IN THE SUPREME COURT OF FLORIDA

CASE NO. 09-765

JOHN MAREK,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

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

REPLY BRIEF OF APPELLANT

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REPLY TO THE STATE'S STATEMENT OF THE CASE

Counsel for the State has repeatedly made untruthful representations regarding the procedural history of Mr. Marek's case in order to argue a lack of diligence by his counsel. In its "Statement of the Case," the State's Answer Brief refers to the "successive rule 3.850 motion filed on July 22, 1993" and "the 'supplemental motion'" filed on July 24, 1994 (Answer Brief at 6-7). In the very next paragraph, the State's Answer Brief sets forth: "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" (Answer Brief at 8). According to the State, "[t]he 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" (Answer Brief at 8).

The description of the final amended Rule 3.850 motion filed on September 21, 2001, as containing claims that were not timely prosecuted is simply false. In its brief, the State provides no explanation for these descriptions of Mr. Marek's claims. The language the State employs in its Answer Brief is a straight lift

from the discredited Response to Second Amended Motion to Vacate Judgments and Sentence that was filed on November 27, 2001, in which the State erroneously denied that any activity in the case had occurred between 1996 and 2001 (2PC-R. 853).[1]

At the Huff hearing held on February 19, 2002, Mr. Marek's counsel observed that the State's arguments in its November 27, 2001, response that Mr. Marek had not prosecuted his Rule 3.850 motion were premised upon its erroneous omission of five years of litigation:

> And in Mr. Marek's case, when I was getting ready for this hearing today, I was gathering the papers and I was reading the state's response. And the state's

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[1]Specifically, the State argued that the failure to file a motion to vacate premised upon evidence disclosed in 1996 before 2001 created a procedural bar to the consideration of the claims premised upon that evidence (2PC-R. 880, 925, 931). The State's argument had overlooked the fact that these claims were in fact raised in the amended 3.850 filed on August 30, 1996. On January 15, 1997, Judge Kaplan disqualified himself from the case. On March 6, 1997, the State asked that it not be required to respond to the motion for postconviction relief until the public records requests made by Mr. Marek had been resolved.

In 1997, the Office of the Capital Collateral Representative was split into three separate regional offices and Mr. Marek's case was transferred to the CCRC-South regional office. In 1998 when Neal Dupree was appointed as the CCRC-South, a conflict was declared as to Mr. Marek and his case was transferred to CCRC-North and to attorneys who had not previously represented Mr. Marek. In 2002, CCRC-North contracted with undersigned counsel to once again act as Mr. Marek's counsel. When CCRC-North was shuttered in 2003, undersigned counsel was appointed as registry counsel for Mr. Marek. Despite these circumstances entirely beyond Mr. Marek's control, continuous litigation occurred between 1996 and 2001, contrary to the repeated false representations made by Assistant Deputy Attorney General Snurkowski who for unknown reasons was not present for or involved in the litigation that occurred during that time period.

> response which was filed, I guess, November of 2001, I was sort of troubled by the fact that within it there is just a certain sort of representation or it's based on certain representations that's just not true.
>
> * * *
>
> The problem is that this misrepresentation is underneath the entire things. For example, footnote 11 of the state's response which appears on page 39 indicates that as to claim 9, the information surfaced in July of 1996, but Mr. Marek had not filed anything on this claim until the year 2001 and was time barred in reference to claim 10.

(2PC-R. 73-74). In responding at the 2002 Huff hearing, the Assistant Attorney General acknowledged the error, explaining "we don't have full access to the records that apparently the CCR - - and I'm going to look to make sure on this one, but I don't believe that we were given service. It was not. It was just to [the State Attorney]" (2PC-R. 92).[2] Accordingly, the Assistant

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[2]During the active litigation in Mr. Marek's case that occurred between 1996 and 2001, Assistant Deputy Attorney General Snurkowski did not show up for a single hearing. She was not shown as counsel on a pleading entitled "State's Response to Defendant's Sixth Supplement to Motion to Disqualify Judge" which was served on April 23, 1996 (2PC-R. 272) or on the pleading entitled "State's First Request for Extension of Time to Respond to Defendant's Motion for Post Conviction Relief" which was served on August 29, 1996. In a pleading served by the State in 1997, Assistant Attorney General Sara Baggett in the West Palm Beach office was shown as being served (2PC-R. 543). No one from the Attorney General's Office showed up for hearings conducted on November 22, 1999 (2PC-R. 1) or October 23, 2000 (2PC-R. 49).

The State was represented at the 2002 Huff hearing by representatives from both the State Attorney's Office and by Assistant Deputy Attorney General Snurkowski. The November 27, 2001, response was signed by both representatives. However, the Assistant Deputy Attorney General seemed to acknowledge that her office had drafted the response and had not had access to the pleadings filed by the parties between 1996 and 2001 nor the

Attorney General asked at the end of the Huff hearing for permission to supplement the response in light of the 5 years of litigation omitted from the State's November 27, 2001, response (2PC-R. 123). The State was given 30 days to correct its response and include a discussion of the litigation occurring during the 5 year period (2PC-R. 951-53).[3] A Modified Response was filed on April 2, 2002.

In this Modified Response, the State acknowledged that litigation on Mr. Marek's motion to vacate continued through those five years:

> On August 29, 1996, Marek filed an amended postconviction motion raising nine claims. The first seven were identical to the claims raised in his successive motion 1993-1994. Marek added two additional claims that: Claim VIII - Newly Discovered Evidence Establishes That Mr. Marek's Capital Conviciton and Sentence Are Constitutionally Unreliable And That Mr. Marek Is Innocent; and Claim IX - The Trial Judge Failed to Disqualify Himself From Mr. Marek's Trial And Postconviction Proceedings And The Prejudice Resulting Therefrom Violated The Fifth, Sixth, Eighth And Fourteenth Amendments To The United States Constitution.
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> Between the first amended 3.850 filed August 1996 and the second amended 3.850 filed September 27, 2001, the following chronology of events has occurred:

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numerous hearings that had occurred during that period.

[3]Not too surprisingly, in its Modified Response filed on April 2, 2002, the State dropped its procedural bar arguments premised upon the failure to file a Rule 3.851 based upon information disclosed in 1996 before 2001 since in fact Mr. Marek filed an amended motion in 1996 that included information that had been disclosed at that time (Compare 2PC-R. 931 to PC-R2. 1031-34).

> - Starting in September of 1996 public records (Chapter 119) demands commenced; State complies June 23, 1997; additional motions to compel filed in 1997-98; public records hearing held November 22, 1999; order on public records hearing December 13, 1999; State provides exempt documents to court December 21, 1999; October 5, 2000, additional public records request and motion to compel filed; October 23, 2000, hearing set for latest public records demand; November 30, 2000, second hearing on public records held, agencies required to respond by January 5, 2001; December 18, 2000, CCRC makes more public records demands; January 5, 2001, notice of compliance by State filed; June 13, 2001, order issued on exempt public records; September 26, 2001, hearing on remaining public records issues; court orders amended 3.850 to be filed by September 28, 2001.
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> - Contemporaneous with the filing of the "first" amended motion August 29, 1996, Marek filed yet another motion to disqualify the trial court. On September 20, 1996, that motion was denied.
>
> - On November 2, 1998, CCRC South filed a notice of conflict and on November 4, 1998, CCRC North was designated counsel of record. On December 15, 1998, notice of appearance of CCRC North was filed.
>
> - December 13, 1999, Court reserves ruling on Marek's motion for discovery (to depose Judge Kaplan). February 11, 2000, Marek renews motion for discovery to depose Judge Kaplan. March 13, 2000, telephonic hearing where court orders memors from the parties. April 20, 2000, Marek's memo filed; State responds May 5, 2000. June 13, 2001, Court issues order denying Marek's first and amended motion to permit discovery to depose Kaplan.

(2PC-R. 951-53).[4]

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[4]Even this recitation overlooked important events during the 1996-2001 time period. No reference was made to the State's motions for extension to respond to the Rule 3.850 motion, nor to

Thus, the amended Rule 3.850 motion filed on September 27, 2001, was a second amendment. It amended the motion initially filed in 1993, that was supplemented in 1994, and that was first amended in 1996. The second amended motion filed in 2001 identified twelve claims for relief: 1) access to public records; (2) the conflict of interest created by Broward County's system for funding special assistant public defenders and expert witnesses; (3) ineffective assistance provided by trial counsel and the trial mental health expert at the penalty phase; (4) jury recommendation was tainted by invalid aggravators; (5) unconstitutional automatic aggravator; (6) dilution of jury's sense of responsibility for penalty; (7) exclusion of mitigating evidence; (8) due process violated by litigating prior Rule 3.850 motion under death warrant; (9) newly discovered evidence regarding Wigley; (10) Judge Kaplan's bias tainted the trial, penalty phase and prior post-conviction proceedings; (11) capital sentencing statute violates Sixth Amendment; (12) lethal injection violates Eighth Amendment (2PC-R. 702-841). Claims 2 through 7 were presented in Mr. Marek's second Rule 3.850 motion which was filed on July 22, 1993 (Supp. 2PC-R. 1-98). Claim 8 was presented in a supplement which was filed on January 26, 1994

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the State's request to hold proceedings on the Rule 3.850 in abeyance until the conclusion of the public records litigation, nor to the fact that Judge Kaplan granted the motion to disqualify on January 15, 1997.

(2PC-R. 19). Claims 9 and 10 were presented in an amendment filed on August 30, 1996 (2PC-R. 313-437).[5] Only Claims 1, 11 and 12 were presented for the first time in the second amendment filed on September 27, 2001.

In a brief filed with this Court in 2006, the State in its procedural history returned to its old discredited contention that nothing happened between 1996 and 2001.[6] In that procedural history, the State recited the following:

> On June 3, 1996, the Court ordered the state to respond to Marek's original 3.850 motion.
>
> Marek filed an amended rule 3.850 in September 21, 2001, - Claims II, III, IV, V, VI, VII and VIII were practically verbatim to the seven claims raised and "unprosecuted" by Marek in his 1993/1994 motion for postconviction relief.

(Answer Brief at 10).[7] When Mr. Marek's counsel pointed out the falsehood being perpetrated in the State's 2006 Answer Brief,

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[5]The first amended motion filed in August of 1996, had contained nine claims. In addition to the six claims pled in the motion filed in July of 1993 and the supplement to the motion filed in January of 1994(2PC-R. 19), the amended motion alleged that Judge Kaplan's bias had tainted Mr. Marek's trial and post-conviction proceedings (Claim IX, 2PC-R. 423-35), and newly discovered evidence regarding Wigley (Claim VIII, 2PC-R. 417-23).

[6]No explanation appears in the Answer Brief as to why the State picks up the discredited contentions that it made in November of 2001, and subsequently abandoned.

[7]Ignored by the Assistant Deputy Attorney General was the fact that the State requested an extension of time to respond on August 29, 1996, and an amended motion to vacate was filed on August 30, 1996. Also ignored by the Assistant Deputy Attorney General was the fact that on March 6, 2007, the State asked to hold its obligation to file a response in abeyance until the public records litigation was completed.

Assistant Deputy Attorney General Snurkowski chose to not correct her false representation. Instead, she repeated it when she asked this Court to dispense with oral argument in the pleading she filed in April of 2006. When Mr. Marek's counsel again pointed out the falsehood, Assistant Deputy Attorney General Snurkowski chose to not correct her false representation. Instead, she repeated it when she filed a response to Mr. Marek's Rule 3.851 motion filed in May of 2007, on July 2, 2007 (3PC-R. 57).

The significance of this history is to demonstrate that the State's representative in the proceedings has amply and repeatedly demonstrated her lack of knowledge of Mr. Marek's case. Whether her false representations are due to ignorance or due to malevolence does not matter. They are simply untrue.

The State's representative's inability to accurately represent the record was again on display on Monday, April 27, 2009, when the circuit court held a hearing on Mr. Marek's motion for rehearing/motion to amend. At that time in response to Mr. Marek's arguments regarding the pendency of Caperton v. Massey in the U.S. Supreme Court and the basis for Judge Kaplan's disqualification from Mr. Marek's case, Assistant Deputy Attorney General Snurkowski stated:

> [N]ow, going back, we had all the issues with regard to Judge Kaplan, that involved - and that's just testimony that was made that day and had to do with, in fact, his views on the death penalty and his position

> on the death penalty. It was only mentioned the notion that he was personal or friendly with Mr. Muldorf [sic]. I think there may have been question with regard to whether anything that was done was done because of that, but I think that was a comment during those proceedings.
>
> We think we had a little bit of a change in the view of what the problem was with Judge Kaplan from something that did not prevail with regard to his personal views and now the personal relationship because of the Caperton case which is pending before the United States Supreme Court.

(Transcript of 4/27/09 hearing at 45).

However, the order granting the disqualification which was signed by Judge Kaplan stated:

> 1. This Court finds that all of the grounds of the Defendant's several Motions to Disqualify are legally insufficient to disqualify the trial judge.
>
> 2. Over many years this Judge's personal relationship with Attorney Hilliard Moldof has developed into a close friendship with Attorney Moldof, his wife, Mrs. Zena Moldof, as well as the Moldof's children.
>
> 3. The court still feels it could be fair and impartial in this matter.
>
> 4. However, the court believes that the manifest appearance of impartiality is just as important as actual impartiality.
>
> 5. Accordingly, based upon the possible appearance of the court not being impartial, based upon the above stated reasons (and for these reasons only),
>
> It is hereby,
>
> ORDERED AND ADJUDGED that the undersigned Judge hereby recuses himself from further proceedings in this matter.

(Order filed January 15, 1997). The record quite clearly shows

the basis for Judge Kaplan's disqualification and demonstrates that once again, Assistant Deputy Attorney General Snurkowski misrepresented the record and the history of Mr. Marek's case.

Ignoring the actual record and the reason set forth by Judge Kaplan for his disqualification, Assistant Attorney General Snurkowski states in the Answer Brief:

> 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.

(Answer Brief at 50). So apparently rather than look up the order of recusal and accurately acknowledged what the order stated, Assistant Attorney General Snurkowski decided to suggest that undersigned counsel had not been forthright with this Court or with the circuit court. She clearly will say anything to try to bring about Mr. Marek's execution and win this case.[8]

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[8]The United States Supreme Court has written under the American system a prosecutor is:

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

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

ARGUMENT IN REPLY

ARGUMENT I, Part B: Disparity in treatment of Mr. Marek and his co-defendant.

As to Argument I, part B, the State's Answer Brief asserts:

> 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.

(Answer Brief at 34). Once again, the State's representative is simply not accurately representing the record.

Certainly, the circuit court believed the issue had been raised since it addressed it in its April 23, 2009, order denying the motion to vacate ("This Court further finds that the Defendant [sic] claim regarding the prosecutor's use of inconsistent theories is refuted by *Walton v. State, supra*.")(Order of 4/23/09 at 4). The circuit court believed the issue had been raised since it again addressed the issue in its April 27, 2009, denying Mr. Marek's motion for rehearing/motion to amend ("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 1554, 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).")(Order of 4/27/09 at 1).[9]

The circuit court thus found the issue raised by Mr. Marek and concluded that it lacked merit. The State's position to the contrary is just false.[10]

The State also argues that the law of the case precludes consideration of this issue:

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

(Answer Brief at 25-26, n. 9). However, Mr. Marek relied both on

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[9]The State makes no effort to address what the circuit court stated. To do so would require acknowledging that the issue was before the circuit court, unless the State's representative's contention would be the circuit court was just clairvoyant, accurately anticipating what Mr. Marek would raise in this Court.

[10]The State in its Answer Brief also states:

> 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.

(Answer Brief at 32). But of course, Mr. Marek cited Cone v. Bell because it reiterated that due process imposes obligations upon prosecutors to seek justice, not just personal victories. Apparently, a prosecutor's obligation to seek justice is beyond the State's representative's grasp.

the fact that Wigley record was not before this Court at the time of the direct appeal, and that this Court's decision in Raleigh v. State, 932 So. 2d 1054 (Fla. 2006), warranted revisiting the issue.

The State in its Answer Brief never addresses the quoted passages from Wigley's trial that Mr. Marek has relied upon to show that the prosecution took inconsistent position in the two cases contrary to the standard set forth in Raleigh. Clearly, the State's refusal to address the arguments made at the Wigley trial demonstrates that the State's position at Wigley's trial cannot be reconciled with the position the State took at Mr. Marek's trial.

ARGUMENT I, Part C: Ineffective Assistance of trial counsel under Srickland v. Washington.

As to this issue, the State's Answer Brief begins:

> Next Marek argues yet another claim that was not presented in his most recent motion for post-conviction review.

(Answer Brief at 34). Once again, the State's representative is simply not accurately representing the record.

Certainly, the circuit court believed the issue raised now had been raised in the motion filed below since it addressed it in its April 23, 2009, order denying the motion to vacate ("This Court also finds that the Defendant's "Second Claim" in both of his motion and also as explained in his Memorandum under *Wiggins v. Smith*, 539 U.S. 510 (2003), *Rompilla v. Beard*, 545 U.S. 374

(2005) and *Williams v. Taylor*, 529 U.S. 362 (2000) in which the Defendant has requested to re-examine his claim of ineffective assistance of penalty phase counsel is speculative and is an improper attempt to re-litigate a matters already previously determined.")(Order of 4/23/09 at 3).

Tellingly absent from the State's Answer Brief is any effort to explain why Mr. Marek would not be entitled to relief under Williams v. Taylor, Wiggins v. Smith, and Rompilla v. Beard. The Answer Brief references the three cases once on page 34 as indicating that Mr. Marek is relying on these three cases to raise an issue that he did not raise in circuit court. Yet, the circuit court addressed these three cases in its order. And then thereafter, the State makes no effort to explain why those three cases do not mean that Mr. Marek received ineffective assistance of counsel. The State makes no effort to explain why these three cases do not mandate relief because such an argument cannot be made; those decisions clearly show that Mr. Marek received ineffective assistance of counsel at his penalty phase. Instead, all that the State can rely on are decisions that were rendered long before Williams v. Taylor, Wiggins v. Smith, and Rompilla v. Beard were decided.

ARGUMENT I, Part D: The standardless clemency process produces arbitrary executions.

As to this issue, the State's Answer Brief asserts:

> 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.

(Answer Brief at 44). Once again, the State's representative is simply not accurately representing the record.

In his motion to vacate that was filed on May 11, 2007, Mr. Marek set forth the following arguments:

> **10. Clemency**
>
> 44. Clemency is a critical stage of the capital process.[11] However, the ABA Report found Florida's clemency process to be lacking: "Given the ambiguities and confidentiality surrounding Florida's clemency decision-making process and that fact that clemency has not been granted to a death-sentenced inmate since 1983, it is difficult to conclude that Florida's clemency process is adequate."[12] ABA Report at vii. See Furman, 408 U.S. at 253 (Douglas, J., concurring) ("Under these laws no standards govern the selection of the penalty. People live or die, dependent on the whim of one man or of 12.").

(3PC-R. 42). In footnote 11, Mr. Marek stated:

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

In footnote 12, Mr. Marek stated:

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

> more arbitrariness in the decision making as to who is to be executed.

(3PC-R. 42). These allegations were repeated in the amended motion filed July 18, 2008.

Clearly contrary to the State's assertion in its Answer Brief, Mr. Marek did present his clemency argument to the circuit court. A citation to Harbison v. Bell was not included because the decision did not issue until April 1, 2009, well after the motion to vacate and the amended motion to vacate were filed.[11]

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[11]In a cryptic passage, the State in its Answer Brief asserts:

> 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.

(Answer Brief at 45). The purpose of this is unclear. Is the State's position that counsel should not take his obligation to pursue all available remedies for his client seriously? Undersigned counsel believes that he has a duty to his client that he does not take lightly. Just yesterday on April 30, 2009, undersigned counsel received a call from a hysterical father and step-mother reporting that counsel's father is having surgery on May 5th on his prostate and that his step-mother was told on April 30th that she had lymphoma of the skin. The situation that counsel finds himself is exceedingly stressful. But, he feels honor bound to his client of twenty years to try and demonstrate why his execution is wrongful and unconstitutional. That counsel feels that the time parameters that have been set are unfair to Mr. Marek is an appropriate matter to point out to this Court. That counsel feels obligated under the new decision in Harbison v. Bell to pursue a clemency application does not mean that counsel feels that he has a surplus of time. Instead, it should be understood for what it is, an unshakable belief that the

Moreover, the State in its Answer Brief ignores what the United States Supreme Court has said about the clemency process in a capital case. "Far from regarding clemency as a matter of mercy alone, we have called it 'the "fail safe" in our criminal justice system.'" Harbison v. Bell, Slip Op. at 12. Indeed, it is hard to understand as the State argues, that it is proper for the "fail safe" to occur before the judicial proceedings have occurred. Certainly having a clemency hearing first insures that it cannot act as a "fail safe" as our criminal justice system requires.[12] The State's Answer Brief makes no effort to address

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execution of John Marek is, at minimum, wrong, and that the death sentence that has been imposed and is scheduled to be carried out is arbitrary in the extreme.

As for the State's suggestion that Mr. McClain will violate some statute if he honors what he believes is his obligation under Harbison, that position was not asserted in the pleading that the State filed in federal district court. Nor has the State sought to file an extraordinary writ asserting that undersigned counsel's announced intention to prepare a clemency application is in violation of his registry appointment. If such a pleading were filed, undersigned counsel would be happy to explain that the statute cited by the State concerns limitations on the work that the State will compensate counsel for. He understands that he cannot file an application for clemency and expect to be reimbursed by the State. However, that does not preclude him from filing a clemency application on Mr. Marek's behalf when his time will be reimbursed by the federal government as dictated by Harbison.

[12]In Harbison, the United States Supreme Court explained that federal habeas counsel may develop in the course of his representation "the basis for a persuasive clemency application" which arises from the development of "extensive information about his [client's] life history and cognitive impairments that was not presented during his trial or appeals." Slip Op. at 13. The process that occurred in 1988 before the life history was investigated and developed cannot be the "fail safe" that is

how the 1988 proceeding was the "fail safe" that due process requires.[13]

ARGUMENT II: The Lackey claim.

As to this claim, the State says that Mr. Marek's claim is indistinguishable from similar claims raised by others. Oddly, Assistant Deputy Attorney General Snurkowski in this argument maintains that Mr. Marek has been litigious when she has been falsely asserting for years that between 1996 and 2001 he did nothing. Apparently, the facts according to the Assistant Deputy Attorney General change depending on what is convenient to win.

ARGUMENT III: The claim that may arise once Caperton is decided.

Mr. Marek has been very up-front that the decision in Caperton v. Massey has not issued. However because of the signing of the death warrant, Mr. Marek may be executed before the decision in a case that undersigned counsel has been

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envisioned by the United States Supreme Court.

[13]The State also does not address the fact that the public records disclosed on Monday, April 27, 2009, show that the State Attorney's Office was in contact with the Governor's Office and the Parole Commission in September of 2008 in order to provide information regarding Mr. Marek and his mental evaluations and to give the Governor guidance as to whether a warrant should be signed on Mr. Marek or whether mercy should be shown and a warrant signed on someone else. Of course, Mr. Marek and his counsel were not in the loop and not given the opportunity to set forth the reasons why mercy was warranted. It is this one-sided process in which the Assistant Deputy Attorney General who cannot get the facts right, but who wants to win the case, gets to be the one giving the Governor information that results in a process that is hardly a "fail safe", but instead a violation of due process and the Eighth Amendment.

monitoring because of its potential impact on Mr. Marek's death sentence. Again, undersigned counsel has focused upon Judge Kaplan's presiding over an evidentiary hearing in 1988 when he was required to listen to the testimony of his good friend, Hilliard Moldof and decide whether he had rendered ineffective assistance of counsel at Mr. Marek's penalty phase proceeding.

Yet, the State has insisted on misrepresenting the facts both in the circuit court and here. The State refuses to acknowledge the basis of Judge Kaplan's disqualification. The State keeps asserting that it was not premised upon Judge Kaplan's relationship with Mr. Moldof. However, the order of disqualification is very clear:

> 1. This Court finds that all of the grounds of the Defendant's several Motions to Disqualify are legally insufficient to disqualify the trial judge.
>
> 2. Over many years this Judge's personal relationship with Attorney Hilliard Moldof has developed into a close friendship with Attorney Moldof, his wife, Mrs. Zena Moldof, as well as the Moldof's children.
>
> 3. The court still feels it could be fair and impartial in this matter.
>
> 4. However, the court believes that the manifest appearance of impartiality is just as important as actual impartiality.
>
> 5. Accordingly, based upon the possible appearance of the court not being impartial, based upon the above stated reasons (and for these reasons only),
>
> It is hereby,
>
> ORDERED AND ADJUDGED that the undersigned Judge hereby recuses himself from further proceedings in this

matter.

(Order filed January 15, 1997). The State has ignored the record in its pursuit of a win.

CONCLUSION

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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by US Mail delivery to Carolyn Snurkowski, Assistant Deputy Attorney General, Department of Legal Affairs, The Capitol PL01, Tallahassee, Florida 32399-1050 on May 1, 2009.

CERTIFICATE OF FONT

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

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