

Director of Public Safety (appear via telephone)
Daytona Beach Shores Police Department
3050 South Atlantic Avenue
Daytona Beach Shores, FL 32118

IN THE CIRCUIT COURT OF THE 17TH JUDICIAL CIRCUIT IN AND FOR BROWARD COUNTY, FLORIDA

SC-65821

STATE OF FLORIDA

Plaintiff

vs.

JOHN RICHARD MAREK,

Defendant

CASE NO: 83-7088 CF10B; 84-1525

JUDGE: Peter M. Weinstein

CASE UNDER ACTIVE DEATH WARRANT
EXECUTION SCHEDULED FOR MAY 13, 2009 AT 6:00 P.M.

ORDER

THIS CAUSE comes before this Court upon an Order from the Florida Supreme Court dated April, 22, 2009, in which this Court was directed to complete all proceedings and enter all orders by April 27, 2009. The hearing scheduled for Monday, April 27, 2009 at 10:15 a.m. is on the Defendant's Demands for Additional Public Records, filed on April 24th, 2009, brought pursuant to Fla. R. Crim. P. 3.852(h)(3). This Order is being issued to make sure that all of the agencies served with a Defendant's Demand for Additional Public Records shall appear in person or by telephone (those who appear by telephone are designated on the Notice of Hearing). The agencies shall also submit all of the records in their possession to the Records Repository and shall bring copies of those records to the hearing. The agencies appearing by telephone shall make immediate arrangements with CCRC-S to provide copies of the records to the Repository and to CCRC-S.

Accordingly it is

ORDERED AND ADJUDGED that in accordance with the Order of the Florida Supreme Court dated April 22, 2009, the hearing on the Defendant's Demands for Additional Public Records pursuant to Fla. R. Crim. P. 3.852 (h)(3) shall be held at 10:15 a.m., Monday, April 27, 2009 until completed. The agencies are directed to comply with this Order by submitting public records, if in their possession, to the Records Repository, to file a Notice of Compliance with the original to be sent to the Clerk of the Broward County Circuit Court, and with copies sent to the Florida Supreme Court and to the undersigned judge. It is further

The agencies which are appearing by telephone are directed to arrange with CCRC-S, at the hearing to provide copies of records, if in their possession. It is further

ORDERED AND ADJUDGED this Order is being issued on April 24, 2009. All agencies must comply with this Order by 10:00 a.m. April 27, 2009 to comply with the requirements of the Florida Supreme Court and this Court.

DONE AND ORDERED on this 24th day of April, 2009 in Chambers, Broward County Circuit Court, Fort Lauderdale Florida.

Peter M. Weinstein

PETER M. WEINSTEIN
CIRCUIT COURT JUDGE

CERTIFICATE OF SERVICE: Via Fax, E-Mail and U.S. Mail

SC65821
STATE OF FLORIDA V. JOHN RICHARD MAREK
83-70888 CF10B, 84-1525

Terrance Lynch, Esquire on behalf of B.S.O. and Dania Police Department
Broward County Sheriff's Office, Legal Department
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Susan Bailey, Esquire
A.S.A., 17TH Judicial Circuit

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Carolyn Snurkowski, Esquire (appear via telephone)
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Director of Public Safety (appear via telephone)
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3050 South Atlantic Avenue
Daytona Beach Shores, FL 32118

IN THE CIRCUIT COURT OF THE SEVENTEENTH JUDICIAL CIRCUIT IN AND FOR BROWARD COUNTY, FLORIDA

STATE OF FLORIDA,

Plaintiff,

CASE NO.: 83-7088CF10B

vs.

JUDGE: PETER M. WEINSTEIN

JOHN RICHARD MAREK,

Defendant.

_____/

ORDER DENYING DEFENDANT'S SUCCESSIVE MOTION TO VACATE AND SET ASIDE JUDGMENTS OF CONVICTION AND SENTENCES WITH REQUEST FOR LEAVE TO AMEND AND AMENDED MOTION TO VACATE JUDGMENTS OF CONVICTION AND SENTENCES WITH REQUEST FOR LEAVE TO AMEND

THIS CAUSE comes before this Court upon: (1) the Defendant's Successive Motion to Vacate and Set Aside Judgments of Conviction and Sentences with Leave to Amend dated May 11, 2007, and (2) the Defendant's Amended Motion to Vacate Judgments of Conviction and Sentences with Request for Leave to Amend dated July 18, 2008. The State filed its original Response to the Defendant's Successive Post Conviction Motion on July 16, 2007, its Supplemental Response on Lethal Injection Proceedings dated October 11, 2007, its Response to '"Marek's Amended Motion to Vacate and Motion to Deny All Relief as to Marek's Successive Post Conviction Motion," dated August 22, 2008, and four State's Notices of Additional Authority dated September 15, 2008, October 2, 2008, January 14, 2009 and February 5, 2009 [hand delivered in court on January 30, 2009]. On February 23, 2009, the Defendant filed a Memorandum of Law with respect to the claims raised in the successive and amended motion.

Having reviewed considered the Defendant's Successive Motion and the Amended Motion and the Defendant's accompanying Memorandum of Law, the State's

Responses and supplemental authorities, having considered the entire Court file, and applicable law and being otherwise duly advised in the premises, this Court finds:

As to the Defendant's Claim I in both his original and amended motion that Florida's current method of execution violates the Eighth Amendment, this Court finds that the claim is without merit.

The constitutionality of lethal injection as carried out by the Department of Corrections was litigated and addressed in *Lightbourne v. McCollum*, 969 So.2d 326 (Fla. 2007), *reh. den.* November 7, 2007, --- *cert. den.* ---U.S. ---, 128 S. Ct. 2485, 171 L. Ed.2d 777 (U.S. Fla. 2008). The Florida Supreme Court has declared the procedures constitutional. *See also, Power v. State,* 992 So.2d 218 (Fla. 2008). The Department of Corrections' August 2007 protocols were addressed by the Florida Supreme Court. *See, Schwab v. State,* 969 So.2d 318 (Fla. 2007), *reh. den.* Nov.7, 2007, *cert. den.* ---U.S. ---, 128 S. Ct. 2485, 171 (U.S. Fla. 2008); *Schwab v. State,* 982 So.2d 1158 (Fla. Jan. 24, 2008), *reh. den.* May 21, 2008 (affirming the order denying the Defendant's second successive motion for post conviction relief; the Florida Supreme Court rejected the Defendant's assertions that the DOC's execution teams were improperly trained in preparing and mixing the correct chemical amounts and that the FDLE agents were not trained to identify potential problems. The mock execution training exercises were conducted under the prior DOC protocol and a licensed pharmacist was required to mix the chemicals under the new protocol); *Schwab v. State,* 995 So.2d 992, 2008, 33 Fla. Law Weekly S431 (Fla. June 27, 2008), *pet. for cert.* filed June 30, 2008, *cert. den.* July 1, 2008 (affirming the order denying the Defendant's successive motion for post conviction relief; the Florida Supreme Court adopted Judge Charles Holcomb's Order which refuted the Defendant's claims and compared Florida's lethal injection procedures to the procedures in the case of *Baze v. Rees,* ---U.S. ---, 128 S. Ct. 1520, 170 L.Ed2d 420 (U.S. Ky. 2008)); *Sexton v. State,* 997 So.2d 1073 (Fla. September 18, 2008), *reh. den*. Dec. 17, 2008.

Additionally, *see, Henyard v. State,* 992 So.2d 120 (Fla. September 10, 2008), *cert. den.* --- U.S. ---; 129 S.Ct. 28, 171 L. Ed. 2d 930 (U.S. Fla. September 23, 2008) (rejecting the Defendant's claim that based on *Baze, supra,* the Florida Supreme Court should revisit its decision which found "Florida's method of lethal injection as implemented by the August 2007 protocols," constitutional. The Florida Supreme Court rejected the Defendant's argument that *Baze* shed "new light" on the Court's previous decisions on lethal injection, i.e., the *Lightbourne* and *Schwab*, *supra* cases); *Tompkins v. State,* 994 So.2d 1072, (Fla. November 7, 2008), *pet. for cert. filed* (U.S. Feb. 11, 2009) (No. 08-8614) (prisoner under sentence of death and also under an active death warrant). The Florida Supreme Court rejected the Defendant's lethal injection challenges in detail including a claim relating to the "Dyehouse memorandum" which was addressed in *Lightbourne, supra,* and also upheld the trial court's decision to grant the FDLE and the DOC's objections to the Defendant's supplemental public records 3.852(i) demands since the requested records were neither relevant nor were they reasonably calculated to lead to the discovery of admissible evidence as required under Rule 3.852 (i)(2)(C). *See also, Ventura v. State,* 34 Fla. Weekly S71-72 (Fla. Jan. 29, 2009) ("Florida's current lethal injection protocol passes muster under *any* of the risk based standards considered by the *Baze* Court"), as cited by *Reese v. State,* 34 Law Weekly S 296 (Fla. March 26, 2009)(slip opinion). *See Woodel v. State,* 985 So.2d 524 (Fla. 2008), *cert. denied,* ---- U.S. ---, 129 S. Ct. 607, 172 L. Ed. 2d 465 (2008); and *Lebron v. State,* 982 So.2d 649 (Fla. 2008).

This Court also finds that the Defendant's "Second Claim" in both of his motions and also as explained in his Memorandum under *Wiggins v. Smith,* 539 U.S. 510 (2003), *Rompilla v. Beard*, 545 U.S. 374 (2005) and *Williams v. Taylor,* 529 U.S. 362 (2000) in which the Defendant has requested to re-examine his claim of ineffective assistance of penalty phase counsel is speculative and is an improper attempt to re-litigate matters already previously determined. Moreover, the Defendant's reliance on

the American Bar Report ("ABA Report") is not newly discovered evidence and is "a compilation of previously available information related to Florida's death penalty system and consists of legal analysis and recommendations for reform, many of which are directed to the executive and legislative branches." *Walton v. State,* 3 So. 3d. 1000 (Fla. 2009),*reh den.* Feb. 27, 2009, citing *Rutherford v. State,* 940 So.2d 1112, 1117 (Fla. 2006) and the remaining cases cited therein.

This Court further finds that the Defendant claim regarding the prosecutor's use of inconsistent theories is refuted by *Walton v. State, supra.* This Court also finds that the Defendant's reliance in both his successive and amended motions to *Furman v. Georgia,* 408 U.S. 238 (1972) is without merit. *See, Salazar v. State,* 991 So.2d 364 (Fla. 2008), *cert. den.* 129 S.Ct. 1347, 77 USLW 3469 (U.S. Fla. Feb. 23, 2009). Additionally, this Court adopts the reasoning set forth in the States' Responses and supplemental authorities as delineated, *infra,* and incorporates each by reference.

Accordingly, it is hereby

ORDERED AND ADJUDGED that the Defendant's Successive Motion to Vacate Judgments of Conviction and Sentences with Request for Leave to Amend and the Defendant's Amended Motion to Vacate Judgments of Conviction and Sentences with Request for Leave to Amend are respectfully **DENIED.**

The Defendant has thirty (30) days from the date of this order to file an appeal.

DONE AND ORDERED on this _____ day of April, in Chambers, Broward County Courthouse, Fort Lauderdale, Florida.

_____
PETER M. WEINSTEIN
CIRCUIT COURT JUDGE

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