IN THE SUPREME COURT OF FLORIDA

JOHN MAREK

Appellant,

v. CASE NO. SC09-765

STATE OF FLORIDA,

Appellee.

_____/

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

ANSWER BRIEF OF THE APPELLEE

BILL McCOLLUM
ATTORNEY GENERAL

CAROLYN M. SNURKOWSKI
Assistant Attorney General
Florida Bar No. 158541

DEPARTMENT OF LEGAL AFFAIRS
PL-01, THE CAPITOL
Tallahassee, Florida 32399-1050
(850) 414-3566
(850) 487-0997 (Fax)

COUNSEL FOR APPELLEE

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PRELIMINARY STATEMENT

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

The record on appeal will be referenced as "TR" followed by the appropriate volume and page number. Reference to the State trial court evidentiary hearing record will be "CH" followed by the appropriate volume and page number. References to Marek's initial brief will be to "IB" followed by the appropriate page number.

INTRODUCTION

On April 20, 2009, Governor Crist signed a third death warrant setting the warrant week beginning at 12:00 noon on May 8, 2009, through 12:00 noon on May 15, 2009, with the execution set for Wednesday, May 13, 2009, at 6:00 p.m. At the present time no stays of execution exist.

STATEMENT OF THE CASE

Marek was indicted on July 6, 1983, for first degree murder, kidnapping, burglary, sexual battery, and aiding and abetting a sexual battery of Adella Marie Simmons. He was found guilty on June 1, 1984, and on June 5, 1984, at a separate sentencing proceeding, the jury, by a vote of 10-2, recommended

a sentence of death. The trial court followed the jury's death recommendation and imposed the death penalty, finding four (4) statutory aggravating circumstances proven beyond a reasonable doubt and no mitigating circumstances applicable.

The Florida Supreme Court affirmed both the conviction and imposition of the death penalty in Marek v. State, 492 So.2d 1055 (Fla. 1986),[1] and no petition for writ of certiorari was filed in the United States Supreme Court.

On October 10, 1988, Marek filed his initial postconviction motion pursuant to Fla.R.Crim.P. 3.850, raising twenty-two (22) claims.[2] On October 12, 1988, he filed his state habeas corpus

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[1] Marek raised six issues on appeal:

(1) The court erred in sentencing Marek to death for first-degree murder, when it had previously sentenced Raymond Wigley (a co-defendant) to life in prison for the same offense;

(2) The court erred in failing to grant a mistrial when the state elicited testimony concerning a firearm found in the truck where such testimony and evidence was irrelevant and unconnected to the case and highly inflammatory;

(3) The court erred in denying the defendant's motion to disqualify the entire jury panel, where the panel had been exposed to a jury orientation video which portrayed criminal defendants in a false and disfavorable light;

(4) The court erred in denying the defendant's motion for judgment of acquittal;

(5) The court erred in imposing the death sentence due to lack of sufficient evidence, or aggravating factors, to warrant imposition of such sentence;

(6) **The court's sentence of death by electrocution amounts to cruel and unusual punishment.**

[2] The following is a summary of those issues raised:

petition in the Florida Supreme Court urging sixteen (16) issues for review, thirteen (13) of which paralleled his Rule 3.850 motion).[3]

(I) Marek was forced to undergo criminal judicial proceedings while not legally competent; (II) Deprived an adequate mental health evaluation due to counsel's ineffectiveness in not providing the expert with background; (III) Trial court's refusal to provide a circumstantial evidence instruction; (IV) Improper prosecutorial comments during the opening and closing arguments at both phases; (V) Ineffective assistance of counsel at both the guilt-innocence and sentencing phases of his trial; (VI) Trial counsel's failure to investigate his alcohol abuse and to present that defense; (VII) Trial counsel's failure to argue and request instruction on the mitigator-- no significant history or prior criminal activity, and violation of Hitchcock, Lockett; (VIII) Failure to instruct on nonstatutory mitigating circumstances of proportionality; (IX) Inability to present a defense when his counsel was not permitted to present mitigating evidence; (X) Introduction of nonstatutory aggravating factors perverted the sentencing phase; (XI) Improper and misleading instruction on an aggravating circumstance and the court's finding of a different aggravating circumstance then presented to the jury; (XII) Marek's rights denied by instruction to the jury and reliance by the trial court on an improper aggravating circumstance; (XIII) Marek's rights denied by instruction allowing the jury to consider an aggravating circumstance not supported by the record; (XIV) Heinous, atrocious or cruel aggravating circumstance; (XV) Trial court erred in failing to independently weigh the aggravating and mitigating circumstances; (XVI) Shifting of the burden of proof instruction; (XVII) Sentencing jury diluted in their sense of responsibility for sentencing, contrary to Caldwell v. Mississippi, 105 S.Ct. 263 (1985), Adams v. Dugger, 815 F.2d 1443 (11th Cir. 1987), and Mann v. Dugger, 844 F.2d 1446 (11th Cir. 1988); (XVIII) Marek's sentence of death constitutes cruel and unusual punishment, and violates Enmund v. Florida; (XIX) Trial court's refusal to find mitigating circumstances; (XX) Unconstitutional automatic aggravating circumstance; (XXI) Jury instruction that a verdict of life must be made by a majority of the jury; (XXII) Introduction and use of Marek's post-Miranda silence as evidence of a lack of remorse.

[3] In Marek's petition for writ of habeas corpus filed in the Florida Supreme Court, the following summarized, claims:

An evidentiary hearing was held November 3-4, 1988, by state trial court on Marek's motion for postconviction relief. The trial court ultimately denied the motion, and the Florida Supreme Court, denied Marek's state habeas and the appeal from

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(I) Using the contemporaneous conviction of kidnapping as an aggravating circumstance (prior violent felony) was unconstitutional; (II) Marek was acquitted of 'sexual' battery, thus an unconstitutional basis for his death sentence arose when the court ignored the verdict and sentenced him for having 'intended to commit a sexual battery'; (III) Pecuniary gain cannot serve as a proper aggravating circumstance since it was not a primary motive for the capital felony; (IV) Heinous, atrocious or cruel aggravating circumstance improper under Maynard v. Cartwright; (V) Introduction of nonstatutory aggravating factors perverted his sentencing phase which resulted in the arbitrary and capricious imposition of the death penalty; (VI) Failure to instruct the jury on the nonstatutory mitigating circumstance is disparate treatment; (VII) His sixth amendment right to present a defense when counsel was not permitted to present mitigating evidence; (VIII) Trial court's failure to independently weigh the aggravating and mitigating circumstances; (IX) Eighth amendment was violated by trial court's refusal to find the mitigating circumstances clearly set out in the record; (X) Sentencing jury was repeatedly misinformed and misled by instructions and argument which diluted their sense of responsibility for sentencing, contrary to Caldwell v. Mississippi, 105 S.Ct. 2633, Adams v. Dugger, 816 f.2d 1443 (11th Cir. 1987), and Mann v. Dugger, 844 f.2d 1446 (11th Cir. 1988); (XI) Death sentence constitutes cruel and unusual punishment, and violates Enmund v. Florida; (XII) Denied due process and a fair trial by improper prosecutorial comments during the opening and closing arguments in both the guilt and penalty phases; (XIII) Court's refusal to provide the jury with a circumstantial evidence instruction; (XIV) Prosecutor's systematic exclusion of non-Witherspoon excusals by use of peremptory challenges violated right to be free from cruel and unusual punishment; (XV) Appellate counsel was ineffective for failing to raise trial counsel's objection to the improper denial of the defendant's request for an additional peremptory challenge; (XVI) Appellate counsel ineffective for failing to raise the state's use in evidence of inflammatory crime scene photos.

the denial of his 3.850 motion, in Marek v. Dugger, 547 So.2d 109 (Fla. 1989).

Marek then filed his federal petition for writ of habeas corpus in the Southern District of Florida, asserting twenty-two (22) claims.[4] Relief was denied in Marek v. Dugger, Case No. 89-

[4] In federal habeas corpus, Marek asserted the following issues (summarized): Claim I - forced to undergo judicial proceedings although not legally competent; Claim II - deprived of due process and equal protection because mental health experts incompetent under Ake v. Oklahoma, 470 U.S. 68 (1985); Claim III - trial court refused to give circumstantial evidence instruction; Claim IV - prosecutorial misconduct, comments in opening and closing at trial & penalty phases; Claim V - denial effective assistance of counsel at trial & penalty phases; Claim V(1) - trial and penalty; Claim V(1)(a) - failure to cross examine detective Rickmeyer; Claim V(1)(b) - failed to argue statements should not have been admitted; Claim V(1)(c) - ineffective for calling forensic serologist George Duncan; Claim V(1)(d) - failure to insure jury instructed as to lesser included offense "attempted burglary with an assault"; Claim V(1)(e) - failure to transcribe voir dire; Claim V(1)(f) - failed to investigate alcohol abuse and did not present to jury intoxication defense; Claim V(1)(g) - failure to investigate, develop and present mitigating evidence of childhood, mental background and general background; Claim V(2) - failure to object to unreasonable aggravation; Claim V(2)(a) - law not developed as to "contemporaneous" conviction; Claim V(2)(b) - failure to preserve instruction on burglary; Claim V(2)(c) - failed to argue HAC was also "unconstitutionally vague"; Claim V(3) - failure to argue in favor of statutory mitigation; Claim V(3)(a) - failed to argue lack of significant history of prior criminal activity; Claim V(3)(b) - should have argued Marek under extreme emotional disturbance due to alcohol abuse and intoxication; Claim V(3)(c) - failure of counsel to do enough to show good prisoner under Skipper v. South Carolina, 106 S.Ct. 1669 (1986); Claim V(4) - other issues of ineffectiveness - cumulative errors by counsel; Claim VI - failure to investigate Marek's alcohol abuse and present defense of intoxication; Claim VII - counsel's failure to request instruction on no significant history and denied individualized sentencing under Hitchcock; Claim VIII - failure to instruct on nonstatutory mitigation -

6824-Civ-Gonzalez, October 1, 1990. On appeal to the Eleventh Circuit Court of Appeals, Marek abandoned all but five (5) issues on appeal.[5] The court affirmed the denial of federal habeas corpus relief. Marek v. Singletary, 62 F.3d 1295 (11th Cir. 1995).

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proportionality instruction; Claim IX - counsel not permitted to present mitigation - could not show disparate treatment and denied admission of Dr. Krieger's report; Claim X - introduction of nonstatutory aggravating factors; Claim XI - improper and misleading instruction on aggravation; Claim XII - reliance by jury of improper aggravating factor - contemporaneous felony as prior violent felony; Claim XIII - jury permitted to consider aggravating factor not supported by record; Claim XIV - HAC did not apply to Marek's case; Claim XV - trial court failed to independently weigh the aggravating and mitigating circumstances; Claim XVI - shifting of burden of proof; Claim XVII - Caldwell violation; Claim XVIII - Edmund v. Florida violation; Claim XIX - trial court's refusal to find mitigation set forth in record; Claim XX - automatic aggravator - felony murder; Claim XXI - jury mislead as to instruction regarding majority vote at penalty; Claim XXII - introduction of Marek's post-Miranda silence - due to lack of remorse.

[5] Marek argued: Point I: denial of meaningful and individualized sentencing due to counsel's failure to conduct an independent investigation and present mitigation; Point II: a Lockett and Hitchcock violation due to preclusion of consideration of Dr. Krieger's report; Point III: sentencing jury did not receive guiding and channeling instructions regarding aggravating circumstances; Point IV: ineffective assistance of counsel on direct appeal, and Point V: defense counsel rendered ineffective assistance in failing to provide sole mental health expert who had Marek's background for adequate evaluation.

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

On January 24, 1994, Marek filed a "supplemental motion," raising a seventh claim to his 1993 state motion, specifically: Claim VII – he was deprived of his due process rights when he was forced to litigate his previous rule 3.850 motion under warrant when his collateral counsel was deprived of adequate time and adequate funds.

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[6] Claim I: the procedure by which special assistant public defenders and expert witnesses are appointed to handle capital cases and the manner in which they are funded in Broward County creates an irreconcilable conflict of interest in violation of Marek's rights as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, as well as the corresponding provisions of the Constitution of the State of Florida; Claim II: Marek was denied a meaningful and individualized capital sentencing determination due to counsel's unreasonable failure to conduct independent investigation and to present compelling mitigation, and mental health expert's greater concern was cost cutting and future court appointments in violation of the Sixth, Eighth and Fourteenth Amendments; Claim III: the jury's death recommendation, which was accorded great weight by the trial court was tainted by consideration of invalid aggravating circumstances, in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments; Claim IV: Marek's sentence rests upon an unconstitutional automatic aggravating circumstance, in violation of Stringer v. Black, Maynard v. Cartwright, Hitchcock v. Dugger, and the Sixth, Eighth and Fourteenth Amendments; Claim V: Marek's sentencing jury was repeatedly misinformed and misled by instructions and arguments which unconstitutionally and inaccurately diluted their sense of responsibility for sentencing, contrary to Caldwell v. Mississippi, 105 S.Ct. 2633 (1985), and Mann v. Dugger, 847 F.2d 1446 (11th Cir. 1988), and in violation of the Eighth and Fourteenth Amendments; Claim VI: failure to allow Marek to present mitigating evidence violated his Fifth, Sixth, Eighth and Fourteenth Amendment rights.

A new 2001 motion was filed by Marek included Claims II, III, IV, V, VI, VII and VIII which were practically verbatim to seven (7) claims raised by Marek in his 1993/1994 motion for postconviction relief. The remaining claims, Claim I (public records); Claim IX (newly-discovered evidence made known in July 1996); Claim X (recusal of the trial court known since 1994); Claim XI (Apprendi v. New Jersey issue), and **Claim XII (constitutionality of lethal injection)**, were either barred based on time limitations for failing to timely prosecute a claim or without merit based on decisions of the Florida Supreme Court.

A supplemental response was filed April 2, 2002, and on September 30, 2003, the trial court denied all relief. Rehearing was subsequently denied on January 8, 2004, and a notice of appeal was filed February 6, 2004. The Florida Supreme Court in a one-page order denied all appellate review, Marek v. State, 940 So. 2d 427 (Fla. 2006).[7] His December 20,

[7] In his successive habeas, Marek raised four claims, the gravamen of each claim being: 1. Under Tennard v. Dretke, 124 S.Ct. 2562 (2004), Marek was entitled to have evidence presented that may call for a sentence less than death; 2. Trial counsel failure to pursue the statutory mitigator of no significant history of criminal activity, citing Roper v. Simmons, 125 S.Ct. 1183 (2005); 3. Effectiveness of counsel at penalty phase should be revisited in light of Rompilla v. Beard, 125 S.Ct. 2456 (2005) and Wiggins v. Smith, 539 U.S. 510 (2003); and 4. Confrontation clause violation per Crawford v. Washington, 124 S.Ct. 1354 (2004) at penalty phase.

2006, certiorari petition, from the last state court litigation, was denied April 24, 2007.

On May 11, 2007, Marek filed another successive post-conviction motion asserting two claims, a challenge to Florida's method of execution and the newest 2006 ABA report. The State responded on July 2, 2007, and the trial court denied all relief on April 23, 2009. Marek sought public records pursuant to Rule 3.852(h), and the court set a hearing to review any public records issues for April 27, 2009. On April 27, 2009, just prior to the public records hearing commencing, Marek filed a Motion for Rehearing/Motion to Amend Motion to Vacate, raising three additional claims and rearguing previously denied claims. The State responded and after hearing oral argument the trial court on April 27, 2009, denied the motion.[8]

Additionally, in his appeal Marek asserted in Issue VII, the trial court erred in denying his challenge to lethal injection. Below, the trial court citing Sims v. State, 754 So. 2d 657 (Fla. 2000), rejected Marek's challenge to execution by lethal injection in Claim XII finding that on the merits Sims controlled and also found the claim was procedurally barred because "as Defendant was given 30 days during which to elect a manner of execution, pursuant to Sec. 922.105(1) and (2), Fla. Stat. (2000)" he "did not make any election, and by not doing so, his choice by default was death by lethal injection." (Judge Weinstein's Order p.15.)

[8] On April 24, 2009, Marek's counsel filed a "Notice of Counsel's Decision Under Harbinson v. Bell To Represent Petitioner In State Clemency Proceedings." The State responded to the notice on April 28, 2009.

STATEMENT OF THE FACTS

The Florida Supreme Court in Marek v. State, 492 So. 2d 1055, 1056-1057 (Fla. 1986), summarized the pertinent facts as follows:

> This tragic incident began on June 16, 1983, when the victim and her female companion were returning home from a vacation. The victim's companion testified that when the car in which the two women were riding broke down on the Florida Turnpike near Jupiter, appellant, who was driving a pickup truck, pulled over; that appellant was talkative and friendly; that he unsuccessfully attempted to fix the car and then offered to take one of the women, but not both, to a service station; that at approximately 11:30 p.m. the victim left with appellant and Raymond Wigley, who was an occupant of the pickup truck; that Wigley had been present during a part of appellant's conversation with the two women but remained silent; and that, during the five days she and the victim were together on their vacation, the victim did not have sexual intercourse.
>
> At approximately 3:35 a.m. the following morning, a police officer patrolling Dania Beach noticed two men walking from the vicinity of a lifeguard shack towards a Ford pickup truck. He testified that he spoke to the men, who identified themselves as Marek and Wigley, for about forty minutes. He noted that appellant was the more dominant of the two; that appellant joked with the officer and interrupted Wigley every time Wigley attempted to speak; and that appellant drove the truck away from the beach when the conversation was completed. Later that morning, the nude body of the 47-year-old victim was discovered on the observation deck of the lifeguard shack. According to medical testimony, the victim had been strangled between approximately 3:00 and 3:30 a.m., and was probably conscious for one minute after the ligature was applied to her neck. Her body was extensively bruised and her finger and pubic hairs had been burned. The medical examiner testified that he found sperm in the victim's cervix and believed she had had sexual intercourse after 11:30 p.m. on June 16.

Bruises indicated that the victim had been kicked with a great deal of force. According to the examiner, some of the victim's injuries indicated she had been dragged up to the roof of the lifeguard shack and into the observation tower.

Police issued a "be-on-the-lookout" bulletin to law enforcement agencies for appellant and Wigley. On the evening of June 17, a Daytona Beach police officer, as a result of that bulletin, stopped Wigley, who was driving a truck on Daytona Beach, and found a small automatic pistol in the truck's glove compartment. Approximately one-half hour later in the same vicinity, police took appellant into custody. The victim's jewelry was later found in the truck.

A fingerprint expert testified that six prints lifted from the lifeguard shack matched appellant's fingerprints, and one matched Wigley's. Only appellant's print was found inside the observation deck, where the body was discovered.

The appellant testified in his own behalf that he and Wigley had traveled together from Texas to Florida for a vacation; that he had attempted to fix the victim's disabled [*1057] vehicle and had offered to take the women to a filling station; that he fell asleep after the victim got into the truck and that when he awoke, she was gone; that he went back to sleep and woke up at the beach, where he found Wigley on the observation deck of the lifeguard shack; and that it was dark in the shack and he did not see the victim's body. Appellant admitted that after he had been incarcerated and a detective told him he had "made it to the big time," he responded: "S.O.B. must have told all."

The jury convicted appellant of first-degree murder, kidnapping with the intent to commit a sexual battery, attempted burglary, and two counts of battery. Consistent with the 10-2 jury recommendation, the trial judge imposed the death sentence. He found no mitigating circumstances and found the following four aggravating circumstances: (1) appellant was contemporaneously convicted of kidnapping, a felony involving the use or threat of violence; (2) appellant committed the murder while engaged in the commission of attempted burglary with intent to commit sexual

> battery and in the course thereof committed an assault; (3) appellant committed the murder for pecuniary gain; and (4) the murder was heinous, atrocious, and cruel. In a separate trial completed prior to Marek's trial, a jury convicted Wigley of first-degree murder, kidnapping, burglary, and sexual battery, and recommended the imposition of a life sentence for the murder. The trial judge sentenced Wigley to life in prison in accordance with the jury's recommendation.

The closing arguments by the state at the guilt phase and penalty phases of Marek's trial were premise on the evidence and arguments therefrom derived. (TR VIII 1132-1154, 1206-1217) and (TR IX 1299-1309) The State argued that there were a number of ways to convict Marek for the first degree murder of Ms. Simmons, and all of the alternatives required that Marek, based on his actions, was a principal in her murder. At penalty the evidence in aggravation and mitigation was discussed and the State concluded its presentation that the aggravation outweighed the mitigation in Marek's case.

At the penalty phase held June 5, 1984, defense counsel objected to the aggravating factor of financial or pecuniary gain being read to the jury. (TR IX 1282). **Moldof informed the court that he was not going to mention Wigley's sentence of life imprisonment because he did not want to open the door to the prosecution regarding Wigley's confession.** Moldof wanted to introduce the report of Dr. Krieger with regard to his initial comments and evaluation as to Marek. (TR IX 1283). However, the

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

The record reflects the State presented no further evidence at the penalty phase. Defense counsel called Terry Webster on behalf of Marek (TR IX 1295), who testified that she was a jail detention officer who knew Marek. She had first met him when he was incarcerated awaiting trial and that he was held in one of the "favored cells." (TR IX 1296-1297). She observed that Marek never used foul language around her and was very polite and not disruptive. (TR IX 1297). She further observed that Marek was very upset after he was convicted and cried. (TR IX 1298). She stated she never had a problem with Marek. (TR IX 1299). No other witnesses were called.

The closing arguments by the State and defense counsel consisted of the following. The State argued that Appellant never displayed any emotion during the course of the trial and seemed to be sleeping through parts of it. He apparently never reacted and apparently never showed any remorse through any of his actions. The prosecutor observed that when Deputy Webster testified in behalf of Marek, in particular that he cried, those tears were not for remorse but rather, that Marek got caught. (TR 1306—1309)

Moldof discussed in great detail, Marek's drinking problem (TR IX 1315-1316), and talked about Marek's accomplice, specifically Wigley's involvement in the crime. Moldof informed the jury that there was no evidence that Marek knew what happened in the shack. He further observed:

> The other mitigating circumstance would be the age of Mr. Marek and I think Mr. Carney (prosecutor) is incorrect in one respect. He was twenty-one at the time, not twenty—two. Again I think that probably just speaks of perhaps a little lack of insight into how much liquor one can endure and how much one should be drinking and how much part the liquor did play in whatever Mr. Marek's actions were that caused you to render your verdict on Friday.
>
> The only other aspects of mitigation that I think are relevant is (6) which is any other aspect of his character or record or any other circumstance of the offense.
> I think you have heard from Deputy Webster, who is really the only other person called that had nothing to do with the case. Deputy Webster can give you some insight into John Marek; what type of person he is.

> He's been, as she's testified, in jail at least since December and she probably knows since June, and during the entire time she's been on duty and had an opportunity to observe Mr. Marek even prior to the trial.
> Mr. Carney would like you to believe that well Mr. Marek is now putting on a show for Deputy Webster and you being on the verge of tears and being upset and being quite human about this but Mr. Marek, up until this time, has not displayed any of the characteristics like she said of some of the male inmates that display some very distasteful, disrespectful, foul language at a female detention officer and act very disrespectful and quite often either attacked them -- at least attack them verbally. Mr. Marek has been, at least while incarcerated, courteous, respectful and she had no problem with him. I think that does speak to his character and the type of individual he is and something you can take into consideration in determining what your sentence should be.
>
> (TR IX 1317—1319)

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

No portions of the co-defendant Wigley's trial transcripts were introduced during Marek's trial. In Marek's current statement of the case and facts, he has selected excerpts taken

out of context, from the Wigley trial and set those excerpts out in Marek's statement of the facts. At IB p. 5, Marek argues that Mr. Marek's "direct appeal attorney would have been unaware of the different positions the State took at Wigley's trial."

Interestingly, the record shows at the post-conviction hearing Hilliard Moldof, defense counsel for Marek, testified that he spoke to Wigley's defense counsel and monitored Wigley's trial. (CH 400) Had some inconsistencies as to the State's presentation in the case come to pass, Mr. Moldof was in the best position to question the State's presentation in his client's case. Moreover he was never asked at the evidentiary hearing whether there were inconsistencies in the State's cases. And based on his testimony as a whole, he benefitted from what he knew and what the State stated as to co-defendant Wigley. Moldof testified that he had seen the reports on Marek's codefendant Wigley's mental condition. He knew about the trial because he had gone to court and monitored it. He clearly did not want Wigley's mental reports to come in at Marek's trial because they reflected that Wigley was dominated by Marek and he was afraid of Marek. (CH 348-351). Moldof believed that the reports on Wigley would have helped to prove the State's theory that Marek was the "main character" and the "perpetrator of the murder." (CH 353).

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

Hilliard Moldof, trial defense counsel called by the State, testified regarding his representation of Marek:

Hilliard Moldof testified he had been practicing criminal law and that he had been in the Public Defender's Office in Broward County, Florida, for 3½ to 4 years before he took this case, handling probably 5 or 6 prior death cases prior to Marek's case. (CH 312-313). He spoke to Marek about talking with Marek's family for the penalty phase, however, Marek told him that he (Marek) had been in foster homes since he was a young kid and did not think the foster parents would know much about him. (CH 316-317). Marek told him that the foster people he last lived with might not be good persons to call because they were involved in some criminal activity, something having to do with homosexuality. (CII 318). Moldof testified that in considering circumstances for possible mitigation, he looked at Marek's age, his lack of serious criminal background, and Marek's mental condition. (CH 320). Although he received a report from Dr. Krieger, he did not use it. Moldof reiterated that while he thought about looking at the fact that Marek had been in foster care and that his parents had abandoned him, everything Marek told him about his past seemed and was negative. Marek's foster parents were mad at him because he had stolen from them. Marek told Moldof that he had no clues as to how to find them. (CH 322). Moldof testified he just could not

argue that Marek was retarded because the State would have "killed him" on that topic. Based upon his conversations with Marek, Moldof believed that Marek's distant past was bad and, that his more recent past may have involved a homosexual relationship. (CH 322—324). In reviewing the "new" materials forthcoming at the 3.850 hearing by post-conviction counsel, Moldof said he still did not know if he would have used it "based on everything he knew." (CH 329-330).

Moldof observed that Marek was not too responsive at trial, and although he was cooperative, he was not "very" cooperative. Marek continued to reinforce Moldof's opinion that the people in Texas, Marek's past, would not help him and that information regarding Marek's recent past would be very negative. (CH 333-334)

The mental health expert, Dr. Krieger told Moldof that his report found Marek was competent. However, Moldof asked Dr. Krieger to do more tests, (CH 340), specifically addressing statutory mitigating factors. The reason why Moldof did not get another, second written report, was because Dr. Krieger believed Marek was falsifying answers. His belief was bottomed upon the fact that if Marek's test results were correct, Marek would have been "seeing pink elephants, etc." Moldof was afraid that this information would come out, and Marek would be seen as manipulating both his lawyer and his doctor. (CH 342). With

regard to whether Marek could remember the events of the murder, Dr. Krieger said Marek was being less than truthful. (CH 343)

Moldof also testified that he had seen the reports on Marek's codefendant Wigley's mental condition. He knew about the trial because he had gone to court and monitored it. He clearly did not want Wigley's mental reports to come in at Marek's trial because they reflected that Wigley was dominated by Marek and he was afraid of Marek. (CH 348-351). Moldof believed that the reports on Wigley would have helped to prove the State's theory that Marek was the "main character" and the "perpetrator of the murder." (CH 353). While Moldof testified that he also knew about the prior criminal record in Texas, he avoided presenting "no significant criminal history" to the jury because he was afraid of what could come out. He believed it was "too risky." (CH 355). Moldof testified that he did not believe that there was a valid intoxication defense, based upon the physical evidence presented at trial-- the medical examiner's testimony about the victim's body, that she was tortured and physically moved; the fact that within minutes of the murder, Marek had a coherent and jovial conversation with police officers; and the fact that Moldof felt the jury did not believe Marek's testimony that he drank a huge quantity of beer that day and still functioned as he did. (CH 356-357).

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

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

Moldof observed that in all the capital cases that he had handled, this was the only one where the death penalty had been imposed. He further noted that Marek was not the most helpful client, but Marek did not evidence any retardedness or slowness. (CH 376-377). He prepared a number of pretrial motions and that he did receive information and background information in his discussions with Marek. He felt that the "natural" family information was very remote and that the foster family information was not positive. (CH 380). He specifically observed that he did not want the jury to know that Marek had been kicked out of his foster family's home. (CH 382). Moldof told Marek to tell the truth to Dr. Krieger because he wanted the doctor to check out Marek's "partial amnesia". (CH 385). He testified he made a strategic decision not to call Dr. Krieger

because he did not want a report or the testimony about a second set of tests brought to the attention of the jury. (CH 387). Moldof observed that he had reservations about Marek testifying but that Marek wanted to testify.

He further testified that at Marek's penalty phase he did not want to suggest Marek "might be retarded" because he felt it was negative and not a positive factor for the jury to consider. (CH 392). This was premised upon the fact, that any statements regarding retardedness were totally contrary to Marek's appearance in court and his testimony. (CR 393). He stated that he, Moldof, elected not to possibly insult the jury's intelligence with an intoxication defense based on the State's evidence and the physical evidence presented at trial. (CH 394).

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

discussions with Wigley's counsel and monitoring Wigley's trial. (CH 400)

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

> I thought a lot of it would have been not something the jury would feel sorry for. Your intent seems to be I should have let them hear all these tales about his upbringing so they will feel sorry for him. I though some of that would have the opposite impact. Here is a guy that's very dangerous and here's the reason why. He's abandoned. This confirms.
>
> I think part of my attack was to say you said he's guilty beyond a reasonable doubt but you don't know for sure. What if ten years from now Wigley says I did all that. You don't want to put him to death. If I was going to make that argument I couldn't also say look at all this history. That shows he's probably the guy that did it.
>
> That's a definite problem to bring that out to the jury and say don't give a death recommendation. I made the decision it was a better tact to go to the jury and say you still can't be sure. It was a horrendous affair but you still don't know who did that. (CH 398).

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

> It would be crazy if I said no its not important to know. Certainly it is once you have tried the case and you have seen where the jury has gone and some arguments you can see the jury has been receptive to, some they are not and use all that in determining what is going to play best to the jury in the sense of the ultimate goal of having them give a life recommendation.
>
> Although they came back guilty on him they found Wigley as guilty. I thought there was ample evidence

> that Wigley was involved. Because Wigley was sentenced to life I thought I could convince this jury still they were not sure what Marek had done versus Wigley….
>
> I don't want to sound presumptuous. In all the times I've been in front of Judge Kaplan my experience has been that if you can get a jury's recommendation he won't override it and if he would override he had override it your way. I've seen him override a death sentence to life. Doing the opposite. . (CH 399).

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

> What he told me. What Dr. Krieger had in his report. What I gleaned from Jimmy Cohn. You know, we talked about Wigley and Marek and how we might -- I was thinking of calling Wigley and there is a lot there that I probably can't tell you now but I knew a lot about Marek in the sense I thought I knew a lot about him, had a feel for what I would get and a lot of it I didn't think would play to the jury in the sentencing phase, looking at how bad he was coming up. (CH 400).

SUMMARY OF THE ARGUMENT

ISSUE I: Marek's death sentence was appropriate. The Florida Supreme Court's opinion in Marek v. State, 492 So. 2d 1055, 1058 (Fla. 1986), resolved any contention that there was disparate treatment in Marek's and his codefendant's sentences. As to trial counsel effectiveness in presenting mitigation that matter has also been reviewed and denied by both the state and federal courts entertaining the assertion. Lastly, Marek's clemency review, fully complied with the Florida Rules of Executive Clemency.

ISSUE II: Marek's Lackey v. Texas argument is groundless. He has continuously litigated the validity of the sentence and conviction imposed for the first degree murder of Ms. Adella Simmons.

ISSUE III: The granting of certiorari review in Caperton v. Massey, Case No. 08-22 by the United States Supreme Court has no impact on Marek's underlying complaint that his trial judge should have been recused because the trial judge was friendly with defense counsel.

ISSUE IV: Based upon a plethora of cases since Lightbourne v. McCollum, 969 So. 2d 326 (Fla. 2007), Marek has not distinguished his case from those, as to the validity of Florida's death penalty procedures. He has not come forth with

any basis for further evidentiary hearings or additional review of the claims resolved adversely to his position.

ARGUMENT

ISSUE I

MAREKS'S SENTENCE OF DEATH VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS BECAUSE IT PERMITS AN ARBITRARY AND CAPRICIOUS IMPOSITION OF A SENTENCE OF DEATH

1. DISPARATE TREATMENT OF CO-DEFENDANT

The Florida Supreme Court on direct appeal resolved the claim that there was disparate treatment in imposing the death sentence in Marek's case in Marek v. State, 492 So. 2d 1055, 1058 (Fla. 1986).[9] Therein the Court held:

[9] Marek argues that "the lower court denied an evidentiary, and therefore the facts presented in this appeal must be taken as true." The pleading does not reflect where in his rehearing motion and amended motion, Marek asked for an evidentiary hearing on this specific point. Moreover, there is nothing new in the facts as presented since Wigley's trial preceded Marek's. That evidence has always been available. Most importantly that evidence does not overcome a major hurdle that these facts are law of Marek's case, found on direct appeal. *See* Fla. Dep't of Transp. v. Juliano, 801 So. 2d 101, 106 (Fla. 2001) ("Under the law of the case doctrine, a trial court is bound to follow prior rulings of the appellate court as long as the facts on which such decision[s] are based continue to be the facts of the case."); Mills v. State, 603 So. 2d 482, 486 (Fla. 1992)(a claim that has been resolved in a previous review of the case is barred as "the law of the case."). Indeed, the only way around law of case is if Marek had come forth with newly discovered evidence that would invoke the Court's power to reconsider and correct "an erroneous ruling," in exceptional circumstances, where reliance on the previous decision would result in manifest

> Sentencing Phase
>
> Appellant challenges his death sentence on four grounds. Appellant first contends that the trial judge erred in sentencing him to death in view of the fact that the judge had previously sentenced Wigley to life in prison for the same offense. This disparate sentencing, according to appellant, should be prohibited as cruel and unusual, arbitrary, and unequal. We reject this argument. In prior cases we have approved the imposition of the death sentence when the circumstances indicate that the defendant was the dominating force behind the homicide, even though the defendant's accomplice received a life sentence for participation in the same crime. See Tafero v. State, 403 So. 2d 355 (Fla. 1981), *cert. denied*, 455 U.S. 983, 71 L. Ed. 2d 694, 102 S. Ct. 1492 (1982); Jackson v. State, 366 So. 2d 752 (Fla. 1978), *cert. denied*, 444 U.S. 885, 62 L. Ed. 2d 115, 100 S. Ct. 177 (1979); Witt v. State, 342 So. 2d 497 (Fla.), *cert. denied*, 434 U.S. 935, 98 S. Ct. 422, 54 L. Ed. 2d 294 (1977). The evidence in this case clearly established that appellant, not Wigley, was the dominant actor in this criminal episode. Both appellant and the victim's traveling companion testified that appellant talked to the two women for approximately forty-five minutes after he stopped, purportedly to aid them. During most of this conversation, Wigley remained in the truck. When Wigley got out of the truck to join appellant, he remained silent. Appellant, not Wigley, persuaded the victim to get in the truck with the two men. **That evidence was reinforced by the testimony of three witnesses who came into contact with the appellant and Wigley on the beach at approximately the time of the murder, which indicated that appellant appeared to be the more dominant of the two men. Finally, only appellant's fingerprint was found inside the observation deck where the body was discovered. This evidence, in our view, justifies a conclusion that appellant was the dominant participant in this crime.**

(Emphasis added).

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injustice. *See* State v. Owen, 696 So. 2d 715, 720 (Fla. 1997). That has not been done here.

Since that time, in various pleadings before the state and federal courts, Marek has raised some permutation of the disparate treatment argument to no avail.[10] No portions of the co-defendant Wigley's trial transcripts were introduced during Marek's trial. In Marek's current statement of the case and facts, he has selected excerpts taken out of context, from the Wigley trial and set those excerpts out in Marek's statement of the facts. Moreover, at IB p. 5, he states that Mr. Marek's "direct appeal attorney would have been unaware of the different positions the State took at Wigley's trial."

Interestingly, the record shows at the post-conviction hearing Hilliard Moldof, defense counsel for Marek, testified that he spoke to Wigley's defense counsel and monitored Wigley's trial. (CH 400) Had some inconsistencies as to the State's presentation in the case come to pass, Mr. Moldof was in the best position to question the State's presentation in his client's case. Moreover he was never asked at the post-conviction evidentiary hearing whether there were inconsistencies in the State's cases. And, based upon Moldof's testimony as a whole, Marek benefitted from what Moldof knew and as to what the State stated regarding co-defendant Wigley.

[10] For example, in post conviction in 1988, he asserted that there existed an Edmund v. Florida, issue, that he was not the actual murderer. That theme continued in his federal district court petition filed in 1989-1990.

Moldof testified that he had seen the reports on Marek's codefendant Wigley's mental condition. He knew about the trial because he had gone to court and monitored it. He clearly did not want Wigley's mental reports to come in at Marek's trial because they reflected that Wigley was dominated by Marek and he was afraid of Marek. (CH 348-351). Moldof believed that the reports on Wigley would have helped to prove the State's theory that Marek was the "main character" and the "perpetrator of the murder." (CH 353).

There is no basis today or when it was first ruled upon on the merits by the Florida Supreme Court to revisit Marek's principal involvement in the first degree murder of the 47-year-old victim, Ms. Adella Simmons, discovered in the observation deck of the lifeguard shack, with only Marek's fingerprint found inside the shack.

In Marek v. Singletary, 62 F. 3d 1295, 1301-1302 (11th Cir. 1995), the Eleventh Circuit court held on this claim:

> B. Preclusion of Mitigating Evidence
>
> Marek contends that the sentencing court violated the principles of Lockett v. Ohio, 438 U.S. 586, 98 S. Ct. 2954, 57 L. Ed. 2d 973 (1978), and Hitchcock v. Dugger, 481 U.S. 393, 107 S. Ct. 1821, 95 L. Ed. 2d 347 (1987), when it precluded Marek from presenting and the jury from considering, evidence of mitigating factors. Marek's claim is threefold. He argues defense counsel was precluded from presenting mitigation to the jury (1) when counsel attempted to introduce a psychological report evaluating Marek and the trial court did not allow the admission of the report

because the doctor was available to testify; (2) when defense counsel attempted to argue that Marek's codefendant received a life sentence and thus, Marek should receive equal treatment but the trial court disallowed this argument unless the state could disclose the contents of the codefendant's confession relating to the culpability of each defendant; and (3) when the trial court did not instruct the jury regarding no significant history of criminal activity as a mitigating factor. We will discuss each contention in turn.

1. Dr. Krieger's report

Marek did not raise this particular claim on direct appeal, but raised it for the first time in his post-conviction proceedings in state court. Following an evidentiary hearing, the trial court found this issue to be procedurally barred. Upon review of Marek's Rule 3.850 petition, the Florida Supreme Court affirmed the trial court's decision finding that the issue was procedurally barred because it could have been, but was not, raised on direct appeal. See Marek v. Dugger, 547 So. 2d 109 (Fla. 1989). The federal district court also found this issue to be procedurally defaulted because it had not been properly and fairly raised in the state courts, relying on Wainwright v. Sykes, 433 U.S. 72, 97 S. Ct. 2497, 53 L. Ed. 2d 594 (1977). See R.-Vol. 4, Exh. 33, p. 5-6. Alternatively, the district court found that:

> The state court refused to allow Marek's psychological report to be introduced into evidence by itself, adjudging the report to be hearsay. Marek's psychologist was available to testify, yet Marek's counsel made a strategic decision not to use the doctor's testimony. There was no limitation on the presentation of this evidence to the jury, hence, no violation occurred.

Id. (citations omitted).

A state prisoner seeking federal habeas corpus relief, who fails to raise his federal constitutional claims in state court, or who attempts to raise claims in a manner not permitted by state procedural rules, is

barred from pursuing the same claim in federal court absent a showing of cause for and actual prejudice from the default. Sykes, 433 U.S. at 87, 97 S. Ct. at 2506 (1977). "Where the state court correctly applies a procedural default principle of state law, Sykes requires the federal court to abide by the state court's decision." Harmon v. Barton, 894 F.2d 1268, 1270 (11th Cir.), *cert. denied*, 498 U.S. 832, 111 S. Ct. 96, 112 L. Ed. 2d 68 (1990). A federal court is not required to honor a state procedural ruling unless that ruling rests on an adequate and independent state ground. Harris v. Reed, 489 U.S. 255, 262, 109 S. Ct. 1038, 1043, 103 L. Ed. 2d 308 (1989). If the last state court rendering a judgment in the case "clearly and expressly" states that its judgment rests upon a state procedural bar, then the federal court may be barred from considering that claim. Id. at 263, 109 S. Ct. at 1043. "However, should a state court reach the merits of a claim notwithstanding a procedural default, the federal habeas court is not precluded from considering the merits of the claim." Alderman v. Zant, 22 F.3d 1541, 1549 (11th Cir.), *cert. denied*, ___ U.S. ___, 115 S. Ct. 673, 130 L. Ed. 2d 606 (1994). When a state court addresses both the independent state procedural ground and the merits of the federal constitutional claim, the federal court should apply the state procedural [*1302] bar and decline to reach the merits of the claim. Id.

Marek may overcome his procedural default by showing cause for the procedural default and resulting prejudice. Cause requires a showing of some objective factor external to the defense, Murray v. Carrier, 477 U.S. 478, 488, 106 S. Ct. 2639, 2645, 91 L. Ed. 2d 397 (1986), which prevented counsel from constructing or raising the claim. McCleskey v. Zant, 499 U.S. 467, 497, 111 S. Ct. 1454, 1472, 113 L. Ed. 2d 517 (1991). This Marek has failed to do. Accordingly, we hold that the district court properly concluded that this claim is procedurally defaulted and we decline to reach the merits of the claim. See Alderman, 22 F.3d at 1549. 4

> 4 We hold in the alternative that the claim lacks merit because counsel was not precluded from presenting this alleged mitigating evidence. He made a tactical choice not to have Dr. Krieger testify. *See*

discussion A infra. Since there was no preclusion, there is no error. *See* generally Hitchcock, 481 U.S. at 394, 107 S. Ct. at 1822. *See also* Horsley v. Alabama, 45 F.3d 1486, 1489 n.6 (11th Cir. 1995).

2. Evidence of codefendant's sentence

Marek also contends that his counsel was precluded from presenting evidence of his codefendant's life sentence in mitigation. A related but different claim was raised on direct appeal. The Florida Supreme Court concluded that Marek's claim that the trial court erred in sentencing him to death in view of the fact that the judge had previously sentenced his codefendant to life in prison for the same offense, was not "cruel and unusual, arbitrary, and unequal." Marek v. State, 492 So. 2d at 1058. The court observed that the evidence clearly established that Marek was the more dominant of the two. **The federal district court determined that this issue was procedurally defaulted and alternatively found that the state court's factual determination that Marek was the dominant actor was entitled to deference pursuant to Sumner v. Mata, 449 U.S. 539, 101 S. Ct. 764, 66 L. Ed. 2d 722 (1981). The federal district court concluded that Marek's claim that the sentencing court erred in not allowing mitigating evidence of the disproportionate sentences must be denied. R.-Vol.4, Exh. 33, p. 5.**

The district court properly found this claim was procedurally defaulted because Marek failed to raise this specific claim on direct appeal. Marek raised this claim in his post-conviction proceedings and both the state trial court and the Florida Supreme Court found this issue to be procedurally barred. Marek has failed to show cause for and resulting prejudice from the procedural default. *See* Sykes, 433 U.S. at 87, 97 S. Ct. at 2506. Accordingly, the district court properly concluded that the claim was procedurally defaulted. See discussion infra B. 1.

We note, however, that the district court was correct in affording deference to the state court's finding that Marek was the dominant actor. The record evidence amply supports this finding. Both Marek and the

> victim's traveling companion testified that Marek was the more talkative; that codefendant Wigley remained in the truck during Marek's attempts to fix the car; that Marek persuaded the victim to get in the truck with the two men; that three witnesses who came into contact with Marek and the codefendant on the beach around the time of the murder testified that Marek appeared to be the more dominant of the two; and that only Marek's fingerprints were found inside the observation deck where the body was discovered. See Marek v. State, 492 So. 2d at 1058. Thus, in light of this evidence, the alleged mitigating evidence of codefendant Wigley's life sentence may not have been mitigating after all. *See* Demps v. Dugger, 874 F.2d 1385, 1390-91 (11th Cir. 1989)(op. of Fay, J.), *cert. denied*, 494 U.S. 1090, 110 S. Ct. 1834, 108 L. Ed. 2d 963 (1990)); id. at 1395-96 (Clark, J., concurring). Accordingly, Marek's claim lacks merit.

(Emphasis added)

Marek presently is citing Cone v. Bell, __ U.S. __, 2009 US LEXIS 3298 (April 28, 2009), to support his argument that the State took "inconsistent arguments" in the trials of Marek and Wigley, his codefendant. The issue as to inconsistent arguments has been rejected, and nothing in Cone v. Bell, supra., adds to or challenges the correctness of the courts review of that claim.[11]

[11] For example, the closing arguments by the state at the guilt phase and penalty phases of Marek's trial were premised on the evidence and arguments therefrom derived. (TR VIII 1132-1154, 1206-1217) and (TR IX 1299-1309) The State argued that there were a number of ways to convict Marek for the first degree murder of Ms. Simmons, and all of the alternatives required that Marek, based on his actions, was a principal in her murder. At penalty phase, the evidence in aggravation and mitigation was discussed and the State concluded its presentation that the aggravation outweighed the mitigation in Marek's case.

The lower court in this case concluded:

> 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 [sic: 492 So. 2d 1055], 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).

Additionally, citing Rutherford v. State, 940 So. 2d 1112, 1117 (Fla. 2006) Marek urges that he has developed newly discovered evidence, to wit: the 2006 ABA Report. The Court in Rutherford rejected his claim.

> However, even if we were to consider the information contained in the ABA Report, nothing therein would cause this Court to recede from its decisions upholding the facial constitutionality of the death penalty. See, *e.g.*, Hodges v. State, 885 So. 2d 338, 359 & n.9 (Fla. 2004) (noting that the defendant's claim that "the death penalty statute is unconstitutional because it fails to prevent the arbitrary and capricious imposition of the death penalty, violates due process, and constitutes cruel and unusual punishment," has "consistently been determined to lack merit"); Lugo v. State, 845 So. 2d 74, 119 (Fla. 2003) ("We have previously rejected the claim that the death penalty system is unconstitutional as being arbitrary and capricious because it fails to limit the class of persons eligible for the death penalty."). **Further, Rutherford does not allege how any of the conclusions reached in the ABA Report would render his individual death sentence unconstitutional.**

Rutherford, 940 So. 2d at 1117 (Emphasis added).

Marek did not argue this precise matter below to the trial court and he has not shown how it has become a viable argument on appeal. Marek is entitled to no relief as to this claim.

2. FAILURE TO APPLY STRICKLAND V. WASHINGTON

Next Marek argues yet another claim that was not presented in his most recent motion for post-conviction review. Citing Williams v. Taylor, 529 U.S. 362, 396 (2000); Wiggins v. Smith, 539 U.S. 510, 527 (2003) and Rompilla v. Beard, 545 U.S. 374 (2005), he contends that these cases relate back to Srickland and are applicable to his 1984 trial. This claim last surfaced in a successive state habeas filed in the Florida Supreme Court in 2004 as Claim III. The Court rejected the argument in Marek v. Singletary, 940 So. 2d 427 (Fla. 2006).

Specifically he challenges "trial counsel's failure to investigate his (Marek's) family background…." He is procedurally barred from raising this claim in this successive pleading, see Darden v. State, 496 So. 2d 136 (Fla. 1986)(finding a claim of ineffectiveness raised in the initial post-conviction motion procedurally barred when raised in successive petition); Christopher v. State, 489 So. 2d 22, 25 (Fla. 1986)(same) and more recently in a similar vein, Muehlemann v. State, 3 So. 3d 1149, 1164 (Fla. 2009)(finding a claim to be procedurally barred where the very same issue

presented in subsequent appeal was raised and ruled upon previously in the direct appeal.).

The record bares out that Marek raised either an ineffective counsel claim or a denial of developing mitigation in the following litigation, in his initial 1988, Rule 3.850 motion in claims V, IX, and XIX, (wherein an evidentiary hearing was held); in his 1993, successive Rule 3.850 motion, claims II and VI, reasserted in 2001, successive motion, claims II and IV; in 2004, in a successive state habeas Claim III; in his federal habeas corpus petition before the Southern District Court, in 1990, in claims V, in particular V(1)(f), V(1)(g), V(3)(b), V(3)(c), VI, and IX; and the ineffective claim as to mitigation was raised and rejected by the Eleventh Circuit Court in point I, in 1995.

Because the Eleventh Circuit wrote in detail on the subject matter as to Point I, that discussion is presented here as an overview of what has been reviewed:

> A. Ineffective Assistance of Counsel at the Penalty Phase
>
> Marek alleges that he was denied the effective assistance of counsel at his penalty phase because his counsel failed to present compelling mitigation evidence which may have produced a different outcome--i.e., a sentence of life imprisonment. "Ineffectiveness of representation is a mixed question of law and fact subject to de novo review." Bolender v. Singletary, 16 F.3d 1547, 1558 n.12 (11th Cir.), *cert. denied*, ___ U.S. ___, 115 S. Ct. 589, 130 L. Ed. 2d 502 (1994). A state court's conclusion that counsel

rendered effective assistance is not a finding of fact binding on a federal court. Strickland v. Washington, 466 U.S. 668, 698, 104 S. Ct. 2052, 2070, 80 L. Ed. 2d 674 (1984).

In order to prevail on a claim of ineffective assistance of counsel, a petitioner must show both (1) that the identified acts or omissions of counsel were deficient, or outside the reasonable range of professionally competent assistance, and (2) that the deficient performance [*1299] prejudiced the defense such that, without the errors, there is a reasonable probability that the balance of aggravating and mitigating circumstances would have been different. Strickland, 466 U.S. at 687, 104 S. Ct. at 2064. Courts need not address both these prongs "if the defendant makes an insufficient showing on one." Id. at 697, 104 S. Ct. at 2069. We begin any ineffective assistance inquiry with "a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Id. at 689, 104 S. Ct. at 2065; *accord*, *e.g.*, Atkins v. Singletary, 965 F.2d 952, 958 (11th Cir. 1992)("We also should always presume strongly that counsel's performance was reasonable and adequate…."), *cert. denied*, ___U.S.___, ___ S. Ct. ___, 132 L. Ed. 2d 865, 63 U.S.L.W. 3906 (U.S., Jun. 26, 1995) (No. 94-9167). "[A] petitioner seeking to rebut the strong presumption of effectiveness bears a difficult burden." Waters v. Thomas, 46 F.3d 1506, 1512 (11th Cir. 1995)(*en banc*). "In evaluating ineffective assistance of counsel claims, this court places particular weight on the trial counsel's explanation of trial strategy, proffered at a state trial court or federal district court evidentiary hearing…." Card v. Dugger, 911 F.2d 1494, 1509 (11th Cir. 1990).

Marek contends that his counsel was deficient in his failure to investigate, develop, and present mitigating evidence regarding Marek's childhood, mental state, and general background. Marek states that his defense counsel should have travelled to Texas, where Marek lived prior to the murder, and interviewed witnesses. At the evidentiary hearing in state court, Marek's counsel, Mr. Moldof ("Moldof"), testified that he made tactical, strategic choices not to present evidence with regard to Marek's past since

Marek himself admitted most of the evidence would be negative. See R.-Vol. XVII, p. 381. Moldof did secure the assistance of a mental health expert, Dr. Krieger, and through conversations with Dr. Krieger and Marek, counsel collected information regarding Marek's background and early childhood.

The record reflects that Marek was abandoned by his natural family at the age of nine and was subsequently raised by several different foster families. Marek's parents and other family members, however, had little or no contact with Marek for years prior to the murder and counsel strategically determined that their testimony would have little value. The most Marek's parents could testify was that Marek overdosed on his mother's medication when he was eight or nine months old and Marek suffered from a speech impediment. The foster parents who were called to testify at the state evidentiary hearing had no real knowledge of Marek's criminal background but knew Marek had been in trouble in the past. See R.-Vol. XVII, pp. 206-260.

At the state evidentiary hearing, Marek called Dr. Krop, a psychologist, who testified that he reviewed medical and school records in anticipation of the Rule 3.850 proceeding. Dr. Krop stated that although he was critical of Dr. Krieger because he could have obtained more information, he ultimately came to the same conclusion as Dr. Krieger, that Marek suffered from a severe anti-social personality disorder. See R.-Vol. XVI, pp. 123-188. The state called Dr. Krieger to testify at the evidentiary hearing. Dr. Krieger stated that even with the new evidence presented at the hearing regarding Marek's background he would not have altered his evaluation and assessment of Marek. Moreover, Dr. Krieger stated that he was concerned that Marek may have exaggerated his symptoms and this testimony would not have done the defendant any good. R.-Vol. XVII, pp. 262-309.

Moldof testified at the state evidentiary hearing. See R.-Vol. XVII, pp. 312-400. Moldof stated that the defense he presented on Marek's behalf was the "lingering doubt" theory that Marek's codefendant Wigley may have committed the murder. Moldof made a strategic decision not to present an intoxication defense because of the physical evidence at trial and

because he did not think the jury would believe Marek's assertion that he consumed several cases of beer on the day of the murder. Id. at 358 (juror rolled her eyes when Marek testified that alcohol did not affect him). Moldof did, however, argue intoxication as a mitigating factor to the jury at the penalty phase. Moldof also argued age as a mitigating factor at the penalty phase. Moldof made a tactical decision not [*1300] to call Dr. Krieger to testify at the penalty phase because he believed that Dr. Krieger's testimony may have done more harm than good. Dr. Krieger indicated in his report that he thought Marek was malingering and if Dr. Krieger was cross-examined by the state, this information would have come to the jury's attention.

"Under certain circumstances, trial counsel's decision not to investigate family childhood background may legitimately be the product of a reasoned tactical choice." Francis v. Dugger, 908 F.2d 696, 703 (11th Cir. 1990)(relying on Stanley v. Zant, 697 F.2d 955, 970 (11th Cir. 1983), *cert. denied*, 467 U.S. 1219, 104 S. Ct. 2667, 81 L. Ed. 2d 372 (1984)), cert. denied, 500 U.S. 910 (1991). This court has "never held that counsel must present all available mitigating circumstance evidence in general, or all mental illness mitigating circumstance evidence in particular, in order to render effective assistance of counsel." Waters, 46 F.3d at 1511. "To the contrary, the Supreme Court and this Court in a number of cases have held counsel's performance to be constitutionally sufficient when no mitigating circumstance evidence at all was introduced, even though such evidence, including some relating to the defendant's mental illness or impairment, was available." Id. (examples omitted).

"A defense attorney is not required to investigate all leads, however, and 'there is no per se rule that evidence of a criminal defendant's troubled childhood must always be presented as mitigating evidence in the penalty phase of a capital case.'" Bolender, 16 F.3d at 1557 (footnote omitted)(quoting Devier v. Zant, 3 F.3d 1445, 1453 (11th Cir. 1993), cert. denied, ___ U.S. ___, 115 S. Ct. 1125, 130 L. Ed. 2d 1087 (1995)). "Indeed, 'counsel has no absolute duty to present mitigating character evidence at all, and trial

counsel's failure to present mitigating evidence is not per se ineffective assistance of counsel.'" Bolender, 16 F.3d at 1557 (citations omitted). The inquiry must be whether the failure to put this alleged mitigation evidence before the jury was a tactical choice by trial counsel. Id. 3 If so, this tactical choice must be given a strong presumption of correctness. Id.

> 3 The question of whether a decision by counsel was a tactical one is a question of fact. Horton v. Zant, 941 F.2d 1449, 1462 (11th Cir. 1991), *cert. denied*, 503 U.S. 952, 112 S. Ct. 1516, 117 L. Ed. 2d 652 (1992).

We are persuaded that Marek's counsel made a reasonable strategic decision not to present to the jury the alleged mitigating evidence of Marek's sad childhood. Moldof testified at the hearing that information on Marek's recent past, "why he left home, might be something of homosexuality which I thought would be very negative to this jury." R.-Vol. XVII, pp. 324, 334. Moldof also noted the nature of the crime and tactically decided that evidence of Marek's troubled past would not "have altered their [the jury's] repugnance in this case." Id. at 372-74. Moldof also made a tactical decision regarding Marek's Texas prison records. He did not obtain these records because if he "didn't bring it out probably the State wouldn't be able to get before the jury he [Marek] was ever incarcerated." Id. at 336-37.

The record reflects that Moldof conducted a reasonable investigation with regard to mitigation evidence to be presented at the penalty phase of Marek's trial. Marek told Moldof that his background would not generate any helpful mitigating evidence and, in fact, following Dr. Krieger's recommendation and collecting information on Marek's background, Moldof came to the same conclusion. This case is an example of defense counsel's attempt to present, based on tactical decisions, the best possible mitigation to the jury and judge at sentencing. The evidence presented during the state evidentiary hearing convinces us that Moldof's representation fell within the reasonable range of attorney performance.

> Even if counsel's performance were deemed deficient, Marek fails to show any resulting prejudice from the allegedly deficient performance. *See* Strickland, 466 U.S. at 699-700. 104 S. Ct. at 2071. Given the particular circumstances of this case and the overwhelming evidence against Marek, evidence [*1301] of an abusive and difficult childhood would have been entitled to little, if any, mitigating weight. See generally Francois v. Wainwright, 763 F.2d 1188, 1190-91 (11th Cir. 1985). **Accordingly, Marek fails to satisfy both prongs of the Strickland standard and, therefore, the district court properly concluded that Marek's counsel did not render ineffective assistance of counsel.**

Marek, 62 F.3d at 1298-1301. (Emphasis added).

At the Rule 3.850 proceedings, evidence was presented that defense counsel did secure the assistance of a mental health expert and between the two of them, and Mr. Marek, collected information regarding Marek's background, his early childhood and other aspects of his life. Defense counsel, at the evidentiary hearing, testified that he made strategic choices not to present evidence with regard to Marek's past since Marek himself admitted most of the evidence would be negative. The record reflects that Marek was abandoned by his natural family at the age of nine and any testimony forthcoming from his parents or other family members had *de minimus* value since they readily admitted that they had little to no contact with Marek years prior to the murder. When Marek's parents testified at the 3.850 hearing, the most significant item to which they could testify was an incident when he was eight months old,

specifically, that he had overdosed on his mother's collection of medication and that at age seven or eight, Marek suffered from a speech impediment. The foster parents who were called, Mr. and Mrs. Hand, had no real knowledge of Marek's criminal background although they knew he had been in trouble in the past. They were also aware that Marek had not been successful and he lived with other foster parents. They did indicate that Marek was a sweet, kind boy, but they had no knowledge of what happened to Marek after he left their home. The testimony of Dr. Krop revealed that he had reviewed medical records and school records in anticipation of the Rule 3.850 proceedings. Dr. Krop, although critical that Dr. Krieger could have obtained more information when Dr. Krieger evaluated Marek, ultimately came up with the same result that Marek suffered a "severe" anti—social personality disorder.

The State called Dr. Krieger at the 3.850 proceeding. Dr. Krieger testified that it did not surprise him that an individual with Marek's childhood turned out as he did. Dr. Krieger further testified that even with the new evidence presented at the 3.850 hearing he would not have altered his evaluation and assessment of John Marek.

Defense counsel, Hilliard Moldof, testified that he made a strategic decision that it was better to go forward and suggest to the jury a "lingering doubt" argument as to whether Marek or

Wigley, the codefendant, committed the murder. Mr. Moldof stated that he believed that if the jury recommended life, the trial court would not overrule that recommendation. He noted that even if the jury recommended death, there was a good chance that the trial court would override a death recommendation and impose life. Moldof testified that he explored the possibility of asserting Marek's age as a mitigating factor and stated that he did argue that both Marek and his codefendant, Wigley, should be given the same sentence. He stated he made a strategic decision not to call Dr. Krieger because he believed that Dr. Krieger's testimony would have done more harm than good.

With regard to bringing out testimony as to Marek's drug abuse and alcohol abuse, Mr. Moldof testified that he knew about Marek's alcohol problems based on his conversations with Dr. Krieger and Marek. He stated that he made a strategic choice not to go with an intoxication defense or explore the alcohol abuse because of the physical evidence presented at trial. In his view, it was not a viable defense based on the facts and circumstances surrounding the murder. At trial, for example, Marek's defense was that Raymond Wigley, not John Marek, committed the murder. At trial, Marek testified that he fell asleep in the truck shortly after the victim got into the truck and that when he woke up, sometime later, and asked where

the victim was, Wigley told him that he had dropped her off. (TR VII 948). Marek testified that he went back to sleep and that when he finally awoke, the truck was parked on the beach and Wigley was nowhere in sight. Marek testified that he called for Wigley and finally found him in the observation deck of the lifeguard stand. (TR VII 950). Marek admitted going into the observation deck, but he denied ever seeing the victim's body there. (TR VII 856). He denied hearing any yelling or struggling while he was purportedly asleep in the cab of the truck and he categorically denied strangling the victim or burning her pubic hair. (TR VII 973, 976). Defense counsel argued that Wigley was responsible for the murder and that evidence presented by the State made a case against Wigley, not Marek. (TR VII 969, 970-971, 1203).

Defense counsel argued that Marek had been drinking (and Marek indeed testified he had been drinking sixty to a hundred beers a day), and was intoxicated at the time Marek and Wigley stopped to help the victim and her traveling companion. Marek testified that after he could not fix the victim's car, he, Wigley and the victim took off in the truck to take her to a service station so she could call for help. He testified that within moments of getting into the truck, he fell asleep and that was the last time he saw the victim. (TR VIII 1181—1182, 1189, 1203). He maintained his innocence and testified that he

did not commit the murder. Moldof made a strategic decision not to present a straight up intoxication defense based on the physical evidence and Marek's testimony at trial. Albeit, an intoxication instruction was sought and given, any suggestion by Marek that his lawyer rendered ineffective assistance of counsel for not going forward with evidence either at trial or in mitigation as to Marek's alcohol or drug abuse, is highly suspect. The record reflects Marek maintained his innocence throughout and defense counsel continually pointed to Wigley as the perpetrator of the crime.

Marek has failed to demonstrate how he is entitled to reargue this matter.

3. CLEMENCY CLAIM

Next Marek argues for the first time in this appeal that he has been denied a critical stage of the capital scheme, clemency. Interestingly, the only other mention of this was in the "Notice of Counsel's Decision Under Harbinson v. Bell, To Represent Petitioner In State Clemency Proceedings," filed in federal court in the Southern District Court for Florida. As part of the notice, Marek's post-conviction counsel, Mr. McClain, indicated that he will continue to undertake various and/or necessary actions and investigations for the purpose of preparing an application for clemency, presumably before the state Executive Clemency Board, based on perceived omissions

regarding "the wealth of unconsidered mitigation," such as mental health matters, the life sentence given codefendant Wigley (now deceased), and information as to Marek's life history, not properly reviewed by any court.

For the Court's benefit, it should be noted, first that Mr. McClain has asserted he will not have adequate time to properly litigate Marek's case, however, in spite of the state statute barring CCRC and registry appointed counsel from handling clemency, he will devote his time to the preparation of a clemency application. *See* Sections 27.51(5)(a); 27.511(9); and 27.5303(4), Fla. Statutes.

Marek's clemency proceeding was conducted on February 10, 1988, before the Florida Executive Clemency Board,[12] following a comprehensive investigation, detailed application prepared by counsel and, interviews of Marek, with counsel present, by a three member panel of the Florida Parole Commission. See Rule 15, Rules of Executive Clemency. Marek's clemency application was denied when, September 12, 1988, his first death warrant issued, signaling no clemency was approved by the Executive Clemency Board. Marek was represented in the state clemency proceedings by attorney Bruce H. Little. Marek was neither abandoned by counsel nor left alone to navigate the clemency

[12] The Executive Clemency Board is comprised of the Governor and members of the Florida Cabinet.

process from his jail cell, *see* Harbinson v. Bell, 129 S. Ct. 1481, 173 L. Ed. 2d 347 (2009).

Since that time, Marek has had a second death warrant, and now, a third death warrant following ongoing and repeated successive post-conviction litigation. Prior to the issuance of the instant warrant, the Governor requested and obtained an updated report from the Florida Parole Commission concerning Marek. See Rule 15 (C) Rules of Executive Clemency (permitting the Governor to activate further review). With the issuance of the third warrant on April 20, 2009, the Governor again declined to grant executive clemency in Marek's case.[13]

In light of the fact that the state clemency process has already taken place, commencing in 1988, until April 20, 2009, when Marek's third death warrant was signed, there is no basis for Marek's current post-conviction counsel to suggest the underpinnings of Harbinson, have not been met. Marek has not had to "navigate the clemency process from his jail cell."

As such, should Marek's counsel ultimately file another clemency application in Marek's behalf, Marek is not entitled to any delay of the pending execution set for May 13, 2009.

[13] In Florida, the votes of the Governor and two members of the Executive Clemency Board are required to grant executive clemency; the Governor however is a necessary affirmative vote, or put another way if the Governor votes not to grant clemency, clemency cannot be granted.

To his suggestion that he is entitled to some redress from a court regarding an executive grace, this Court has found such a notion groundless. *See* Tompkins v. State, 994 So. 2d 1072, at 1084-1085 (Fla. 2008). Additionally this claim is not properly before the Court.

ISSUE II

LACKEY V. TEXAS, 514 U.S. 1045 (1995) ARGUMENT

Next Marek argues that due to the length of time that has passed pursuant to the language by Justice Stevens in Lackey v. Texas, supra., he has been denied his Eighth Amendment rights. The trial court rejected the claim finding:

> 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.

The identical argument was made in Tompkins v. State, 994 So. 2d 1072, 1085 (Fla. 2008), and rejected by the Florida Supreme Court. The Court held:

> Length of Time on Death Row
>
> Tompkins's next claim is that Governor Bush's failure to reset his execution in 2004 resulted in Tompkins remaining on death row for such a prolonged period of time, twenty-three years, that it constitutes cruel and unusual punishment in violation of the Eighth Amendment. We reject this claim as we have repeatedly done in the past. In Booker v. State, 969 So. 2d 186

(Fla. 2007), this Court recognized that "no federal or state court has accepted the argument that a prolonged stay on death row constitutes cruel and unusual punishment, especially where both parties bear responsibility for the long delay." Id. at 200; see also Gore v. State, 964 So. 2d 1257, 1276 (Fla. 2007) (holding that twenty-three years served on death row is not cruel and unusual punishment), *cert. denied*, 128 S. Ct. 1250, 170 L. Ed. 2d 89 (2008); Elledge v. State, 911 So. 2d 57, 76 (Fla. 2005) (finding no merit in constitutional claim predicated on the cruel and unusual nature of prolonged stay on death row); Lucas v. State, 841 So. 2d 380, 389 (Fla. 2003) (concluding that twenty-five years on death row does not constitute cruel and unusual punishment); Foster v. State, 810 So. 2d 910, 916 (Fla. 2002) (holding that twenty-three years on death row is not cruel and unusual punishment).

Further, Tompkins contributed to the delay of his execution by filing five postconviction motions. He cannot now contend that his punishment has been illegally prolonged because the delay in carrying out his sentence is in large part due to his own actions in challenging his conviction and sentence. As explained by this Court in Lucas:

> In the twenty-five years since he was first found guilty of the murder of Jill Piper, Lucas has exercised his constitutional rights in challenging both the finding of guilt and his death sentence. The finding of guilt was upheld in his first direct appeal in 1979 and was not challenged in any of the subsequent appeals. Lucas is clearly guilty of the murder of Jill Piper, and it has been determined that the proper sentence is death. Lucas's exercise of his constitutional rights has prevented his sentence from being carried out. Lucas may not now claim that his punishment has been cruel and unusual as a result of his own actions in challenging his death sentence. Lucas's claim that he was entitled to an evidentiary hearing on this issue is without merit and is denied.

841 So. 2d at 389.

> Accordingly, in light of this Court's precedent, we conclude that the trial court did not err in summarily denying Tompkins's claim that his twenty-three years on death row constitutes cruel and unusual punishment.

Like Tompkins, and Elledge, and others, Marek has been litigious over the years and certainly, has contributed to the time that has passed from conviction to ultimate imposition of the death sentence for this horrendous murder. To the argument made today that the State was remiss in not pressing forward with an execution date sooner, it would seem unpersuasive since Marek is still seeking redress of his claims before the court. No Eighth Amendment has occurred. See Tompkins, wherein the Court opined:

> "…even if Tompkins had raised this argument in the trial court, there is no authority that supports a claim that section 922.06(2) either explicitly or implicitly provides criminal defendants with any enforceable rights and, specifically, a "right" to a speedy execution. Further, shortly after Tompkins IV became final, Tompkins filed his third postconviction [*1085] motion, the summary denial of which was not affirmed by this Court until 2007 in Tompkins VI.
>
> Accordingly, the trial court did not err in summarily denying Tompkins's claim that Governor Crist violated section 922.06(2) in resetting his execution."

Tompkins, 994 So, 2d at 1084-1085.

A similar result is warranted here.

ISSUE III

PENDENCY OF CAPERTON V. MASSEY, CASE NO. 08-22, UNITED STATES SUPREME COURT

Marek argues that the pending case of Caperton v. Massey, Case no. 08-22, awaiting resolution in the United States Supreme Court presents an issue which upon resolution will provide succor to Marek's argument that Judge Kaplan should have recused himself because defense counsel Moldof, under attack in a post-conviction pleading, was a friend of the trial judge.[14]

Simply because a case is pending in the USSC, even on the merits, does not warrant relief. The underlying matter was thoroughly vetted in the trial court and the Florida Supreme court found no merit to the claim. Caperton is clearly not at issue here.

In the Caperton case, the issue involves whether a judge should have recused himself from an appeal in a $50 million jury verdict even though the CEO of the lead defendant spent $3 million supporting the judge's campaign for a seat on the bench.

[14] It is noteworthy that at the hearing held April 27, 2009, before the trial court, Marek's counsel made a point to suggest that the issue of Judge Kaplan's recusal was based on the friendship between the judge and Hilliard Moldof. The State urged that there were a number of matters that influenced Judge Kaplan's recusal. Based upon the number of pages Mr. McClain has devoted to the history of that event, it would appear counsel's representations were less than forthright as to the circumstances and allegation before the trial court a number of years ago.

Clearly Caperton, is not the situation herein and, any outcome from the USSC will not impact whether Moldof rendered effective assistance of counsel in defending Marek at trial.

For example see King v. State, 808 So. 2d 1237, 1245-46 (Fla. 2002), wherein the Court held in a similar argument:

> We are aware that the United States Supreme Court very recently granted certiorari in State v. Ring, 200 Ariz. 267, 25 P.3d 1139 (2001), *cert. granted*, 151 L. Ed. 2d 738, 122 S. Ct. 865 (2002); however, we decline to grant a stay of execution following our precedent on this issue, on which the Supreme Court has denied certiorari. Thus, King is not entitled to relief on this issue.

See also Morgan v. United States, 195 Fed. Appx. 924, 927 (11th Cir. 2006), noting that while the Supreme Court has granted certiorari in the Ninth Circuit case adopting a contrary position, Bockting v. Bayer, 399 F.3d 1010 (9th Cir. 2005), *cert. granted sub nom.* Whorton v. Bockting, 126 S. Ct. 2017, 164 L. Ed. 2d 778 (May 15, 2006), until the Supreme Court holds otherwise, we are bound by our prior holding in Espy. *See, e.g.*, Ritter v. Smith, 811 F.2d 1398, 1404-05 (11th Cir. 1987) ("it is well established that the grant of certiorari has no precedential value").

Marek has made neither a colorable showing the Caperton, case will have any impact on his case nor shown how any ruling of Moldof's representation at trial impacted Marek's conviction.

Moreover, as this Court held in Schwab v. State, 973 So. 2d 427, 428 (Fla. 2008), the United States Supreme Court is a more fitting court to decide whether Caperton will impact Marek's case.

ISSUE IV

FLORIDA'S PROCEDURES FOR LETHAL INJECTION DO NOT VIOLATE THE EIGHTH AMENDMENT AS TO CRUEL AND UNUSUAL PUNISHMENT

LETHAL INJECTION:

Marek filed a successive motion raising a "lethal injection claim" on May 11, 2007. The trial court ordered on June 14, 2007, the State to respond to Marek's challenge to lethal injection based upon the events surrounding the December 13, 2006, Diaz execution and all matters relating thereto. The State responded July 2, 2007.

On April 16, 2008, the United States Supreme Court in a 7-2 opinion upholding Kentucky's method of execution, to-wit: a three drug lethal injection procedure, held in Baze v. Rees, 553 U.S. ___, 128 S. Ct. 1520, 170 L Ed 2d 420 (2008), that Kentucky's procedure "is consistent with the Eighth Amendment", and therefore constitutional. Moreover, the Court held that "A State with a lethal injection protocol substantially similar to the protocols we uphold today would not create a risk that meets this standard" (that the inmate has established that a state's

protocol "creates a demonstrated risk of severe pain."). The Court held that the procedure in Kentucky, akin to the three drug lethal injection procedure ratified by the Florida Supreme Court in Lightbourne v. McCollum, 969 So. 2d 326 (Fla. 2007) is constitutional and does not violate the Eighth Amendment.

As such, a review of the successive motion filed by Marek reveals that his first claim challenging Florida's lethal injection procedure was rejected on these identical claims in Lightbourne, supra., and any lingering doubt was resolved by the United States Supreme Court's Baze decision.

Marek contended below that he is entitled to successive postconviction relief because the Department of Corrections (DOC) has adopted a "new" protocol for lethal injection and the adoption of the "new" protocol allegedly "changes" the manner in which Florida is conducting lethal injections. He is raising this claim in a "successive" motion for postconviction relief, asserting that the "new" protocol (and presumably the 2006 events of the Diaz execution) entitle him to further review. Of course, unless he asserts more than just an assertion, he is entitled to no more relief than the trial court and Florida Supreme Court provided in Schwab v. State, 982 So. 2d 1158 (Fla. 2008), wherein the Court held that the summary denial was apropos:

Next, Schwab asserts that newly discovered evidence shows that the DOC execution team is not being trained properly in preparing and administering the correct chemical amounts as required and that FDLE agents are not sufficiently trained to identify potential problems. In support, Schwab attached the FDLE notes allegedly showing that: (1) the DOC execution team botched two of the five training practice sessions; and (2) the FDLE monitor observing the mixing of the chemicals is not sufficiently trained. Even taking Schwab's allegations as true, Schwab has not met the standard that this Court set forth in Jones v. State, 701 So. 2d 76, 79 (Fla. 1997):

> In order for a punishment to constitute cruel or unusual punishment, it must involve "torture or a lingering death" or the infliction of "unnecessary and wanton pain." Gregg v. Georgia, 428 U.S. 153, 96 S. Ct. 2909, 49 L.Ed.2d 859 (1976); Louisiana ex rel. Francis v. Resweber, 329 U.S. 459, 67 S. Ct. 374, 91 L. Ed. 422 (1947). As the Court observed in Resweber: "The cruelty against which the Constitution protects a convicted man is cruelty inherent in the method of punishment, not the necessary suffering involved in any method employed to extinguish life humanely." Id. at 464, 67 S. Ct. at 376.

See also Lightbourne v. McCollum, 969 So. 2d 326, 32 Fla. L. Weekly S687 (Fla. Nov. 1, 2007) (reaffirming the standard announced in Jones, 701 So. 2d at 79). As to Schwab's claim concerning the FDLE monitor for the chemicals, the circuit court correctly recognized that the "newly discovered" FDLE notes involve mock executions that occurred under the prior protocols. Under the new protocol, a licensed pharmacist must mix the necessary chemicals. We do not find that Schwab's allegations as to these training exercises implicate any constitutional violation. Summary denial was proper.

For the reasons stated above, we affirm the circuit court's order denying Schwab's second successive motion for postconviction relief.

Schwab v. State, 982 So. 2d at 1159-1160.

And in the Florida Supreme Court's earlier decision in Schwab v. State, 969 So. 2d 318, 324-325 (Fla. 2007), (decided the same day as Lightbourne), the Supreme Court held that:

> In the third subissue that we address, Schwab challenges the circuit court's ruling which denied his public records requests. Schwab filed an initial motion to compel the production of numerous records from Florida's Department of Corrections (DOC), including materials pertaining to the training of execution team members; the records pertaining to the identity and addresses of non-departmental persons who consulted with the DOC concerning execution training; documentation of the qualifications, licenses, training, and education of execution team members; copies of training manuals and other items pertaining to the training of execution team members; medication management and chemical procurement protocols; records of mock executions; scientific and research materials used by the DOC for preparing lethal chemicals; and any nondisclosure agreements between the DOC and suppliers of the chemicals. The DOC responded with numerous objections. After holding a hearing on the requests and objections, the circuit court issued a lengthy order, finding that Schwab did not demonstrate that the requested records related to a colorable claim for relief and concluded that Schwab was on a fishing expedition. 3 In order to dispute the finding as to a fishing expedition, Schwab filed a motion for reconsideration with an attachment from a "quality assurance auditor," explaining in detail that the quality assurance auditor needed the requested documents in order to provide an assessment as to the reliability and efficacy of the DOC's execution procedures. The circuit court denied the motion for reconsideration, explaining that since it found that an evidentiary hearing was not warranted, the court found no reason to reconsider its prior decision in denying the motion to compel.
>
> 3 Schwab filed the motion to compel prior to filing his motion for

> postconviction relief, and the court ruled on the motion before the rule 3.851 motion was filed. In its order, the court recognized that it was difficult to assess how certain requested materials would relate to any claim since no claims had yet been filed.

As recognized above, Schwab was either entitled to an evidentiary hearing or to have the court below take judicial notice as to the evidence presented in Lightbourne. Schwab does not allege that there were public records that he needed which were not produced or admitted into evidence in Lightbourne. Moreover, while Schwab's motion for consideration did provide more detail as to how the requested information was relevant to his claims, his argument [*324] for production relied upon the affidavit of a "quality assurance auditor." Schwab fails to sufficiently explain how this auditor is qualified to provide a reliability and efficacy report on DOC's method of execution. Accordingly, we deny this claim.

In the final lethal injection subissue that we specifically address, 4 Schwab challenges the use of a paralytic drug during an execution, alleging that there is no legitimate clinical reason for using a paralytic and that the Governor's Commission on Administration of Lethal Injection questioned the wisdom of using such a drug. 5 Without commenting specifically on the argument concerning the chemical mix used during lethal injection, the trial court concluded that Schwab did not allege facts which required an evidentiary hearing regarding whether the current DOC protocol might be found to violate his constitutional rights. On appeal, Schwab argues that the trial court erred in summarily rejecting his claim because his factual allegations were not conclusively refuted by the record.

> 4 Schwab raises numerous other Eighth Amendment challenges that were also presented in Lightbourne. This Court addresses those arguments in depth in that opinion. Accordingly, we do not repeat those same rulings here but rely on our concurrent holding in Lightbourne v. McCollum, No.

> SC06-2391, 969 So. 2d 326, 2007 Fla. LEXIS 2255 (Fla. Nov. 1, 2007), to dispose of Schwab's challenges as to whether the postconviction court erred when it rejected a foreseeable risk standard, deferred unduly to DOC, and rejected his argument that a consciousness assessment must meet a clinical standard using medical expertise and equipment. Schwab also contends that the circuit court erred in finding that his motion was insufficiently pled. We do not interpret the lower court's order as denying the motion as insufficiently pled and thus reject this claim.
>
> 5 The Commission recommended that:
>
> [T]he Governor have the Florida Department of Corrections on an ongoing basis explore other more recently developed chemicals for use in a lethal injection execution with specific consideration and evaluation of the need for a paralytic drug like pancuronium bromide in an effort to make the lethal injection execution procedure less problematic.
>
> The Governor's Commission on Administration of Lethal Injection, Final Report with Findings and Recommendations (March 1, 2007) at 13 (emphasis added).

Before addressing Schwab's specific challenge, it is important to note: (1) Schwab does not assert that he would have presented any additional testimony or other evidence regarding pancuronium bromide than that presented in Lightbourne; and (2) Schwab relies upon no new evidence as to the chemicals employed since this Court's previous rulings rejecting this very challenge. In Sims v. State, 754 So. 2d 657, 668 (Fla. 2000), after reviewing the evidentiary hearing, including testimony from defense experts which questioned the chemicals to be administered during executions, this Court held that "the procedures for administering the lethal injection . . . do not violate the Eighth Amendment's prohibition against cruel and unusual punishment." 754 So. 2d at 668. The

> Court reiterated its Sims holding in Hill v. State, 921 So. 2d 579 (Fla. 2006), where the petitioner challenged the use of specific chemicals in lethal injection, asserting that a research study published in the medical journal The Lancet presented new evidence that Florida's lethal injection procedures may subject the inmate to unnecessary pain. See id. at 582 (discussing Leonidas G. Koniaris et al., *Inadequate Anaesthesia in Lethal Injection for Execution*, 365 Lancet 1412 (2005)). This Court held that the study did not justify holding an evidentiary hearing in the case and relied on its prior decision in Sims. Id. at 583; see also Rutherford v. State, 926 So. 2d 1100, 1113-14 (Fla.) (rejecting the argument that the study published in The [*325] Lancet presented new scientific evidence that Florida's lethal injection procedure created a foreseeable risk of the gratuitous infliction of unnecessary pain on the person being executed), cert. denied, 546 U.S. 1160, 126 S. Ct. 1191, 163 L. Ed. 2d 1145 (2006); Rolling v. State, 944 So. 2d 176, 179 (Fla. 2006) (same).
>
> In turning to the evidence presented in Lightbourne regarding this claim, we find that the toxicology and anesthesiology experts who testified in Lightbourne agreed that if the sodium pentothal is successfully administered as specified in the protocol, the inmate will not be aware of any of the effects of the pancuronium bromide and thus will not suffer any pain. Moreover, the protocol has been amended since Diaz's execution so that the warden will ensure that the inmate is unconscious before the pancuronium bromide and the potassium chloride are injected. Schwab does not allege that he has additional experts who would give different views as to the three-drug protocol. Given the record in Lightbourne and our extensive analysis in our opinion in Lightbourne v. McCollum, we reject the conclusion that lethal injection as applied in Florida is unconstitutional.

Albeit addressing another issue raised by Schwab as to newly discovered evidence pertaining to mental issues, the Court

clearly articulated when a new trial would obtain or further evidentiary review was needed. The Court noted, 969 So. 2d at 325-326:

> To obtain a new trial based on newly discovered evidence, a defendant must meet two requirements. First, the evidence must not have been known by the trial court, the party, or counsel at the time of trial, and it must appear that the defendant or defense counsel could not have known of it by the use of diligence. Second, the newly discovered evidence must be of such nature that it would probably produce an acquittal on retrial. See Jones v. State, 709 So. 2d 512, 521 (Fla.1998). If the defendant is seeking to vacate a death sentence, the second prong requires that the newly discovered evidence would probably yield a less severe sentence. See Jones v. State, 591 So. 2d 911, 915 (Fla.1991). Claims in successive motions may be denied without an evidentiary hearing "[i]f the motion, files, and records in the case conclusively show that the movant is entitled to no relief." White v. State, 964 So. 2d 1278, 32 Fla. L. Weekly S494, S495 (Fla. July 12, 2007) (citing Fla. R. Crim. P. 3.851(f)(5)(B)).
>
> We affirm the circuit court's holding that Schwab's claim regarding neurological impairment is procedurally barred because it could have been raised in Schwab's initial postconviction proceeding. The record reveals that Schwab repeatedly alleged that he suffers from brain damage in his initial postconviction motion. The trial court granted Schwab an evidentiary hearing on the claims that included brain damage allegations, and Schwab presented no evidence regarding his brain damage. Schwab had an opportunity to pursue this topic as potential mitigation and failed to do so. Thus, he is now procedurally barred from doing so.
>
> As for Schwab's argument that he is entitled to a new trial due to two recent scientific articles regarding brain anatomy and sexual offense, this Court has not recognized "new opinions" or "new research studies" as newly discovered evidence. Cf. Diaz v. State, 945 So. 2d 1136, 1144 (Fla.) [*326] (holding

doctor's letter discussing lethal injection research was not newly discovered evidence because author's conclusions were based on data from 1950), *cert. denied*, 127 S. Ct. 850, 166 L. Ed. 2d 679 (2006); Rutherford v. State, 940 So. 2d 1112, 1117 (Fla. 2006) (holding American Bar Association report published in 2006 was not newly discovered evidence because it was "a compilation of previously available information related to Florida's death penalty system"), *cert. denied*, 127 S. Ct. 465, 166 L. Ed. 2d 331 (2006).

Even if the articles were "newly discovered" evidence, we agree with the postconviction court that Schwab has not satisfied the second Jones prong. Jones, 591 So. 2d at 915. The alleged newly discovered evidence is not of such a nature that it would probably yield a less severe sentence on retrial. While the sentencing judge found that the trial evidence established the "substantially impaired ability to conform one's conduct" mitigating factor, he also found that the trial evidence indicated that Schwab may have been "unwilling" rather than "unable" to control his desires. Accordingly, new evidence truly demonstrating that Schwab could not control his conduct could impact sentencing. However, we agree with the postconviction court that these scientific articles are not such evidence. As the postconviction court found, "neither article affirmatively asserts that [brain damage] causes such crimes as committed by Mr. Schwab." Neither article posits a solely neuroanatomical etiology for sexual offense, nor do the articles negate the sentencing judge's conclusion that carefully planned crimes such as those committed by Schwab are largely inconsistent with Schwab's claim that he could not control his behavior.

Based on the foregoing, Schwab is not entitled to a new trial on the basis of this allegedly newly discovered evidence.

The United States Supreme Court in Baze v. Rees, 552 U.S. ___, 128 S. Ct. 1520, 170 L ED 2d 420 (2008), evident in the concurring opinions of a number of Justices, had before it

issues pertaining to Kentucky's three drug protocols as well as ancillary issues attending any challenge to those protocols and procedures. The Court clearly rejected each of those individual issues along with the standard constituting cruel and unusual punishment as it relates to a lawful lethal injection execution. The Court opined that a condemned inmate can not merely suggest a "slightly or marginally safer alternative" means or procedure without more, rather the Court observed that in order to satisfy the Farmer v. Brennan, 511 U.S. 825, 842 (1994), "substantial risk of serious harm" test, a defendant needed more. "Simply because an execution method may result in pain, either by accident or as an inescapable consequence of death, does not establish the sort of 'objectively intolerable risk of harm' that qualifies as cruel and unusual." Baze v. Rees, 128 S. Ct. at 1525-1526.

Moreover, the Court held that "Permitting an Eighth Amendment violation to be established on such a showing would threaten to transform courts into boards of inquiry charged with determining 'best practices' for executions, with each ruling supplanted by another round of litigation touting a new and improved methodology." In such circumstances the Court citing, Bell v. Wolfish, 441 U.S. 520, 562 (1979), observed that such an approach "would embroil the courts in ongoing scientific controversies beyond their expertise, and would substantially

intrude on the role of state legislatures in implementing their execution procedures—a role that by all accounts the States have fulfilled with an earnest desire to provide for a progressively more humane manner of death." For example, in footnote 2 of Chief Justice Roberts' opinion, it was noted how The Lancet article, relied upon by many Florida death row inmates, suffered from extensive peer review rejection, allowing Chief Justice Roberts to observe that the best practice approach would result in the courts undertaking review of such matters thus engaging in "debatable matters far exceeding their expertise." Justice Thomas, in his concurring opinion, opined, that because courts have neither the authority nor expertise in these matters, the solution lies in enforcing of the threshold standard requirements articulated by the Court's cases. Baze, 128 S. Ct. 1526-1527.

The Court further explored and rejected allegations raised regarding the amount of dosages used for the first drug, the dangers in the mixing of the drugs by Kentucky employees "untrained"; potential problems with IV lines ("the asserted problems related to the IV lines do not establish a sufficiently substantial risk of harm to meet the requirements of the Eighth Amendment"); the training practices and redundancy in the Kentucky system (which are not as complete as Florida's per Lightbourne); the Warden's presence in the execution chamber and

other measures required by the Kentucky procedures. The Court held that "In light of these safeguards, we cannot say that the risks identified by petitioners are so substantial or imminent as to amount to an Eighth Amendment violation." Baze, 128 S. Ct. at 19.

The Court likewise, rejected arguments regarding the single-drug alternative and arguments regarding euthanasia in animals--finding that the methods of euthanasia for animals approved for veterinarians "is not an appropriate guide to human practices for humans." Baze, 128 S. Ct. at 19-20. The Court also rejected the need for a BIS monitor for assessing anesthetic depth of a prisoner, which the Court found neither required nor endorsed by the medical community. Baze, 128 S. Ct at 21. "Petitioners have not shown that these supplementary procedures, drawn from a different context, are necessary to avoid a substantial risk of suffering." Baze, 128 S. Ct. at 21.

> Kentucky has adopted a method of execution believed to be the most humane available, one it shares with 35 other States. Petitioners agree that, if administered as intended, that procedure will result in a painless death. The risks of maladministration they have suggested -- such as improper mixing of chemicals and improper setting of IVs by trained and experienced personnel -- cannot remotely be characterized as "objectively intolerable." Kentucky's decision to adhere to its protocol despite these asserted risks, while adopting safeguards to protect against them, cannot be viewed as probative of the wanton infliction of pain under the Eighth Amendment. Finally, the alternative that

> petitioners belatedly propose has problems of its own, and has never been tried by a single State.

Baze, 128 S. Ct. at 23.

In light of the extensive litigation in Lightbourne, challenging Florida's lethal injection procedures and the expansive review of the United States Supreme Court in Baze, Marek has presented nothing--to suggest that he has overcome his pleading requirements. Nor can he now retreat from or attempt to modify the arguments upon which he relied for review-- all his claims have been rejected by the Court in Baze.

Most recently, the Court reaffirmed rejection of Marek's lethal injection claim in Ventura v. State, 2 So. 3d 194 (Fla. 2009) finding:

> We have repeatedly and consistently rejected Eighth Amendment 4 challenges to Florida's current lethal-injection protocol. See Tompkins v. State, 994 So. 2d 1072, 1080-82 (Fla. 2008); Power v. State, 992 So. 2d 218, 220-21 (Fla. 2008); Sexton v. State, 33 Fla. L. Weekly S686, S691 (Fla. Sept. 18, 2008); Schwab v. State, 995 So. 2d 922, 924-33 (Fla. 2008); Woodel v. State, 985 So. 2d 524, 533-34 (Fla. 2008), cert. denied, 129 S. Ct. 607, 172 L. Ed. 2d 465 (2008); Lebron v. State, 982 So. 2d 649, 666 (Fla. 2008); Schwab v. State, 982 So. 2d 1158, 1159-60 (Fla. 2008); Lightbourne v. McCollum, 969 So. 2d 326, 350-53 (Fla. 2007). In his postconviction motion and brief to this Court, Ventura has simply re-alleged the criticisms of Florida's revised protocol that Lightbourne and his expert, Dr. Heath, presented in 2007. See Lightbourne, 969 So. 2d at 347-49. Ventura has not presented any allegations beyond those of Lightbourne and Schwab (who predicated his claims upon those of Lightbourne).

> 4 The prohibition against "cruel or unusual punishment" present in the Florida Constitution "shall be construed in conformity with decisions of the United States Supreme Court which interpret the prohibition against cruel and unusual punishment provided in the Eighth Amendment to the United States Constitution." Art. I, § 17, Fla. Const.

This Court has thus previously rejected each of these challenges to Florida's lethal-injection protocol and--based upon the sound principle of stare decisis--we continue the same course here. See, e.g., Lightbourne, 969 So. 2d at 349-53; Schwab, 969 So. 2d at 321-25. As we stated in Schwab, "Given the record in Lightbourne and our extensive analysis in our opinion in Lightbourne v. McCollum, we reject the conclusion that lethal injection as applied in Florida is unconstitutional." Schwab, 969 So. 2d at 325.

ii. Baze Does Not Require Reconsideration of Lightbourne and Related Decisions

The only "new" contention Ventura presents is that our recent lethal-injection decisions, including Lightbourne, have not applied the standard articulated by the Baze plurality. However, Ventura overlooks that we explicitly held in Lightbourne:

> In light of the[] additional safeguards [present in the August 2007 lethal-injection protocol] and the amount of the sodium pentothal used, which is a lethal dose in itself, we conclude that [the petitioner] has not shown a *substantial, foreseeable or unnecessary risk* of pain in the DOC's procedures for carrying out the death penalty through lethal injection that would violate the Eighth Amendment . . . .

969 So. 2d at 352-53 (footnote omitted) (emphasis supplied). Our analysis thus provided that Florida's current lethal-injection protocol is constitutional under either a substantial-risk, foreseeable-risk, or unnecessary-risk standard. This Court also recently observed in Tompkins that "we have rejected

contentions that Baze set a different or higher standard for lethal injection claims than Lightbourne." 994 So. 2d at 1081. We now take this occasion to explain why this is so.

The disjunctive phrasing of our holding in Lightbourne has proven prescient because the United States Supreme Court has not yet adopted a majority standard for determining the constitutionality of a mode of execution. See generally Baze v. Rees, 128 S. Ct. 1520, 170 L. Ed. 2d 420 (2008). Specifically, the Baze plurality adopted a version of the substantial-risk standard, 5 while Justice Breyer, concurring in the judgment, and Justices Ginsburg and Souter, dissenting, adopted a version of the unnecessary-risk standard. See id. at 1525-38 (Roberts, C.J., joined by Kennedy and Alito, JJ.); id. at 1563-67 (Breyer, J., concurring in the judgment); 6 id. at 1567-72 (Ginsburg, J., dissenting, joined by Souter, J.). In contrast, Justices Thomas and Scalia renounced any risk-based standard in favor of a rule of law that would uphold any method of execution which does not involve the purposeful 7 infliction of "pain and suffering beyond that necessary to cause death." Id. at 1556-63 (Thomas, J., concurring in the judgment, joined by Scalia, J.). Justice Stevens did not provide a separate standard but, instead, expressed general disagreement with (1) the death penalty based upon his long experience with these cases and the purported erosion of the penalty's theoretical underpinnings (deterrence, incapacitation, and retribution), and (2) the allegedly unnecessary use of the paralytic drug pancuronium bromide. See id. at 1542-52 (Stevens, J., concurring in the judgment).

> 5 In relevant part, the plurality stated:
>
> > [A]n inmate cannot succeed on an Eighth Amendment claim simply by showing one more step the State could take as a failsafe for other, independently adequate measures. This approach would serve no meaningful purpose and would frustrate the State's legitimate interest in carrying out a sentence of death in a timely manner. . . .

> . . . A stay of execution may not be granted on grounds such as those asserted here unless the condemned prisoner establishes that the State's lethal injection protocol creates *a demonstrated risk of severe pain*. He must show that the risk is *substantial* when compared to the *known and available alternatives. A State with a lethal injection protocol substantially similar to the protocol we uphold today would not create a risk that meets this standard. . . .*
>
> . . . State efforts to implement capital punishment must certainly comply with the Eighth Amendment, but what that Amendment prohibits is wanton exposure to "objectively intolerable risk," Farmer[v. Brennan], 511 U.S. [825, 846, 114 S. Ct. 1970, 128 L. Ed. 2d 811,] and n.9 [(1994)], not simply the possibility of pain.

Baze, 128 S. Ct. at 1537 (Roberts, C.J., joined by Kennedy and Alito, JJ.) (emphasis supplied).

> 6 Justice Breyer prefaced his concurrence in the judgment by stating: "In respect to how a court should review such a claim, I agree with Justice Ginsburg. She highlights the relevant question, whether the method creates *an untoward, readily avoidable risk* of inflicting severe and unnecessary suffering." Baze, 128 S. Ct. at 1563 (Breyer, J., concurring in the judgment) (citing Justice Ginsburg's dissent at 1572) (some emphasis supplied).

> 7 See *Black's Law Dictionary* 1272 (8th ed. 2004) ("purposeful, adj. Done with a specific purpose in mind; DELIBERATE.").

Hence, the Baze Court did not provide a majority opinion or decision. In turn, this lack of consensus has complicated our duty to interpret article I, section 17 of the Florida Constitution "in conformity with the *decisions of the United States Supreme Court*" 8 concerning the Eighth Amendment's bar against "cruel

and unusual punishments." Under normal circumstances, we would resort to the "narrowest grounds" analysis presented in Marks v. United States, 430 U.S. 188, 193, 97 S. Ct. 990, 51 L. Ed. 2d 260 (1977), which provides that "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.'" (quoting Gregg v. Georgia, 428 U.S. 153, 169 n.15, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976) (plurality opinion)). However, there are no reliable means of determining the "narrowest grounds" presented in Baze because three blocks of Justices provided three separate standards for determining the constitutionality of a mode of execution. We addressed this issue in Henyard v. State, 992 So. 2d 120 (Fla. 2008):

> We have previously concluded in Lightbourne and Schwab that the Florida protocols do not violate any of the possible standards, and that holding cannot conflict with the narrow holding in Baze. Furthermore, we have specifically rejected the argument that Florida's current lethal injection protocol carries "a substantial, foreseeable, or unnecessary risk of pain." Lightbourne, 969 So. 2d at 353. Accordingly, we reject [appellant's] argument [that we should reconsider Lightbourne and Schwab in light of Baze].

Id. at 130 (emphasis supplied). Consequently, Florida's current lethal-injection protocol passes muster under *any* of the risk-based standards considered by the Baze Court (and would also easily satisfy the intent-based standard advocated by Justices Thomas and Scalia).

> 8 Art. I, § 17, Fla. Const. (emphasis supplied).

We also recently upheld and adopted a trial court's analysis concluding that Florida's lethal-injection protocol is "substantially similar" to that of Kentucky. See Schwab, 995 So. 2d at 924-33. This holding brings Florida's lethal-injection protocol squarely within the safe harbor created by the Baze plurality. Baze, 128 S. Ct. at 1537 (Roberts, C.J.,

joined by Kennedy and Alito, JJ.) ("A State with a lethal injection protocol *substantially similar* to the protocol we uphold today would *not* create a risk that meets this standard." (emphasis supplied)); see also Baze, 128 S. Ct. at 1569-71 (Ginsburg, J., dissenting, joined by Souter, J.) (favorably contrasting Florida's consciousness assessment with that of Kentucky and strongly indicating that even the Baze dissenters would have approved Florida's current lethal-injection protocol under an Eighth Amendment analysis).

In its current form, Florida's lethal-injection protocol ensures unconsciousness through a pause between the injection of a lethal dose of sodium pentothal (a potent coma-inducing barbiturate) and the injection of the second and third drugs, during which time the warden engages in a thorough consciousness assessment (brushing the condemned's eye lashes, calling the condemned's name, and shaking the condemned). Further, we have held that the condemned inmate's lack of consciousness is the focus of the constitutional inquiry. See generally Lightbourne, 969 So. 2d 326 (repeatedly stressing the significance of the undisputed fact that a sufficient dose of sodium pentothal renders the condemned unconscious and that this lack of consciousness precludes the perception of any pain associated with the later injection of pancuronium bromide and potassium chloride).

Accordingly, in light of Ventura's failure to comply with rule 3.851(e)(2)(C) and the meritless nature of his lethal-injection claim, we affirm the circuit court's summary denial of his most recent successive postconviction motion.

See also Walton v. State, 2009 Fla. LEXIS __, 34 Fla. L Weekly S89 (Fla. 2009).

As to any claims regarding additional new evidence from DOC personnel, those claims have likewise been rejected. In Tompkins v. State, 994 So. 2d 1072, 1082-82 (Fla. 2008), the Court held:

> We first address and reject Tompkins's claim that he was deprived of his due process rights of notice, opportunity to be heard, and presentation of evidence on his challenge to Florida's lethal injection procedures. Although Tompkins acknowledges that these issues were litigated in the emergency all writs petition filed in Lightbourne v. McCollum, 969 So. 2d 326 (Fla. 2007), cert. denied, 128 S. Ct. 2485, 171 L. Ed. 2d 777 (2008), he claims that the trial court erred in denying him the opportunity to present his own witnesses in support of his challenge to the procedures. [fn5] Specifically, Tompkins sought to present the following evidence to the trial court that he claimed was not presented in Lightbourne: (1) testimony from Sara Dyehouse concerning the memorandum she wrote in 2006 on the revisions to the lethal injection protocol; (2) testimony from DOC Secretary McDonough regarding the Dyehouse memorandum; (3) testimony from Gretl Plessinger concerning the Dyehouse memorandum; and (4) testimony from Dr. David Varlotta, an anesthesiologist who was a member of the Governor's Commission on Administration of Lethal Injection ("the Commission") that was created after the Diaz execution to investigate and make recommendations to the Governor.

The trial court in denying all relief found that "this Court finds that the claim is without merit." (Order Denying Successive Motion, dated April 23, 2009, page 2.) The trial court's determination should be affirmed.

On rehearing, Marek asserted that the trial court erred in refusing to take judicial notice of evidence in the Lightbourne hearing or alternatively grant him a new hearing. The trial court in denying further review held:

> 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.

Marek is entitled to no relief as to this claim, see identical issues resolved in Ventura v. State, 2 So. 3d 194 (Fla. 2009)(Court rejects all permutations of Ventura's lethal injection claim).

THE 2006 ABA REPORT IS NOT NEWLY AVAILABLE EVIDENCE

As to Marek's second claim--that there is newly discovered evidence that his conviction is unconstitutional because of an American Bar Association report entitled *Evaluating Fairness and Accuracy in the State Death Penalty System: The Florida Death Penalty Assessment Report*, published September 17, 2006, that argument is neither new nor unresolved. The claim is without merit and, more importantly, has been rejected by the Florida Supreme Court in Rolling v. State, 944 So. 2d 176 (Fla. 2006).

Marek, like others, asserted below, that "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." In Rolling v. State, 944 So. 2d 176 (Fla. 2006) the Court held:

> Rolling asserted a claim in the trial court that the American Bar Association report entitled *Evaluating Fairness and Accuracy in the State Death Penalty System: The Florida Death Penalty Assessment Report*, published September 17, 2006, constitutes newly discovered evidence proving that imposition of the death penalty is cruel and unusual punishment in

> violation of the Eighth Amendment of the United States Constitution. The trial court denied this claim. We recently addressed this issue in Rutherford v. State, 940 So. 2d 1112, 2006 Fla. LEXIS 2370, (Fla. 2006), wherein we concluded that the ABA Report is not newly discovered evidence because it "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." Id. at 1117, 2006 Fla. LEXIS 2370 at *15. We also held that nothing in the report would cause this Court to recede from its past decisions upholding the facial constitutionality of the death penalty, and that the defendant did not allege how any of the conclusions in the report would render his individual death sentence unconstitutional. Id. at 1118, 2006 Fla. LEXIS 2370 at *15-16. For these same reasons, we affirm the circuit court's summary denial of Rolling's claim.

See also Rutherford, supra.; and Diaz v. State, 945 So. 2d 1136 (Fla. 2006) wherein the Court further held:

> . . .Unlike Rutherford, Diaz did allege that many of the failures of the Florida death penalty system cited in the ABA Report were applicable in his case. However, this does not change the conclusion that the report is not newly discovered evidence. Furthermore, the "failures" that Diaz cites as applying to his case either have been or could have been litigated by him in his direct appeal and postconviction proceedings. Thus, we affirm the circuit court's summary denial of this claim.

It is evident that Marek falls in the same posture as Rutherford, Rolling and Diaz regarding the viability of the ABA report to Florida's death penalty scheme.

As of late, the Court in Walton, supra., has held on the ABA report, that:

Walton has separately asserted that the ABA report entitled *Evaluating Fairness and Accuracy in the State Death Penalty System: The Florida Death Penalty Assessment Report*, published September 17, 2006, constitutes newly discovered evidence which reveals that the imposition of the death penalty constitutes cruel and unusual punishment in violation of the Eighth Amendment. Just as this Court has previously considered The Lancet report, we have also reviewed the ABA report and concluded that it does not constitute newly discovered evidence because the report 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." Rutherford v. State, 940 So. 2d 1112, 1117 (Fla. 2006); see also Tompkins, 994 So. 2d at 1082-83; Power, 992 So. 2d at 220-23; Schwab, 969 So. 2d at 325-26 ("[T]his Court has not recognized 'new opinions' or 'new research studies' as newly discovered evidence."); Diaz, 945 So. 2d at 1136; Rolling, 944 So. 2d at 181. Moreover, nothing in the report would cause this Court to recede from its past decisions upholding the facial constitutionality of the death penalty. See Rolling, 944 So. 2d at 181 (citing Rutherford, 940 So. 2d at 1118).

Though Walton attempts to allege that the report's conclusions render his individual death sentence unconstitutional, the specific allegations in his motion merely refer to generalities that are noted in the report but do not relate in any specific way to Walton's death sentence. See Tompkins, 994 So. 2d at 1083; Power, 992 So. 2d at 222. Walton also fails to assert that had a hearing been granted, he would have presented additional evidence or testimony regarding the lethal injection protocol that would yield a less severe sentence than those already rejected in Tompkins, Power, Diaz, Rolling, and Rutherford. Thus, for the same reasons that we expressed in our previous decisions, we again hold that the ABA report does not constitute newly discovered evidence demonstrating the unconstitutionality of Florida's capital sentencing mechanisms.

Not only is the claim untimely and procedurally barred but, it is also meritless.

The trial court found that Walton, supra., controlled.

CONCLUSION

Based on the foregoing, all relief should be denied.

Respectfully submitted,

BILL McCOLLUM
ATTORNEY GENERAL

_____
CAROLYN M. SNURKOWSKI
Assistant Attorney General
Florida Bar No. 158541

OFFICE OF THE ATTORNEY GENERAL
PL-01, The Capitol
Tallahassee, FL 32399-1050
Phone: (850) 414-3300
Fax: (850) 487-0997

Certificate of Service

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to the Honorable Peter M. Weinstein, Circuit Judge, Broward County Courthouse, 201 SE Sixth Street, Fort Lauderdale, Florida 33301-3303; Martin McClain, Esq., McClain & McDermott, P.A., 141 N.E. 30th Street, Wilton Manors. Florida 33334-1064; and to Susan Bailey, Assistant State Attorney, Office of the State Attorney, 201 SE Sixth Street, Fort Lauderdale, Florida, 33301, this 30th day of April, 2009.

_____
CAROLYN M. SNURKOWSKI
Assistant Deputy Attorney General

CERTIFICATE OF COMPLIANCE

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

_____
CAROLYN M. SNURKOWSKI
Assistant Deputy Attorney General