IN THE SUPREME COURT OF FLORIDA

CASE NO. SC09-____

JOHN MAREK,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

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

INITIAL BRIEF OF APPELLANT/NOTICE OF APPEAL

MARTIN J. MCCLAIN
Florida Bar No. 0754773
McClain & McDermott, P.A.
Attorneys at Law
141 N.E. 30th Street
Wilton Manors, FL 33334
(305) 984-8344

COUNSEL FOR APPELLANT

PRELIMINARY STATEMENT

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

"R." -- record on direct appeal;

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

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

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

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

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

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

"4PC-R." -- record on fourth 3.851 appeal;

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

"Transcript" – transcript of May 6-7, 2009 evidentiary hearing.

REQUEST FOR ORAL ARGUMENT

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

PROCEDURAL HISTORY

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

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

The penalty phase was conducted on June 5, 1984. During the charge conference held before the evidentiary proceeding began in front of the jury, Mr. Marek's trial attorney set forth his objections to certain rulings that Judge Kaplan had made as to how the penalty phase would proceed:

> Additionally, I'd argue to the Court that I would like to comment on Mr. Wigley's having been sentenced to life imprisonment but I'm not going to in light of the Court's opinion that if I were to do that it would open up the possibility of Mr. Carney telling the jury the entire contents of Mr. Wigley's confession without me being given a chance to cross-examine Mr. Wigley. In light of that, I'm not going to mention the fact that Wigley was given a life sentence, but I think I should be able to do that without Mr. Carney by hearsay being

able to introduce the statement of Mr. Wigley when contrarily I'd like to introduce the document that purports to be Doctor Krieger's evaluation of my client but the Court thinks that's not proper because it's hearsay and not susceptible to cross examination.

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

* * *

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

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

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

person could disagree with the advisory as far as life imprisonment is concerned - That only an unreasonable person under the circumstances would life imprisonment. Any reasonable person would obviously advise the death penalty.

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

* * *

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

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

MR. MOLDOF: But - -

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

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

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

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

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

The jury heard no mental health testimony and none of Mr. Marek's life history. Only a jailer testified regarding Mr. Marek's conduct in jail (R. 1295). The jury was instructed on four aggravating circumstances.[1] By a 10-2 vote, the jury recommended death. On July 3, 1984, Judge Kaplan imposed death, finding no mitigating circumstances and four aggravating circumstances: (1) prior violent felony based upon Mr. Marek's contemporaneous conviction of kidnapping;[2] (2) murder committed while engaged in burglary; (3) murder committed for pecuniary gain; (4) heinous, atrocious or cruel (R.1472). Judge Kaplan also found that Mr. Marek and Wigley "acted in concert from beginning to end" (R. 1471).

Mr. Marek appealed.[3] This Court affirmed the convictions and death sentence. Marek v. State, 492 So. 2d 1055 (Fla. 1986).

After a death warrant was signed, Mr. Marek filed a motion

---

[1]During the Rule 3.850 proceedings in 1988, one of the four aggravating circumstances was ruled to have been erroneously relied upon in Mr. Marek's case. Judge Kaplan ruled that the error was harmless because there was no mitigating circumstances in Mr. Marek's case.

[2]This aggravator was subsequently ruled to have been erroneously found in Mr. Marek's case as a matter of law.

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

under Rule 3.850 on October 10, 1988. The motion presented twenty-two claims, including, *inter alia*, trial counsel failed to investigate and present mitigating evidence (Claims V, VI), the defense mental health expert provided inadequate assistance (Claim II), the jury's death recommendation was tainted by invalid aggravators (Claims XI, XII, XIII, XIV), the death sentence rests upon an unconstitutional automatic aggravator (Claim XX), the jury's sense of responsibility for sentencing was diluted (Claim XVII), and the jury was prevented from considering the co-defendant's life sentence and a mental health evaluation of Mr. Marek as mitigation (Claim IX)(1PC-R.1-118). Mr. Marek also filed a motion to disqualify Judge Kaplan on the basis of his letter to the Parole Board advising it that Mr. Marek had repeatedly raped the victim even though the jury had acquitted Mr. Marek of a sexual battery. Judge Kaplan denied this disqualification motion.

An evidentiary hearing was conducted on November 3 and 4, 1988 under the pendency of a death warrant. Judge Kaplan presided at the hearing and heard Mr. Moldof's testify on Mr. Marek's claim that Mr. Moldof rendered ineffective assistance. Judge Kaplan denied all of Mr. Marek's claims (1PC-R. 262-64, 487-88), although he found error in the use of the prior violent felony aggravator at the penalty phase (1PC-R. 266). Judge Kaplan concluded the error was harmless in light of the absence of

mitigation.

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

After a second warrant was signed in 1989, Mr. Marek filed a federal petition for a writ of habeas corpus. The district court issued a stay of execution, but subsequently denied relief. Mr. Marek appealed. In 1995, the Eleventh Circuit affirmed the denial of habeas relief. Marek v. Singletary, 62 F.3d 1295 (11th Cir. 1995).

Meanwhile in 1992, Mr. Marek had filed a second habeas corpus petition in this Court, in light of the decisions in Espinosa v. Florida, 112 S. Ct. 2926 (1992), and Sochor v. Florida, 112 S. Ct. 2114 (1992). This Court denied relief. Marek v. Dugger, 626 So. 2d 160 (Fla. 1993).

Thereafter while his Eleventh Circuit appeal was pending, Mr. Marek discovered new information and filed a second Rule 3.850 motion on July 22, 1993(Supp. 2PC-R. 1-98).[4] The 1993 Rule

[4]This motion raised the following claims: 1) Broward County's system for funding special assistant public defenders created a conflict of interest; 2) ineffective assistance of counsel at the penalty phase; 3) invalid aggravating factors; 4) automatic aggravating factor; 5) diminishment of jury's sense of responsibility for sentencing; 6) exclusion of mitigating evidence. In January of 1994, Mr. Marek supplemented this motion

3.850 motion incorporated the claims from the first Rule 3.850 motion because the prior "proceedings were tainted by the conflict" of interest arising as to the funding of the courts (Supp. 2PC-R. 1). The motion alleged that previously, "Mr. Marek challenged the adequacy of the [trial] mental health evaluation and the adequacy of his [trial] representation. Evidence was presented that investigation and mental health testing were not conducted in order to save taxpayers money and insure future court appointments"(Supp. 2PC-R. 4). On the basis of the conflict issue, a motion to disqualify Judge Kaplan was filed. It was subsequently amended in light of Judge Kaplan's appearance on a television show explaining his belief in harsh sentences for convicted criminal defendants.

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

On December 2, 1996, Mr. Marek filed a Supplemental Motion to Vacate raising a public records claim(Supp. 2PC-R. 139-46).

On January 15, 1997, Judge Kaplan issued an order of

---

with a Claim 7 alleging he was denied due process in post-conviction when he was required to litigate his initial post-conviction motion under the time exigencies created by a death warrant.

disqualification in which he 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).

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

Mr. Marek's amended Rule 3.850 motion was filed on September 27, 2001(2PC-R. 702-841). The motion raised twelve claims: 1)

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

The State filed its supplemental response on April 2, 2002 (2PC-R. 940-1045). Mr. Marek filed a reply to the State's supplemental response (2PC-R. 1046-60).

On September 30, 2003, the circuit court denied Rule 3.850 relief (Supp. 2PC-R. 650-64). Mr. Marek appealed (2PC-R. 1264-65). This Court issued a summary order affirming. Marek v. State, 2006 Fla. LEXIS 1425 (Fla. June 16, 2006).

In May of 2005, Mr. Marek filed a third petition for a writ of habeas corpus in this Court. This petition raised claims under Roper v. Simmons, 125 S.Ct. 1183 (2005), Wiggins v. Smith, 123 S. Ct. 2527 (2003), and Crawford v. Washington, 124 S. Ct.

1354 (2004). This Court also denied that petition. Marek v. State, 2006 Fla. LEXIS 1425 (Fla. June 16, 2006).

On May 10, 2007, Mr. Marek filed his third motion to vacate his conviction and sentence of death. In this motion, he challenged Florida's lethal injection protocol in light of the execution of Angel Diaz and he argued that his sentence of death was arbitrary and capricious within the meaning of Furman v. Georgia, 408 U.S. 238 (1972). While this motion was pending, on April 20, 2009, the Governor signed a warrant scheduling Mr. Marek's execution. The circuit court entered an order denying the motion to vacate on April 23, 2009. On April 27, 2009, Mr. Marek filed a motion for rehearing. On April 29, 2009, he filed his appeal in this Court. On May 8, 2009, this Court issued an opinion affirming. Marek v. State, – So. 2d – (Fla. May 8, 2009).

Meanwhile on May 1, 2009, Mr. Marek filed anther Rule 3.851 motion on the basis of newly discovered evidence.[5] On May 4,

---

[5]The motion contained three claims. The first was premised upon a declaration signed on April 29, 2009, from Michael Conley who indicated that when he was incarcerated with Mr. Marek's co-defendant, Raymond Wigley, he confessed that he was the one who strangled the victim in this case. Based upon this declaration, Mr. Marek alleged that his death sentence should be vacated.

The second claim was premised upon public records disclosed on April 27, 2009, showing that the State Attorney was providing the Governor with information about Mr. Marek and his case in September of 2008 in order to get clemency denied and a warrant signed. This was done without notice to Mr. Marek or his counsel and without Mr. Marek being provided with clemency counsel.

2009, Mr. Marek filed a supplement to the Rule 3.851 motion.[6] Also on May 4, 2009, the circuit court ordered an evidentiary hearing on the motion and scheduled it to begin on May 6, 2009. The State filed a response to the motion to vacate on May 5, 2009, at 4:45 PM.

At the beginning of the evidentiary hearing, Mr. Marek filed a motion for judicial disqualification which the circuit court treated a successive motion under Rule 2.330(g). The circuit court ruled that Judge Kaplan's order in January of 1997 recusing himself meant that the motion filed on May 6, 2009, was successive. The circuit court then conducted an inquiry and considered matters outside the four corners of the motion in order to make factual determinations. Thereafter, the circuit court denied the motion for disqualification.

Testimony was heard by the circuit court on May 6th and May

Given that over 50 death row inmates are in procedural postures as ripe for a warrant as Mr. Marek was on April 20, 2009, the extension of mercy to those other individuals while Mr. Marek was picked for execution violated the Eighth and Fourteenth Amendments.

The third claim concerned the new discovery that the State drafted the order denying Mr. Marek's Rule 3.850 motion in 1988 on an undisclosed *ex parte* basis, and that the failure of the State to disclose the *ex parte* manner in which the order denying relief was created violated due process.

[6]In this supplement Mr. Marek relied upon an affidavit of Jessie Bannerman that was executed on May 1, 2009, that while he was incarcerated with Wigley, Wigley confessed that he choked the victim to death. This affidavit was proffered in support of Claim I.

7th. On May 6th, Jessie Bannerman was called and he testified that he had been incarcerated with Raymond Wigley. He first met Mr. Wigley while they were both in the Broward County jail in 1983. Later, they were incarcerated together first at Union Correctional Institution and then at Martin Correctional. While at Martin, Bannerman testified that Wigley confessed to choking the victim to death:

> Q. And did he tell you what -- how the -- did he tell you anything about the woman?
>
> A. He said that she was either a teacher or she was associated with a university or lived near a university, a school teacher or lived near a university. I didn't get the whole complete drift of it.
>
> But he had broke it down to me that he had encountered this woman on this particular day, saying that the car or something had malfunctioned, and she was with another lady, and he just happened to pick her up.
>
> Q. Now, in this -- was there any discussion about sexual activity with her?
>
> A. He said he had sex with her.
>
> Q. And in terms of -- you said that he killed her. Did he explain how he did that?
>
> A. He said he choked her.
>
> Q. Did he, at any time, indicate anybody else was involved?
>
> A. No, sir.
>
> I thought, up until this day, that he was entirely the only one responsible for what he was charged with. I didn't even know that he had a co-defendant up until this day.

Q. And that's based on what he told you?

A. Yes, sir.

Q. And did he tell you why the woman was killed?

A. Yes.

Q. What did he say?

A. He felt that she would later be able to positively identify him and he said he didn't feel he could afford to take that chance.

(Transcript of May 6th at 180-82).

In his testimony, Bannerman later reiterated that it was while they were at Martin Correctional that Wigley provided his detailed account of what he had done and why:

Q. Is it then that he explained about his case?

A. About the reason why he felt he had to take her out because he thought he might be identified and he didn't want to take that chance, because I asked him, I said, why did you kill her if you had already gotten what you wanted from her, which was money and sex?

He said, I couldn't take a chance that she could have positively identified me.

(Transcript of May 6th at 193).

Testimony was heard on May 7th from Michael Conley who indicated that he had become good friends with Wigley while they were incarcerated together at Belle Glades Correctional:

While you were incarcerated, did you have occasion to know an individual by the name of Ray Wigley?

A. Yes, I did.

Q. Can you explain how you came to know him?

A. I was at Belle Glades, Florida, Belle Glades Correctional, and I met Ray Wigley there and we became good friends.

(Transcript of May 7th at 215-16).

Later, they met again at another prison and Wigley wanted help on his case:

There was threats on my life from the correctional, so they kept moving me around and finally, I wound up at Lake Correctional, but I met Ray Wigley again at Columbia Correctional.

Q. So, you indicated that he approached or came to talk to you about his case?

A. Right.

Q. Why did he come to talk to you about his case?

A. Because my wife worked for a law firm.

Q. Was he wanting to see what advice you could give him or –

A. Right.

Q. Okay.

A. He wanted to see if I could get him a lawyer through somebody that maybe I knew or she knew, pro bono, I believe.

Q. Did you then have a discussion with him about this possibility?

A. Yes.

(Transcript of May 7th at 217).

Conley testified as to the details of his discussion with Wigley about Wigley's case:

So, he said, well, he said, I was involved in a

murder, you know that. We met a lady on the Florida Turnpike. We took her and wound up having sex with her along the way, on the Florida Turnpike, forcing her and beating her and took her to someplace in Florida -- and I can't even tell you where -- I thought it was a warehouse and I was told that it was a lifeguard station or something.

I said, well, what happened? He said, we repeatedly raped her. I said, you know, who? He said, me and the other guy that's on death row.

I said, well how come you're not on death row? He said, well, I got a life sentence.

I said, Ray -- I looked him right in the eye -- I said, Raymond, did you kill woman, and he said, no. I said, Ray, again, did you kill that woman? He said, no. Then he said -- I said to him, I said, Ray, I'm not going to help you.

He said, I killed the woman, Mike. I strangled her. I said to him, how did you strangle her? He said with a scarf or a handkerchief, I believe. It's been so long.

Knowing Raymond Wigley -- I told you I'm going to be honest about this -- he was a wimp, a real wimp, and it was hard for me to visualize him killing anybody. But in the Department of Corrections, wimps are the ones you got to watch out for. They'll kill you first before they get killed, and so whether he killed her or not, I don't know. That's up to the supreme court to decide. I can only tell you what he told me.

He was crying when he told me that, so, I tended to believe him or he was a heck of an actor, one or the another.

BY MR. McCLAIN:

Q. Can you describe -- was he sobbing or was he just crying.

A. He was crying, and he said he felt very bad for the man on death row. He said, guilt is -- I feel guilty because I should be there, too.

(Transcript of May 7th at 219-21).

Conley explained why he pushed Wigley when Wigley first denied the killing:

> Q. When he first told you that he didn't kill her and you said Ray, why did you say, Ray?
>
> A. Because I saw something in his eyes that was different.
> You know, I'm a former entertainer. I had performed in -- all over the country as Elvis years ago, and I really believe I can tell when somebody is being honest or dishonest, even to this day, and I felt he wasn't telling me the whole truth.
>
> Q. And so that's why you said, Ray –
>
> A. Absolutely.
>
> Q. -- both times?
>
> A. Absolutely, and then, I decided not to help him at all.
>
> Q. Okay, after he had broke down?
>
> A. Right.

(Transcript of May 7th at 223-24).

Conley was asked what he remembered Wigley saying about his co-defendant, Mr. Marek:

> Q. Now, did Mr. Wigley say anything about his co-defendant?
>
> A. Beg your pardon?
>
> Q. Did Mr. Wigley say anything about his co-defendant?
>
> A. Yes.
>
> Q. What did he say?

A. He said that he felt guilty about the man being on death row. I didn't know his name. I'm sure he told me but I didn't remember it until I saw his picture.

Q. Okay, and did he describe what kind of person he was?

A. He said he was -- is it okay to say this?

Q. Yeah.

THE COURT: Yes.

THE WITNESS: He said he was slow and a fairly big guy, I guess, but he was slow.

(Transcript of May 7th at 234-25).[7]

When Mr. Marek's counsel sought the issuance of a writ of habeas corpus ad testificandum to bring Robert Pearson to the courthouse to testify, the State offered to stipulate as to what Robert Pearson would testify to:

MS. SNURKOWSKI: Your Honor, at this point, the state will stipulate that this individual will say that Wigley told him that he killed Adele Simmons.

THE COURT: If you stipulate to it then is there any –

MR. McCLAIN: May I confer with my co-counsel, please?

THE COURT: Yes.

MS. SNURKOWSKI: Sometime within the last 25 years.

MR. McCLAIN: Just to repeat, again, the state's stipulation is that –

[7]The State conducted no cross-examination of Conley.

MS. SNURKOWSKI: Could you read the record back?

(Thereupon the court reporter read the requested portion of the record)

MR. McCLAIN: I'm willing to accept the stipulation, Your Honor.

THE COURT: Okay, thank you very much.

(Transcript of May 6th at 202-03). Accordingly, Pearson did not testify. However, it was accepted as fact that his sworn testimony would also be that Wigley had confessed to him that he was the one who killed the victim.

Mr. Marek called trial counsel, Hilliard Moldof, to testify. Mr. Moldof testified regarding what occurred at Mr. Marek's trial regarding the presentation of Mr. Wigley's life sentence as mitigating evidence:

> The judge -- as I recall it, the judge made a -- I told the judge my intent to introduce the life sentence, and the judge said if I did that I would open the door and he would allow the state to introduce just the statement and not require Mr. Wigley to testify, such that I would not have my right to confrontation and cross examine of Mr. Wigley.
>
> As I recall, it was, you know like a Hobson's choice. I was in a position where I had to make a decision at the time, although I felt he was wrong, I felt the judge was wrong about that.
>
> Q. So, you felt like you were having to choose between the confrontation clause --
>
> A. Right.

(Transcript of May 7th at 241-42).[8]

[8]As to the significance of evidence that a co-defendant has received a life sentence, Mr. Moldof testified:

However when Mr. Moldof was asked to review the declaration of Conley and the affidavit of Bannerman and indicate how it would have effected him and what was presented at trial, the State objected to his testimony:

> Q. Now, if you had had, back in 1984, a declaration from Mr. Conley, like that, available -- obviously, it wasn't because it's dated 2009 -- if you had something like that available or Mr. Conley as a witness to testify in person, live, would that have affected your calculus at the penalty phase in terms of presentation of the life sentence for Mr. Wigley?
>
> MS. SNURKOWSKI: Your Honor, I object. Now, again, this is not relevant to anything. This is sheer speculation.

> Q. Is it your experience that a life recommendation for a co-defendant is a significant factor for a jury?
>
> A. I think it's probably one of the most significant factors.
>
> As a matter of fact, recently, I tried a case in this courthouse, Anthony Bryant, in front of Judge Bidwell. It was a -- the state asked for the death on it. It was -- Mr. Sheinberg was the prosecutor and it had a co-defendant -- I'll think of his name -- but the problem was --
>
> MS. BAILEY: Objection to relevancy.
>
> THE COURT: I sustain as to relevancy.
>
> THE WITNESS: Well, in terms of its power, I think it's the most powerful mitigator -- one of the most powerful mitigators, I should say. I think the mental mitigators are probably equally if not more.
>
> But to tell the jury that the co-defendant got a life sentence, I think, you know, certainly makes them pause a lot more when they think they're equally culpable.

(Transcript of May 7th at 242-43).

THE COURT: I think it is sheer speculation so I'll sustain the objection.

(Transcript of May 7th at 244-45).

Mr. Marek then proffered Mr. Moldof's testimony:

THE WITNESS: Well, in light of the court's ruling of it not being relevant, the only thing I would say is -- and it may be that it is relevant in my mind a little bit -- if I had this in that equation with Judge Kaplan where I had to choose between putting in that -- putting in the life recommendation and then the confession would have come in, if I had had somebody like this to rebut the confession, to me, that might have balanced out -- I could have then put on Mr. Conley -- I could have put in the life recommendation, the state introduces the confession, I can't cross examine Wigley, but then I call Conley to rebut the bad parts of the confession where he blamed my client, and certainly, you know, could have argued to the jury then, you know, he was putting himself in the best light, you know, in a police confession, and here's a statement of an individual to whom he confessed from whom he never expected to gain any benefit from, so, this would probably be more honest than the police confusion.

So, yeah, that would have been something I could have used to circumvent the court's ruling and then I could have had both. I could have had the life recommendation and I would have left the confession come in.

BY MR. McCLAIN:

Q. And continuing, as the proffer, so, that would have been important for you to have?

A. Very important.

I mean, that would have perhaps -- you know, I think that could have swayed the balance. I would have taken the life recommendation in front of the jury because I really do feel it's important.

(Transcript of May 7th at 247-48).

As to the Bannerman affidavit, Mr. Moldof's proffered testimony was:

BY MR. McCLAIN:

Q. Have you had a chance to read the Bannerman affidavit?

A. Yes.

Q. And basically, the same question as to that. Obviously, that was not available back in 1984, but is that also something that would have been important for you have in making the decision as to how to proceed at the penalty phase?

A. Well, for the same reasons as Mr. Conley's, yes.

Q. And in fact there's two as opposed to one, is that also significant?

A. Obviously. I mean, the more -- if you had more it's better, in terms of convincing the jury he's made those statements.

(Transcript of May 7th at 250).

As to Claim II of the motion to vacate, the circuit court refused to allow Mr. Marek present any of the proffered evidence in support of the claim.[9] The circuit court concluded that

---

[9]The State argued that Mr. Marek could not present evidence on this issue saying:

MS. SNURKOWSKI: Your Honor, I think I argued yesterday that this is a repeat or this is an attempt to re-argue an issue that was raised in the previous rule 3.51 motion. This, again, is an issue as to clemency, some -- even the verbiage is the same with regard to allegations that Mister -- this is a freakish application of clemency application with regard to Mr. Marek and that there other individuals that are currently in the same position that he might be in, and therefore, why was he the one selected and the other individuals not selected.

That's a matter for the governor and those are the clemency executive privileges of the governor to make

clemency was an executive function and that it had no authority to address Mr. Marek's challenge that the manner in which the clemency process was functioning was unconstitutional (Transcript of May 7th at 266-72, 371, 386).

As to Claim III of the motion to vacate, Mr. Marek called Judge Kaplan to testify. Judge Kaplan acknowledged that back in the late 1980's he often had the State draft orders for him ruling on motions to vacate:

> [Q.]Well, let me ask you, what was your practice while you were a judge in terms of orders. Did you usually have attorneys prepare poposed orders for you or did you usually have your judicial assistant write the orders for you or a law clerk or how -- what was your practice?
>
> A. Well, either way.
>
> I would write some, and sometimes, I'd ask the party that I was ruling in favor of, I'd called him, and say, this is what I want you to do, prepare me an order of this nature or possibly, even put it on the record.

> those determinations. The Attorney General's Office -- the attorney general, personally, is a member of the executive clemency board and he is involved with regard to that and always has been. That's just the structure we have in Florida.
>
> The governor is the individual who, as I've indicated on our pleadings, is a necessary vote for clemency, but he is the absolute vote not for clemency, and that is, if he doesn't vote for it then no clemency is given and the case does not go.
>
> So, these are decisions and matters that are within the power of the executive and the governor with regard to who and who does not get clemency.

(May 7th Transcript at 264-65).

Q. Okay.

A. And they would prepare it, and if I didn't like it, I'd change it, and I would do my own if I had to, but either way.
I'm sure I've done it both ways.

Q. And to the best of your recollection, did you practice change over time or is that just the way it was all the time, or did you do one over the other more earlier or later, or what can you tell me about that?

A. Well, as time went on, I believe, the law stated that the judge should always do his own.

Q. Okay.

A. So, I always did my own, since that seemed to be the rules.

Q. I don't know if -- the case named Rose v State coming out in 1992, does that ring any bells in terms of that was the change that came about?

A. It doesn't ring a bell but I remember the case because its from this area.

(Transcript of May 6th at 110-11).

Though Judge Kaplan was able to recognize the order of recusal in Mr. Marek's case as one he had written himself, he was unable to reach that conclusion as to the 1988 order denying Mr. Marek's motion to vacate:

A. I dictated this, I can tell you that.

Q. Okay.

A. Nobody could do that but me.

Q. Okay.

A. I mean, there was no grounds for his motion, I thought, to recuse myself, but I did it anyway so that he would feel more comfortable.

* * *

Q. This is the -- it's page 261 of the post-conviction record. It's the order denying the motion to vacate. I'm going hand you this document.

A. Yes.

Q. And you can see that it's -- you can see that it was entered November 7th of '88?

A. Okay.

Q. And you can look at the last page and I think it shows your signature on it or an indication that you had signed the original.

A. Yes.

Q. At this point in time, do you recall who wrote that order?

A. Can I look at it?

Q. Absolutely.

A. Your question again, is?

Q. My question is, at this point in time, are you able to tell whether that is an order that you would have drafted yourself or is that something that you would have had one of the parties prepare for you?

A. I don't have a clue.

(Transcript of May 6th at 113).

On May 8, 2009, at 6:15 PM, the circuit court entered its order denying the motion to vacate. Thereupon, this Court issued an order directing Mr. Marek to submit his initial brief by 4:00 PM on Saturday, May 9, 2009.

STANDARD OF REVIEW

The claims presented in this appeal are constitutional

issues involving mixed questions of law and fact and are reviewed *de novo*, giving deference only to the trial court's factfindings. Stephens v. State, 748 So. 2d 1028, 1034 (Fla. 1999); State v. Glatzmayer, 789 So. 2d 297, 301 n.7 (Fla. 2001).

ARGUMENT

ARGUMENT 1: THE CIRCUIT COURT ERRED IN TREATING MR. MAREK'S MOTION FOR JUDICIAL DISQUALIFICATION AS SUCCESSIVE AND IN DENYING THE FACIALLY SUFFICIENT MOTION.

At the commencement of the evidentiary hearing on May 6th, Mr. Marek filed a motion for judicial disqualification that provided in pertinent part:

> 1. On May 4, 2009, undersigned counsel was required to travel to Tallahassee to orally argue Mr. Marek's appeal currently pending before the Florida Supreme Court. Following the argument while undersigned counsel was waiting for his plane flight back to Fort Lauderdale, he went to lunch. At around 2:45 PM while finishing up his lunch, he received a phone call from Roseanne Eckert, an attorney with the Office of the Capital Collateral Region Counsel for the Southern Region (CCRC-South). Ms. Eckert asked counsel if he was aware of the order that had just been entered in Mr. Marek's case. In response to undersigned counsel's puzzlement, Ms. Eckert explained that a fax had been received at CCRC-South. The fax consisted of orders from this Court scheduling an evidentiary hearing for Wednesday, May 6th. Ms. Eckert did not know why the orders had been faxed to CCRC-South, but she had wanted to make sure that the undersigned was aware of them. Since undersigned counsel was unaware of them, he asked Ms. Eckert if she could send them to him electronically. She indicated that she would and the conversation ended.
>
> 2. Immediately thereafter, the undersigned advised his law partner, Linda McDermott, of the ordered evidentiary hearing. While talking to Ms. McDermott, the investigator working on Mr. Marek's case, Dan Ashton, called Ms. McDermott on her phone.

When Ms. McDermott took the call from Mr. Ashton, he was between prison appointments and had just called Mike Conley to check in with him. At that time he had been advised by Mr. Conley that a police officer in Maine, Sergeant Gould, had been to see him on Saturday, May 2nd, and had called back on the morning of the May 4th to tell him that there was going to be an evidentiary hearing in Florida and that the police officer would be transporting Mr. Conley to the hearing. Sometime after noon on May 4th, the police officer called back and advised Mr. Conley to be ready at 5:30 AM the next morning because the police officer would be at house then to pick him up and transport him to the evidentiary hearing. The police officer did not tell Mr. Conley where they would be flying to or provide any flight information, just that Mr. Conley needed to be ready at 5:30 AM to be transported to the hearing. When Mr. Conley advised Mr. Ashton that an evidentiary hearing had been scheduled and that the State had arranged for a police officer to transport Mr. Conley to the hearing, it was the first that Mr. Ashton had learned that such a hearing was in the works. When Mr. Ashton then spoke with Ms. McDermott and to tell her that somehow Mr. Marek's witness in Maine, Mr. Conley, had hours before been advised that an evidentiary hearing was to be conducted and that the State was transporting Mr. Conley with a police escort, she was dumbfounded.

3. When undersigned counsel got on his laptop and checked his email, he learned that this Court had sent the order granting an evidentiary hearing in electronic form to him at 1:28 PM on Monday, May 4, 2009. This was hours after Mr. Conley had been advised in Maine that the evidentiary hearing had been ordered. Such a sequence of events could only be explained by one of two circumstances. Either the State without knowing that a hearing had been scheduled had decided to attempt to transport Mr. Conley to a location where Mr. Marek's counsel could not locate him, or the State had received information on an *ex parte* basis about the coming order scheduling the evidentiary hearing and had given the State the opportunity interfere with Mr. Marek's ability to obtain the testimony of his witness.

4. As Mr. Marek's counsel tried to unravel what was going on, he received no calls or communication from counsel for the State. When he filed a motion

asking that the State be required to given Mr. Marek's counsel access to Mr. Marek's witness, again counsel for the State maintained its silence. When Ms. McDermott and Mr. Ashton went to the Fort Lauderdale airport to wait for afternoon flights from Charlotte, North Carolina, Mr. Ashton approached two men to inquire if one of the two was Sgt. Gould with the Waterville, Maine police department. When he learned that he was in fact Sgt. Gould, he advised Mr. Ashton that Mr. Conley did not get on the plane with him, and did not provide any further information.

5. Mr. Ashton then began trying to call Mr. Conley at his residence in Maine. Ultimately, Mr. Ashton was able to reach Mr. Conley who advised that during the night of May 4th he had to go to the hospital because of his poor health. Mr. Conley indicated that he was not released from the hospital until 7:30 AM and thus was not home to be picked up by Sgt. Gould at 5:30 AM. However, Mr. Conley had spoken with Sgt. Gould several times in the course of the day and had been advised that he would need to go to the Waterville Police Department at 11:00 AM on Wednesday, May 6th, so that he could testify over the phone. Sgt. Gould assured Mr. Conley that it had been worked out so that he could testify over the phone and would not be required to appear in person. Since undersigned counsel was not privy to any discussions at all regarding Mr. Conley, Mr. Marek's witness, testifying over the phone, it is clear that Sharon Ireland and the prosecutors on Mr. Marek's case had reached this agreement *ex parte* as to how the case was to proceed and the manner in which the testimony of Mr. Marek's witness would be heard.

6. As these events were unfolding on May 5, 2009, undersigned counsel ran into Ms. Eckert and thanked her for the heads up about this Court's order of May 4th. In the ensuing conversation, Ms. Eckert advised undersigned counsel that on April 24, 2009, that she had a hearing set in the Broward County Courthouse in the case of *State v. Williams*. The hearing was set for 4:00 PM, and Ms. Eckert arrived early for the hearing, before 4:00 PM. Ms. Eckert saw Sharon Ireland and briefly spoke to her. When Carolyn McCann, Assistant State Attorney, arrived, Ms. Ireland excused herself and said that she had something to give Ms. McCann in a death warrant case. Ms. Ireland

assured Ms. Eckert that she wasn't going to be talking to Ms. McCann about Ms. Eckert's case, so she need not worry. Ms. Ireland and Ms. McCann spoken intently for several minutes, presumably about the death warrant case. Ms. McCann then approached Ms. Eckert and asked if she minded if Ms. McCann did not stay for the hearing in *State v. Williams*, and instead let the Assistant Attorney General who was present represent the State once the case was called by the judge. When Ms. Eckert consented, Ms. McCann and Ms. Ireland walked away together.

7. According to his email, undersigned counsel received an email at 4:45 PM on April 24, 2009, informing him that this Court had scheduled a hearing on the public records requests. This was after Ms. Ireland found Ms. McCann to deliver some papers to Ms. McCann in a death warrant case and then spoke with Ms. McCann intently for a few minutes and then left with her.

8. Thus, Ms. Ireland was seen delivering papers to the assigned prosecutor in a death warrant case on April 24th. On May 4th, the State knew hours before this Court released its order scheduling an evidentiary hearing that a hearing was being ordered and used that knowledge to tamper with Mr. Marek's witness. And on May 5th, the State conveyed to the witness that it had been worked out that he would have to go to the Waterville, Maine police department to testify over the phone; yet, Mr. Marek's counsel was not privy to such an arrangement.

9. From these circumstances, it certainly appears that Ms. Ireland is assisting the State on an *ex parte* basis in its efforts to carry out Mr. Marek's execution on May 13th.

10. In *Randolph v. State, 853 So. 2d 1051, 1057 n. 6 (Fla. 2003)*, the Florida Supreme Court explained:

> The State argues no improper communication took place because there was no evidence of contact between the judge and the State. We reject this argument because Kohler, working as Judge Perry's **law clerk**, was also prohibited from engaging in **ex parte** communication. *See Parker v. Connors Steel Co., 855 F.2d 1510, 1525 (11th Cir.1988)* ("A **law**

> **clerk**, as well as a judge, should stay informed of circumstances that may raise the appearance of impartiality or impropriety. And when such circumstances are present appropriate actions should be taken."); *Hall v. Small Business Admin., 695 F.2d 175, 179 (5th Cir.1983*) (" **Law clerks** are not merely the judge's errand runners. They are sounding boards for tentative opinions and legal researchers who seek the authorities that affect decision. Clerks are privy to the judge's thoughts in a way that neither parties to the lawsuit nor his most intimate family members may be."); *Kennedy v. Great Atlantic & Pacific Tea Co., 551 F.2d 593, 596 (5th Cir.1977*) ("It was [the **law clerk's**] duty as much as that of the trial judge to avoid any contacts outside the record that might affect the outcome of the litigation.") Moreover, Florida's Code of Judicial Conduct defines "judge" as follows: "When used herein this term means Article V, Florida Constitution judges and, where applicable, those persons performing judicial functions under the direction or supervision of an Article V judge."
>
> Thus, a staff attorney's actions are attributed to the judge for whom she is working as a matter of law. As a result, Ms. Ireland's *ex parte* contact with the State and the assistance she has provided the State must be attributed to the presiding judge for purposes of a motion for judicial disqualification.

(Motion for Judicial Disqualification filed May 6th at 2-6)(footnotes omitted).

Judge Weinstein in addressing the motion indicated that he first had determined that the motion was successive under Rule 2.330(g). This ruling meant that Judge Weinstein would not review the motion under the standard applicable to initial motions for disqualification under Rule 2.330(f). Implicit in Judge Weinstein's ruling is that if the motion were an initial motion, it was facially sufficient (Transcript of May 6th at 12).

Mr. Marek's counsel objected to the treatment of the motion as a successive within the meaning of Rule 2.330(g). The argument proceeded as follows:

> [THE COURT:] Mr. McClain, you previously moved to disqualify Judge Kaplan.
>
> MR. McCLAIN: I did, but I attached the order showing that Judge Kaplan did not grant my motion to disqualify, he disqualified on the basis of his own decision, because if you read his order --
>
> THE COURT: I did. I read it previously.
>
> MR. McCLAIN: Sorry, Your Honor.
>
> THE COURT: No, no, no. Thank you. I am very familiar with the file. I've probably read it now five times.
>
> MR. McCLAIN: Okay.
>
> THE COURT: But that's an interesting question. But he did it on the basis of your motion, though.
>
> MR. McCLAIN: No, he says he's denying the motion, and then -- the way I read the order --
>
> THE COURT: Yes.
>
> MR. McCLAIN: -- he says he's denying the motion, and then he says, but on the basis of my relationship with Mr. Moldoff, I do believe I need to disqualify myself for the appearance of -- to avoid the appearance of impropriety.
> It's paragraph 1 where he addresses the motions.
>
> THE COURT: Right.
> This cause comes before the court on the defendant's supplement motion to disqualify trial judge.
> Having reviewed Florida Rules of Judicial Administration Rule 2.610 and applicable case law, the court finds as follows, and then Judge Kaplan found that the grounds to disqualify are legally insufficient, then that he had a personal relationship

with Attorney Moldoff, his wife, Mrs. Zina Moldoff, as well as with the Moldoff children. The court still finds it could be fair and impartial in this matter, however, the court believes -- I'm kind of paraphrasing but you're familiar with it.

MR. McCLAIN: I am. I have it in front of me, Your Honor.

* * *

MR. McCLAIN: And actually he used the words, recuses himself.

THE COURT: Yes, yes. I think we use those words interchangeably often.

MR. McCLAIN: Well, I mean, to some extent, perhaps we're focusing on words trying to discern whether or not this is a first or a second motion. I think we're on the same page --

THE COURT: Right.

MR. McCLAIN: -- and we're looking at this order, and the way I read this order, the motion that I have filed today would be the first motion.

I understand that Your Honor has already indicated that you think it is a second.

* * *

[MR. McCLAIN:] So, the judge's ruling is quite clear that the motions that have been filed were legally insufficient, and so, if we go by the fact that a motion is legally insufficient it doesn't count as the first motion.

The only motion that counts as the first motion is a motion that's granted, and he specifically -- he makes it clear he's not granting the motions because he finds them legally insufficient and he is -- and it's not uncommon for judges to recuse themselves on their own and that does not count as a motion to disqualify.

THE COURT: Even if it's precipitated by the attorney's motion?

MR. McCLAIN: He says it's not. He's addressing

> -- he already ruled on the motions to disqualify previously, and he's addressing -- he's saying, I'm denying that, but -- over many years this judge's personal relationship with attorney Hilliard Moldoff has developed into a close friendship with Attorney Moldoff, his wife, Mrs. Zina Moldoff as well as with Moldoff's children.
>
> So, he is raising a matter that he, personally, feels, under the code of judicial conduct, requires him to disqualify himself.

(Transcript of May 6th at 12-19). Ultimately, Judge Weinstein rejected Mr. Marek's argument and treated the motion as successive and governed by Rule 2.330(g).

Rule 2.330(g) provides in pertinent part: "If a judge has been previously disqualified on motion for alleged prejudice or partiality under subdivision (d)(1), a successor judge shall not be disqualified on a motion by the same party unless . . . ." The issue before this Court is whether Judge Weinstein correctly determined that Judge Kaplan's order in January of 1997 fit within this provision such that Mr. Marek's motion on May 6, 2009, was successive.

Clearly, Judge Kaplan's order stated: "This Court finds that all of the grounds of the Defendant's several Motions to Disqualify are legally insufficient to disqualify the trial judge." The order then goes on to raise a matter not raised by Mr. Marek, Judge Kaplan's relationship with Hilliard Moldof and his family. Based upon this relationship, the order concludes by setting forth: "the undersigned Judge hereby recuses himself from further proceedings in this matter."

The language employed by Judge Kaplan implicates Rule 2.330(i), which provides: "Nothing in this rule limits the judge's authority to enter an order of disqualification on the judge's own initiative." This provision dovetails with Canon 3(E)(1) of the Code of Judicial Conduct. Canon 3(E)(1) provides in pertinent part: "A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might be reasonably questioned . . . ."

Recently, this Court stated: "[Judge Kaplan] recused himself from presiding over Marek's successive postconviction motion to avoid any appearance of impropriety resulting from his recently developed close friendship with Marek's trial counsel." Marek v. State, – So. 2d – , Slip Op. at 16 (Fla. May 8, 2009).[10] When a judge recuses himself on his or her own initiative as required by Canon 3(E)(1), it is not on the basis of a motion to disqualify, and thus it does not mean that any subsequent motion for judicial disqualification is successive.

Recently this Court found error in a circuit court's denial of a motion for disqualification. Wickham v. State, 998 So. 2d 593 (Fla. 2008). There, a motion for judicial disqualification had been filed while Judge McClure presided. He did not grant the disqualification, but instead retired thereby removing

[10]Since Mr. Marek was unaware of the "close friendship", he was not in a position to have filed a motion for judicial disqualification on the basis of the "close friendship".

himself from the case. When Mr. Wickham later filed another motion for judicial disqualification, this Court did not find it successive within the meaning of Rule 3.220(g) and require a finding that the successor judge was biased or could not be fair.[11]

Further, this Court has previously recognized that the rules governing judicial disqualification do not change simply because a case is pending under an active death warrant. In Suarez v. State, 527 So. 2d 190 (Fla. 1988), this Court ruled that a facially sufficient initial motion for judicial disqualification had been erroneously denied.[12] This error required a reversal

---

[11]Likewise, in the case of capital postconviction defendant Victor Farr, Mr. Farr's postconviction counsel moved to disqualify Judge Agner form presiding over his (Farr's) postconviction proceedings. See Columbia County Case No. 91-002 CF, pending before this Court on appeal from the denial of Rule 3.851 relief on SC08-1406. Judge Agner denied Mr. Farr's motion as being legally insufficient. However, thereafter, Judge Agner *sua sponte*, recused himself from presiding over Mr. Farr's postconviction proceedings. Judge Douglas was assigned to preside over the proceedings. Simultaneously with filing Mr. Farr's amended Rule 3.851 motion, Mr. Farr's counsel also filed a motion for disqualification of Judge Douglas and the entire Third Judicial Circuit due to the fact that both Mr. Farr's trial attorney and prosecutor were judges in the Third Judicial Circuit. Judge Douglas granted the motion under the standards set forth in Rule 2.330(f)(formerly Rule 2.160(f)). – the standards for an initial motion. The State appealed and this Court affirmed Judge Douglas' ruling. State v. Farr, SC05-1289, Order (Dec. 5, 2006). The State did not argue that the motion was successive, yet, these are exactly the same circumstances before Judge Weinstein in Mr. Marek's case.

[12]In Suarez, much as here in Mr. Marek's case, the motion for judicial disqualification was premised upon conduct occurring after the death warrant had been signed which were found to be

even though a five day evidentiary hearing had been conducted while Mr. Suarez had an active death warrant pending and a scheduled execution.[13] Thus, the rules do not change simply because the Governor scheduled an execution.

Judge Weinstein erred in treating the motion to disqualify as successive and addressing whether bias or prejudice had actually been shown. When a judge goes beyond the facial sufficiency of an initial motion for judicial disqualification, the act of addressing the court's own impartiality and responding to the allegations itself requires judicial disqualification. Suarez v. Dugger; Lake v. Edwards, 501 So. 2d 759, 760 (Fla. 5th DCA 1987). Accordingly, Judge Weinstein was required to disqualify himself. The order denying Rule 3.851 relief must be reversed and the matter remanded.

ARGUMENT 2: THE NEWLY DISCOVERED EVIDENCE FROM THREE WITNESSES THAT RAYMOND WIGLEY CONFESSED THAT HE WAS THE KILLER AND NOT MR. MAREK WARRANTS RELIEF 3.851 RELIEF BECAUSE IT WOULD HAVE PROBABLY RESULTED IN A SENTENCE OF LESS THAN DEATH HAD IT BEEN HEARD BY THE JURY AND WOULD HAVE ESTABLISHED THAT MR. MAREK'S SENTENCE STOOD IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

A. Introduction.

At the just concluded evidentiary hearing, Mr. Marek

---

sufficient to place a reasonable person in fear of not receiving a fair hearing before an impartial tribunal.

[13]In Suarez after this Court vacated the denial of Rule 3.851 relief and remand for a second evidentiary hearing before a different judge, following the completion of the second four-day evidentiary hearing the new judge granted Rule 3.850 relief and vacated Mr. Suarez's death sentence.

presented two witnesses who testified regarding Raymond Wigley's tearful admission that he was responsible for the murder of Adele Simmons. The State stipulated that a third witness would also testify that Mr. Wigley confessed the murder to him as well.

The circuit court denied Claim I of Mr. Marek's motion to vacate stating three reasons. First, the circuit court indicated that "Marek is attempting to relitigate his prior assertions that Wigley was the murderer, and he should not be sentenced to death while Mr. Wigley was sentenced to life in Florida State Prison" (Order of 5-8-09 at 6). The circuit court said that "[t]his issue was raised previously and decided adversely to the Defendant on the merits. Marek v. State, 492 So. 2d 1055 (Fla. 1986)." (Order of 5-8-09 at 6).

The second reason given by the circuit court for the denial of Claim I was that Wigley's statements as reported "by Conley, Bannerman, and Pearson were made long after the trial. The statements in no way impeach any trial witnesses. They are hearsay and would be inadmissible at trial" (Order of 5-8-09 at 7).

The third reason given by the circuit court for the denial of Claim I was assuming *arguendo* that the statements were admissible, the statements "do not necessarily establish that Wigley was the prime actor or that these witnesses even believed him" (Order of 5-8-09 at 7). The court relied upon the fact that

as "[t]he evidence at trial clearly indicated that Marek was the dominant actor", there was "no merit" to Mr. Marek's claim (Order of 5-8-09 at 7).

None of the three reasons for denying relief withstand scrutiny. As a matter of law, the circuit court erred in denying relief.

B. *Res adjudicata* bar.

The first reason given by the circuit court is that Mr. Marek's claim is barred by *res adjudicata*, *i.e.* that Mr. Marek is attempting to re-litigate an issue already decided against him. However, the circuit court is simply wrong as a matter of law.

Mr. Marek's claim is premised upon new evidence that was not previously known or available. This Court recognized long ago that a claim of newly discovered evidence is cognizable in a Rule 3.851 motion. Jones v. State, 591 So. 2d 911 (Fla. 1991). This Court also recognized that the claim may be raised whether the newly discovered evidence demonstrates that the defendant either would probably not have been convicted or probably not have been sentenced to death. Scott v. Dugger, 604 So. 2d 465 (Fla. 1992).

This Court has ruled that a newly discovered evidence claim can be premised upon a previously unknown and unavailable jailhouse confession by a co-defendant that he was in fact the person who committed the homicide for which the defendant received a death sentence. State v. Mills, 788 So. 2d 249 (Fla.

2001). There, the co-defendant, Ashley had received a disposition of his case that was less than death. Mills had challenged his sentence on that basis in his direct appeal; but, on the basis that Mills was the triggerman the disparate treatment of the co-defendants was not found to be error. In fact, Mills had challenged his sentence in a previous Rule 3.850 motion on the basis that his co-defendant had years later related a version of the homicide at variance with his trial testimony. Mills v. State, 786 So. 2d 547 (Fla. 2001). The new version of Ashley's story was not sufficiently different to warrant Rule 3.851 relief. However, thereafter Mills located an individual who had been incarcerated with Ashley 20 years before and who had been told by Ashley that he, Ashley, was the one who actually killed the victim. Not only did the new statement when presented in a newly discovered evidence claim defeat any procedural bar based upon *res adjudicata*, the new statement which was a confession that Ashley, contrary to the trial evidence, was the actual killer warranted Rule 3.851 relief and a vacation of Mills' sentence of death.

Thus, State v. Mills stands for the proposition that the circuit court's application of a *res adjudicata* bar was erroneous when Mr. Marek was relying on new evidence that had not been previously presented to any in court in support of a claim for

relief. The circuit court clearly erred in its analysis.[14]

C. Inadmissible hearsay.

The second reason given by the circuit court for its decision denying Rule 3.851 relief is that the testimony of Conley, Bannerman, and Pearson "would be inadmissible hearsay" (Order of 5-8-09 at 7). Once again, the circuit court's analysis is in error as a matter of constitutional law and Florida's evidence code.

Section 90.804(2)(c) of the Florida Evidence Code sets forth that a statement against interest is not subject to exclusion by virtue of the hearsay rule. A statement against interest is defined as:

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

This provision is virtually identical to Rule 804(b)(3) of the Federal Rules of Evidence, from which it was derived. The

---

[14]Mr. Marek specifically cited State v. Mills in his Rule 3.851 motion filed on May 1, 2009 (Motion at 14). And, he specifically argued State v. Mills during closing arguments before the circuit court as the case on which he most relied (Transcript of May 7th at 363-66). Despite Mr. Marek's heavy reliance upon State v. Mills, the circuit court in its order denying relief did not mention, let alone address the decision.

United States Supreme Court has explained the proper analysis to be employed in determining whether a statement is against interest:

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

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

Thus according to the United States Supreme Court, Wigley's statements to Conley, Bannerman, and Pearson must be analyzed to determine whether each statement was one that "a reasonable person in the declarant's position would not have made [ ] unless believing it to be true."[15] Certainly, Wigley's confession to three separate individuals at different times that he strangled,

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

choked and killed the victim were statements that were incriminating statements.[16]

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

Recently, the First District Court of Appeal addressed the intersection of the constitutional right to defend and §90.804(2)(c). There, the court found that the exclusion of a declarant's inculpatory statement was reversible error. Curtis v. State, 876 So. 2d 13 (Fla. 1st DCA 2004). The trial court had excluded another individual's "confession from evidence" because it "did not meet the formal requirements of the declaration against penal interest exception to the hearsay rule." Curtis,

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

876 So. 2d at 18.[17] The 1st DCA acknowledged that the declarant had not been shown to be unavailable.[18] Thus, the technical requirements of §90.804(2)(c) could not be satisfied. Thereupon, the 1st DCA stated:

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

Curtis, 876 So. 2d at 19.

Accordingly, the 1st DCA addressed the implications of the Due Process Clause as enunciated in Chambers v. Mississippi, 410 U.S. 284, 302 (1973)("the hearsay rule may not be applied mechanically to defeat the ends of justice"), wherein reversible error was found in the exclusion of another's confessions to the crime for which the defendant stood trial. Under Chambers, "the exclusion of the confessions denied Chambers the right to due process of law, as well as the right to confront the witnesses against him." Curtis, 876 So. 2d at 20. This was because there were "circumstances that provided considerable assurance of their

---

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

[18]Here, there is no question but that Wigley is unavailable. He was murdered 10 years ago.

reliability." Curtis, 876 So. 2d at 20. The 1st DCA found that the analysis under §90.804(2)(c) had largely merged with the Chambers analysis: "Indeed, the Florida courts have consistently applied the constitutional analysis in *Chambers*, despite the exception in *section 90.804(2)(c), Florida Statutes*, for declarations against penal interest." Curtis, 876 So. 2d at 20.[19] Thus, the 1st DCA concluded that in Curtis, "the confession in this case was made under circumstances that provided an assurance of reliability." Id.[20]

The 2nd DCA also recently address the hearsay rule's need to yield to the due process outlined in Chambers v. Mississippi. In Mordenti v. State, 982 So. 2d 710 (Fla. 2nd DCA 2008), the court reversed and ordered a new trial were a co-defendant's confidential statement to his attorney both implicated himself and exculpated his co-defendant, Michael Mordenti. The court relied upon Chambers in concluding that the statement should have

---

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

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

been admitted at Mr. Mordenti's trial.[21]

In essence, the analysis that the 1st DCA and the 2nd DCA have engaged in is the analysis that the United States Supreme Court found to be required in Williamson for the admission of statements against penal interest. Again in Williamson, the United States Supreme Court said "that the very fact that a statement is genuinely self-inculpatory - - which our reading of Rule 804(b)(3) requires - - is itself one of the 'particularized guarantees of trustworthiness' that makes a statement admissible under the Confrontation Clause." Williamson, 512 U.S. at 605.

Courts in other jurisdictions have also grappled with the intersection of the parameters of an exception to the hearsay rule for statements against penal interest and the constitutional rights recognized in Chambers. Recently, federal habeas relief was granted in Chia v. Cambra, 360 F.3d 997 (9th Cir. 2004), *cert. denied*, 2005 U.S. LEXIS 2451 (March 21, 2005). There, an individual named Wang in his third statement to police had advised them "that Chia was not involved in the plot [a planned

---

[21]When Mordenti's case had been before this Court on a Brady claim premised upon the State's failure to disclose what it knew that the co-defendant had said to his own attorney which exculpated Mordenti, this Court had indicated that at a minimum the evidence was admissible as impeachment of the testimony of Gail Milligan who implicated Mordenti in the murder. Mordenti v. State, 894 So. 2d 161, 168 (Fla. 2004). Under that decision, regardless of the admissibility under a hearsay exception, Wigley's statements would have been admissible as impeaching the State's case that Mr. Marek was the killer and the dominant actor.

robbery] and that he, along with Chen and Kow, had never intended to split any of the drugs or money that was stolen from the [undercover DEA] agents with Chia. In fact, Wang explained that Chia warned him that he should not participate in the plan because Chen and Kow could not be trusted." Chia, 360 F.3d at 1001. While finding constitutional error warranted a new trial, the Ninth Circuit said:

> Self-inculpatory statements have long been recognized as bearing strong indicia of reliability. *See, e.g. Fed. Rule Evid. 804(b)(3); Williamson v. United States, 512 U.S. 594, 599 (1994)*("Reasonable people, even reasonable people who are not especially honest, tend not to make self-inculpatory statements unless they believe them to be true."). This is such a statement. The self-inculpatory nature of Wang's Third Statement to the Pasadena police exculpate Chia, while simultaneously inculpating himself. The inculpatory force of the Third Statement is obvious, and indeed California conceded at oral argument that the very words, "he told me don't do it," at once inculpate Wang and exculpate Chia.

Chia, 360 F.3d at 1004-05. The Ninth Circuit concluded:

> The Constitution's guarantee of due process would ring hollow if a criminal defendant such as Chia were prevented from presenting reliable, material evidence of his innocence at trial, when such evidence lies at the heart of his defense. Inherent within the Constitution's promise of due process lies the cardinal principle that no criminal defendant will be deprived of his liberty absent a full and fair opportunity to present evidence in his defense. For the state court to ignore these fundamental principles and exclude Wang's Third Statement from consideration by the jury amounts to an unreasonable application of clearly established federal law.

Id. at 1005.

Habeas relief was also granted in Rivera v. Director,

Department of Corrections, 915 F.2d 280 (7th Cir. 1990). There, a co-defendant, Meger, implicated Rivera and another individual, Norman, in a homicide. However, Meger's initial statements had not implicated Rivera. He later explained this was a result of Rivera's threats and his fear of Rivera until Rivera was taken into custody. Yet, "Meger's testimony was the only evidence that Rivera had participated in the murder." Rivera, 915 F.3d at 281. At trial, Rivera unsuccessfully sought to introduce Norman's confession "because it exculpated him," Rivera. Id. Norman had invoked his Fifth Amendment rights and refused to testify. In finding a due process violation and granting habeas relief, the Seventh Circuit noted, "[t]here is no suggestion that Norman had any motive to exculpate Rivera – that he (as distinct from Meger) had been threatened by, or was otherwise in fear of Rivera, or on the other hand that he might be a relative or close friend of Rivera, motivated by ties of blood or friendship to help him." Rivera, 915 F.2d at 282. According to the Seventh Circuit, "[t]he due process clause entitled a criminal defendant to demand, irrespective of the state's hearsay rule, a trial 'adequate to separate the guilty from the innocent.' [Citation] So if the defendant tenders vital evidence the judge cannot refuse to admit it without giving a better reason than that it is hearsay." Rivera, 915 F.3d at 281.

The issue has also been addressed in several decisions from

several state courts. In Demby v. State, 695 A.2d 1152, 1154 (Del. 1997), constitutional error was found when a criminal defendant was not "permitted to present evidence that Freddy Flonnory ("Flonnory") told Michael Lehman ("Lehman") that he, not Demby, had shot Howard Brown ("Brown")." The defense had sought to introduce a videotape of Lehman telling the police of Flonnory's statement. The Delaware Supreme Court concluded that "Flonnory's statements to Lehman, if true, were against his penal interest. Flonnory's statement that he, not Demby, killed Brown was self-inculpatory." Demby, 695 A.2d at 1158. In assessing whether "corroborating circumstances" provided indicia of trustworthiness under Delaware Rule Evidence 804(b)(3) and under Chambers v. Mississippi, the Delaware Supreme Court stated:

> First, in this case, Flonnory's statements to Lehman were made within a few weeks after Brown was killed. Thus, they were made in close temporal proximity to the commission of the crime. Second, Flonnory's statements to Lehman were truly self-incriminatory. Flonnory was likely to confide in Lehman, since they were confederates in crime at the time of the self-incriminatory remarks, having escaped together from Ferris School. [Citations]. Third, the trustworthiness of Lehman's statement on the videotape was enhanced by the fact that it was given to the police at a time when Lehman had an interest in providing accurate information to ameliorate his own pending criminal charges.

Demby, 695 A.2d at 1158.

The Maryland Court of Appeals addressed the matter in Gray v. State, 796 A.2d 697 (Md. 2002). There, a criminal murder defendant, Gray, had unsuccessfully sought to present evidence of

Gatton's claim that he, Gatton, had committed the murder of the defendant's wife, Bonnie:

> It was further proffered that Evelyn would have testified that on a subsequent occasion Gatton came to her house when her husband was away and raped her. Several days afterwards, she testified that he threatened her, saying, "If I told [anyone about the rape] he would take care of me just like he had took care of Bonnie." Evelyn would have testified that on that occasion he pulled a small handgun from his boot and also a hunting knife from a "case" on his belt, showing them to Evelyn, and saying, "This is what I killed her with."

Gray, 796 A.2d at 700 (bracketed material in original). The Maryland Court of Appeals reversed and ordered a new trial finding the evidence admissible as a statement against interest under Maryland Rule 5-804(b)(3). The court stated:

> the fact that Gatton may have been attempting to intimidate Evelyn does not detract from the fact that he, and indeed any reasonable person, would know that the statements he was making about his lover, the petitioner's wife and the woman Gatton was declaring he had killed, however it was used by him, was a statement against his penal interest.

Gray, 796 A.2d at 707.[22] Accordingly, the court concluded:

> Under the circumstances here present, petitioner was entitled to present his defense, *i.e.*, that Gatton killed Bonnie Gray. When Gatton, through the

[22]The court did note that evidence was also proffered that "Gatton was involved with Mrs. [Bonnie] Gray in a love triangle and became upset when she would leave him to go home to Mr. Gray." There was also "testimony that [Gatton] had been in possession of jewelry similar to that worn by the murder victim and had Evelyn pawn some of it at her brother's pawn shop." Gray, 796 A.2d at 706. This constituted sufficient corroboration, given that there was no evidence that "Evelyn had any relationship with petitioner."

> invocation of his right to remain silent became unavailable, petitioner was, under the facts of this case, entitled to present to the jury Gatton's declarations against penal interest through the person that allegedly heard the declarations, Evelyn Johnson.

Gray, 796 A.2d at 707.

Similarly, the Michigan Supreme Court in People v. Barrera, 547 N.W.2d 280, 285 (Mich. 1996), concluded that the exclusion of a co-defendant's statement against interest was error when that statement was offered by the defense as evidence that the co-defendant "spontaneously acted alone in stabbing the victim."[23] The Michigan Supreme Court indicated that to be a statement against penal interest, "the statement must be against the declarant's interest in 'a real and tangible way.' [Citation]. It must actually assert the declarant's own culpability to some degree – it cannot be a statement merely exculpating the accused." Barrera, 547 N.W.2d at 287.

According to the Michigan Supreme Court, the required analysis was one of "whether, under the totality of the circumstances, the statement was sufficiently reliable." Barrera, 547 N.W.2d at 289.

---

[23]The co-defendant (Copeland) gave the police a written statement in which he indicated that while under the influence of mescaline and alcohol he watched the victim having oral sex with one of the other co-defendants (Musall). Suddenly believing that the victim was his former girlfriend who he had previously warned not to have sex with other guys, he (Copeland) "told the victim that he was going to kill her, and then he pulled a knife out of his sleeve and stabbed her." Barrera, 547 N.W.2d at 285.

> In short, the defendant's constitutional right to present exculpatory evidence in his defense and the rationale and purpose underlying MRE 804(b)(3) of ensuring the admission of reliable evidence must reach a balance. We believe they may be viewed as having an inverse relationship; the more crucial the statement is to the defendant's theory of defense, the less corroboration a court may constitutionally require for its admission.

Barrera, 547 N.W. 2d at 291.

Under these decisions, it is clear that Wigley's statements to Conley, Bannerman, and Pearson were admissible at the guilt phase of Marek's trial, both under the hearsay exception for statements against penal interest and under the due process right outlined in Chambers v. Mississippi.

Moreover, regardless of the admissibility of Wigley's statements to Conley, Bannerman, and Pearson at the guilt phase of Mr. Marek's trial, those statements were undoubtedly admissible at the penalty phase. In Garcia v. State, 622 So. 2d 1325 (Fla. 1993), this Court found trial counsel ineffective for not knowing that hearsay was admissible at a penalty phase and for failing to present a co-defendant's statement indicating that Garcia was not the shooter. Clearly under Garcia, Wigley's statements to Conley, Bannerman, and Pearson would have been admissible at Mr. Marek's penalty phase proceeding.

D. The new evidence would not have mattered because the testimony actually presented in 1984 indicated that Marek was the dominant actor.

The circuit court found that because the evidence at trial

showed Marek to be dominant actor, Wigley's statements directly refuting that evidence and corroborating Mr. Marek's own testimony that he did not kill, was not present at the killing, did not know a killing was going to occur, and did not even contemplate that a killing would occur, would have had no impact on the outcome of the trial. The circuit court's analysis was legally defective.

1. impeachment of State's case - To the extent that the State's evidence at trial was that Mr. Marek was the dominant actor, Wigley's statements to Conley, Bannerman, and Pearson conflict with the State's evidence. By definition, that means that those statements impeach the State's case. This was not considered by the circuit court. Excluding evidence or discounting its value because of the perceived strength of the State's case violates due process as explained in Holmes v. South Carolina, 547 U.S. 319 (2006)(a state cannot exclude evidence that someone else committed the murder of the basis of the strength of the State's case against the defendant).

2. corroboration of Mr. Marek's testimony - The statements Wigley made to Conley, Bannerman, and Pearson corroborate Mr. Marek's testimony at his trial that he did not kill, was not present when the killing occurred, did not know that a killing would occur, nor did he even contemplate that a killing may occur. This was not considered by the circuit court.

3. State's case was circumstantial - As the

prosecutor told the judge at Wigley's sentencing, the State's case against Mr. Marek was entirely circumstantial. Thus ultimately, it was a battle between the State's circumstantial evidence and Mr. Marek's credibility. In such a dynamic, corroborating evidence which was at the same time evidence impeaching the State's case was disproportionally valuable.

4. the acquittal of sexual battery - In its analysis, the circuit court completely ignored the fact that the jury acquitted Mr. Marek of a sexual battery upon the victim. If Wigley's statements to Conley, Banerman, and Pearson are true then Mr. Marek was not a dominant actor. He did not either rape nor kill the victim. He was merely present in the pickup when Wigley drove off with her in the vehicle.

5. State v. Gunsby - The circuit gave no consideration to this Court's ruling in State v. Gunsby, 670 So. 2d 920 (Fla. 1996), that when analyzing a newly discovered evidence claim under Jones v. State, the newly discovered evidence must be evaluated cumulatively with evidence that the jury did not hear because of trial counsel's failure to adequately investigate or any other error present in the case otherwise considered harmless in order to determine whether confidence is undermined in the reliability of the outcome of the adversarial process.

6. one of the four aggravators heard by the jury was later struck and determined improperly considered - The circuit

court gave no consideration to the fact that Eighth Amendment error was previously found to have occurred in Mr. Marek's case when the jury was given an invalid aggravating circumstance to weigh in its deliberation. This Eighth Amendment error was found to be harmless beyond a reasonable doubt only because Judge Kaplan had stated in his sentencing order that no mitigating circumstances were present. However, evidence that Wigley confessed to three different individuals that he was the real killer would have constituted mitigation along with Wigley's life sentence which would have precluded a finding that the Eighth Amendment error was harmless beyond a reasonable doubt.

7. the testimony of Conley, Bannerman, and Pearson would corroborate the testimony of each other and provide indicia of reliability - The circuit court did not consider the fact that there were three separate individuals who did not know each other or know Mr. Marek who indicated that Wigley confessed to being the actual killer. The fact that there are three such witnesses provides corroboration to the testimony of each one regarding Wigley's confession. In State v. Mills, there was only one witness who said the co-defendant confessed to being the triggerman and that warranted penalty phase relief.

8. Wigley broke down and cried - The circuit court failed to consider the circumstances of Wigley's statements to Conley and Bannerman. Conley described himself as a very good

friend of Wigley's. When Wigley confessed to him, it was only after first denying the killing, and then with the confession Wigley began to cry. This was not a situation in which Wigley was trying intimidate the listener, Conley, with whom he was close friends. Crying when confessing to murder to your close friend is not likely to be an effective way to intimidate potential enemies. Similarly, Wigley's confession to Bannerman was in a one-on-one setting. Bannerman was a good friend who hung out with Wigley. The circumstances of the conversation was more that of a confession, than boasting. The circuit court failed to note the circumstances of Wigley's confessions.

9. Wigley's description of Marek - The circuit court failed to consider Wigley's description of Mr. Marek as slow and goofy. This description is in and of itself mitigating as it indicates that Wigley perceived himself to be the dominant actor and that he perceived Mr. Marek as mentally impaired.

10. Enmund v. Florida and Tison v. Arizona implications - The circuit court ignored the implications of Enmund v. Florida, 458 U.S. 782 (1982), and Tison v. Arizona, 481 U.S. 137 (1987). The statements of Wigley to Conley, Bannerman, and Pearson require a factual determination under Enmund and Tison in order for Mr. Marek's death sentence to be constitutional. Wigley's statements corroborate Mr. Marek's testimony that he was not the killer. This implicates Enmund and Tison. When considered along with the jury's acquittal of a

sexual battery, the Eighth Amendment requires a finding after consideration of all of the evidence that if Mr. Marek did not kill that he intended or contemplated that killing would occur. Neither Enmund nor Tison have been satisfied in light of the new evidence that the death sentence stands in violation of the Eighth Amendment.

11. the statements to Conley, Bannerman, and Pearson would have lead to the jury learning of the life sentence for Wigley - The circuit court refused to admit the evidence and therefore refused to consider that trial counsel's decision regarding the presentation of Wigley's life sentence as a mitigating circumstance would have changed if he had been armed with any one or more of Wigley's confessions.

12. the trial judge's statement that in the circumstances of Mr. Marek's case, he would not be able to tell a jury that a recommendation of life was unreasonable - The circuit court did not address Judge Kaplan's statement during the penalty phase charge conference. Judge Kaplan specifically stated: "**There is no way that I can tell 12 people that they were unreasonable. At least, in this case.**" (R. 1286)(emphasis added). This statement reflects that it was possible for jurors to reasonably conclude that Mr. Marek warranted a life sentence even without the statements from Conley, Bannerman and Pearson regarding Wigley's admission that he was the real killer.

13. proper cumulative analysis requires Rule 3.851 relief - Had the circuit court properly considered the above listed factors, he would have had to conclude that the law requires in Mr. Marek's case the same result as occurred in State v. Mills.

E. Circuit court erred in refusing to admit Moldof's testimony regarding what he would have done with Wigley's statements had they been available.

In this regard, the circuit court also erred in not permitting Mr. Marek to introduce his trial attorney's testimony that had Wigley's statements to Conley and Bannerman been available he would have presented them and he would have presented the fact Wigley received a life sentence in mitigation.

F. Conclusion.

Newly discovered evidence of Wigley's numerous confessions warrants Rule 3.851, the vacation of Mr. Marek's conviction, the vacation Mr. Marek's sentence of death, and/or the imposition of a life sentence. The circuit court erred in denying this issue. Relief should issue as a matter of law.

ARGUMENT III: THE CLEMENCY PROCESS AND THE MANNER IN WHICH IT WAS DETERMINED THAT MR. MAREK SHOULD RECEIVE A DEATH WARRANT ON APRIL 20, 2009, WAS ARBITRARY AND CAPRICIOUS AND IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

Over thirty years ago, the United States Supreme Court announced that under the Eighth Amendment, the death penalty must be imposed fairly, and with reasonable consistency, or not at all. Furman v. Georgia, 408 U.S. 238, 310 (1972)(per curiam). At

issue in Furman were three death sentences: two from Georgia and one from Texas. Relying upon statistical analysis of the number of death sentences being imposed and upon whom they were imposed, it was argued that the death penalty was cruel and unusual within the meaning of the Eighth Amendment. Five justices agreed, and each wrote a separate opinion setting forth his reasoning. Each found the manner in which the death schemes were then operating to be arbitrary and capricious. Furman, 408 U.S. at 253 (Douglas, J., concurring) ("We cannot say from facts disclosed in these records that these defendants were sentenced to death because they were black. Yet our task is not restricted to an effort to divine what motives impelled these death penalties. Rather, we deal with a system of law and of justice that leaves to the uncontrolled discretion of judges or juries the determination whether defendants committing these crimes should die or be imprisoned. Under these laws no standards govern the selection of the penalty. People live or die, dependent on the whim of one man or of 12."); Id. at 293 (Brennan, J., concurring) ("it smacks of little more than a lottery system"); Id. at 309 (Stewart, J., concurring) ("[t]hese death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual"); Id. at 313 (White, J., concurring) ("there is no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not"); Id. at 365-66 (Marshall, J., concurring)("It also is evident that the burden of

capital punishment falls upon the poor, the ignorant, and the underprivileged members of society. It is the poor, and the members of minority groups who are least able to voice their complaints against capital punishment. Their impotence leaves them victims of a sanction that the wealthier, better-represented, just-as-guilty person can escape. So long as the capital sanction is used only against the forlorn, easily forgotten members of society, legislators are content to maintain the status quo, because change would draw attention to the problem and concern might develop.")(footnote omitted). Thus, as explained by Justice Stewart, Furman means that: "The Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be . . . wantonly and . . . freakishly imposed" on a "capriciously selected random handful" of individuals. Id. at 310.

On April 20, 2009, the Governor signed a warrant scheduling Mr. Marek's execution for May 13, 2009. As has now been revealed in the public records disclosed on Monday, April 27, 2009, the State Attorney's Office was in contact with the Parole Commission and the Governor's Office in September of 2008 regarding Mr. Marek's case and whether mercy was warranted or whether a death warrant should be signed. According to a recently disclosed email, a parole officer was attempting to obtain a copy of a mental health evaluation conducted on Mr. Marek and a copy of the

medical examiner's autopsy report. (Attachment C to May 1, 2009 3.851 motion). This lead to an email chain that was disclosed on April 27, 2009, documenting the frantic efforts to locate these "very important files." (Attachment D to May 1, 2009 3.851 motion). The public records disclosed on April 27, 2009, also reveal that the mental health evaluation and the autopsy report were faxed to Sandra Pimental at the Parole Commission because "Gov's office wants info next week (Mon Sept 22)." (Attachment E to May 1, 2009 3.851 motion).

Clearly, the Governor's office was evaluating whether to schedule Mr. Marek's execution and wanted to review materials that might warrant mercy. However the State may try to label this as something else, this was a process by which the Governor was deciding whether to proceed with Mr. Marek's execution, *i.e.* a clemency proceeding. This process was conducted without Mr. Marek's counsel's knowledge or for that matter without Mr. Marek having a clemency attorney who could provide the information that may warrant a decision that the Governor should not proceed with Mr. Marek's execution.

A one-sided process that relies upon the prosecutors who have been urging that a death sentence be carried out and who have repeatedly misrepresented the facts and the record and displayed either cavalier ignorance or malevolence towards Mr. Marek and his case, cannot operate as the "fail safe" that the United States Supreme Court explained in Harbison v. Bell, – U.S.

– (April 1, 2009), was expected and required. Such a process means that executions will be carried out on a completely arbitrary and random basis.

In fact, the signing of Mr. Marek's warrant on April 20, 2009, was nothing more than a lottery. There were over fifty death row resides whose cases were as ready for a warrant as Mr. Marek's. From the Capital Commission website it can be determined that the list at a minimum includes: Gary Alvord, Richard Anderson, Jeffrey Atwater, Chadwick Banks, McArthur Breedlove, Jim Eric Chandler, Oba Chandler, Loran Cole, Danny Doyle, Charles Finney, Charles Foster, Konstantinos Fotopoulose, John Freeman, Guy Gamble, Louis Gaskin, Olen Gorby, Robert Gordon, Marshall Gore, Martin Grossman, Jerry Haliburton, Robert Hendrix, John Henry, Paul Howell, James Hunter, Etheria Jackson, Edward James, Ronnie Johnson, Randall Jones, William Kelley, Gary Lawrence, Ian Lightbourne, John Marquard, Sonny Oats, Dominick Occhiccone, Norman Parker, Robert Patten, Daniel Peterka, Kenneth Quince, Paul Scott, Richard Shere, Kenny Stewart, William Sweet, Melvin Trotter, William Turner, Manuel Valle, William Van Poyck, Peter Ventura, Anthony Wainwright, Robert Waterhouse, Johnny Williamson, and William Zeigler. So along with Mr. Marek and David Johnston who both got warrants on April 20th, at least an additional 51 inmates were passed over. Mercy was extended to these other inmates and they were allowed to continue to live. Certainly, there may be very good reasons for extending mercy to

a number of these individuals. That is not the point. The point is there are no standards. There is no guidance. There is absolutely no way to distinguish whose name the Governor places on warrant from the 50 plus names that are not placed on a warrant. The process can only be described as a lottery; the very kind of system that the United States Supreme Court in Furman v. Georgia said would no longer be allowed.

Most states have the judicial branch in charge of scheduling execution dates. Either the trial court or the highest appellate court to hear death appeals determines when an execution date should be set. At that point, the condemned can petition for clemency before those charges with considering clemency applications. However in Florida, the Governor has the power to schedule executions and within that power has the power to not schedule an execution, which is by its very nature an act of clemency. When the Governor has as he does now a pool of some fifty candidates for execution and no governing standards for determining how to exercise that power, there is no basis for distinguishing between those who are scheduled for execution and those who are not. The Florida procedure violates Furman v. Georgia.

When Mr. Marek attempted to present this issue to the lower court, the court refused to allow him to present any of the proffered evidence in support of the claim. The State argued and the circuit court concluded that clemency was an executive

function and that it had no authority to address Mr. Marek's challenge that the manner in which the clemency process was functioning was unconstitutional (Transcript of May 7th at 266-72, 371, 386).

The circuit court's ruling is erroneous. As counsel for Mr. Marek explained:

> MR. McCLAIN: The only point I'm making, Your Honor, is that yes, it is an executive function but simply because something is an executive function doesn't mean that it still doesn't have to comply with the constitution and due process, and the U.S. Supreme Court has ruled in Ohio Adult V. Woodard that there are due process rights in the clemency process which have to be protected.
>
> Then, there's also Furhman, which says, the Eighth Amendment speaks to this, and the U.S. Supreme Court has indicated that the clemency process is part of a capital system.
>
> So, that it is something that is subject to judicial review and that is why I am trying to present it to you.

(Transcript of May 6 at 268).

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

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

Woodard, 523 U.S. at 289 (emphasis added). Here, the lower court's determination that it had no authority to address Mr. Marek's arbitrary clemency process issue ignores Ohio Adult Parole Authority, et al. v. Woodard, in which the Supreme Court held that judicial intervention was warranted in a case where a clemency system was arbitrary. It also ignores the decision in Harbison v. Bell as to the role that the clemency process is to play. It is supposed to be the "fail safe", not some random drawing of a name on card out of a spinning drum filled with business cards that radio stations do for some give away promotion. This claim should be remanded for and evidentiary hearing and thereafter, Rule 3.851 relief should issue.

ARGUMENT IV: MR. MAREK'S RIGHT TO DUE PROCESS WAS DENIED WHEN THE ASSISTANT STATE ATTORNEY WHO REPRESENTED THE STATE IN 1988 DRAFTED THE ORDER DENYING RULE 3.850 ON AN *EX PARTE* BASIS FOR THE JUDGE WHO SIGNED WITHOUT EVER ADVISING MR. MAREK OR HIS COUNSEL OF THE *EX PARTE* CONTACT IN VIOLATION OF DUE PROCESS AS OUTLINE IN BANKS V. DRETKE.

This Court held in Rose v. State, 601 So. 2d 1181, 1183 (Fla. 1992), that when the prosecutor drafted an order for the judge denying a Rule 3.851 motion without notice to the defense, due process was violated: "a judge is placed in the position of possibly receiving inaccurate information or being unduly swayed by unrebutted remarks about the other side's case." In Rose, the

Court did not impose a requirement that the defendant had to show that the *ex parte* contact destroyed the judge's neutrality.

The prosecutor who drafted the order denying Rule 3.850 relief in Rose v. State, was the same prosecutor who represented the State at the evidentiary hearing in 1988 in Mr. Marek's case on his Rule 3.850 motion.

In addition, the type and the style of the order denying Rule 3.850 entered in November of 1988 was the same as the type and style of the response to the motion to vacate that had been prepared by the Rose/Smith/Marek prosecutor.

At the evidentiary hearing on May 6, 2009, Judge Kaplan was asked about his recollection of the circumstances surrounding the preparation of the order denying Rule 3.851 relief. Judge Kaplan acknowledged that back in the late 1980's he often had the State draft orders for him ruling on motions to vacate:

> [Q.]Well, let me ask you, what was your practice while you were a judge in terms of orders. Did you usually have attorneys prepare proposed orders for you or did you usually have your judicial assistant write the orders for you or a law clerk or how -- what was your practice?
>
> A. Well, either way.
>
> I would write some, and sometimes, I'd ask the party that I was ruling in favor of, I'd called him, and say, this is what I want you to do, prepare me an order of this nature or possibly, even put it on the record.
>
> Q. Okay.
>
> A. And they would prepare it, and if I didn't like it, I'd change it, and I would do my own if I had

to, but either way.
I'm sure I've done it both ways.

Q. And to the best of your recollection, did you practice change over time or is that just the way it was all the time, or did you do one over the other more earlier or later, or what can you tell me about that?

A. Well, as time went on, I believe, the law stated that the judge should always do his own.

Q. Okay.

A. So, I always did my own, since that seemed to be the rules.

Q. I don't know if -- the case named Rose v State coming out in 1992, does that ring any bells in terms of that was the change that came about?

A. It doesn't ring a bell but I remember the case because its from this area.

(Transcript of May 6th at 110-11).

Though Judge Kaplan was able to recognize the order of recusal in Mr. Marek's case as one he had written himself, he was unable to reach that conclusion as to the 1988 order denying Mr. Marek's motion to vacate:

A. I dictated this, I can tell you that.

* * *

Q. This is the -- it's page 261 of the post-conviction record. It's the order denying the motion to vacate. I'm going hand you this document.

A. Yes.

Q. And you can see that it's -- you can see that it was entered November 7th of '88?

A. Okay.

Q. And you can look at the last page and I think

it shows your signature on it or an indication that you had signed the original.

A. Yes.

Q. At this point in time, do you recall who wrote that order?

A. Can I look at it?

Q. Absolutely.

A. Your question again, is?

Q. My question is, at this point in time, are you able to tell whether that is an order that you would have drafted yourself or is that something that you would have had one of the parties prepare for you?

A. I don't have a clue.

(Transcript of May 6th at 113).

Based on the evidence, Mr. Marek contends that the State prepared the 1988 order denying Rule 3.851 relief, without notice to Mr. Marek or his counsel.

In denying Mr. Marek's claim, the circuit court indicated that the "claim was without merit" because the "standard font or [] style" was insufficient to prove the claim. (Order of 5-8-09 at 9). And, the circuit court relied on the fact that the judges in the Rose/Smith/Marek cases were different. What the circuit court ignored was the fact that the common denominator in the Rose/Smith/Marek cases was the postconviction prosecutor. A prosecutor who, in the same time frame as Mr. Marek's initial Rule 3.851 litigation, has been guilty of preparing orders denying Rule 3.851 relief without notice to defense counsel.

The circuit court also ignored the significance of the "font or style" of the orders contained in the record on appeal. A review of the orders contained in the record on appeal demonstrates that Judge Kaplan (or his judicial assistant) prepared orders in a distinct fashion – the case number in the caption of the order included the judge's full name. Also, in the judge's orders he did not use all capital letters when he referred to Mr. Marek. However, in the State's pleadings the caption is different – it does not include the judge's full name. Likewise, most noticeably in the State's response to Mr. Marek's Rule 3.851 motion, when referring to Mr. Marek, the State uses all capital lettering.

These facts combined with Judge Kaplan's recollection that he had requested the prevailing party to draft orders in the past and his inability to state that he had prepared the order denying Rule 3.851 relief in 1988, demonstrate that Mr. Marek is entitled to relief.

The circuit court also suggested that Mr. Marek's claim was "procedurally barred as the Court order has been in the record and available for review since 1988." (Order of 5-8-09 at 9. In so ruling, the circuit court ignored the law governing the State's obligation to disclose information which the defendant had no reason to know.

As explained in Mr. Marek's May 1, 2009, Rule 3.851 motion, when Rose was decided, undersigned counsel was representing Frank

Lee Smith in his appeal to the Florida Supreme Court from the denial of his Rule 3.850 motion. At the 1991 evidentiary hearing in Mr. Smith's case, the same prosecutor who engaged in the *ex parte* contact at issue in Rose also spoke with the presiding judge *ex parte* and the judge asked the prosecutor to draft the order denying relief. Mr. Smith's counsel was not privy to the discussion between the judge and the prosecutor, but learned of it when the prosecutor called to ask him to approve as to form the order he had drafted at the judge's request. When undersigned counsel objected on behalf of Mr. Smith, the judge signed the order over objection and refused to disqualify himself. After Mr. Smith challenged this procedure on appeal, the decision in Rose was rendered and the State asked for a remand for an evidentiary hearing to get the facts and determine what had happened. Following the remand and after evidence was taken the case was returned to the Florida Supreme Court, and the Florida Supreme Court found that the *ex parte* communication between the prosecutor and the judge in the preparation of the order denying Rule 3.850 relief violated due process and required that a new evidentiary hearing before a different judge. Smith v. State, 708 So. 2d 253 (Fla. 1998).

At the time of the decision in Smith, undersigned counsel was employed by CCRC-South and was no longer representing Mr. Marek because the office had declared a conflict and Mr. Marek's case had been transferred to CCRC-North.

Following either the decision in Rose or the decision in Smith, at no time did the State contact Mr. Marek or his counsel to inform them that the prosecutor representing the State at the 1988 evidentiary hearing had done what he did in Rose and what he did in Smith, drafting the order denying Rule 3.850 for the judge which he provided to the judge on an *ex parte* basis.

"When police or prosecutors conceal significant exculpatory or impeaching material in the State's possession, it is ordinarily incumbent on the State to set the record straight." Banks v. Dretke, 124 S. Ct. 1256, 1263 (2004). Thus, a rule "declaring 'prosecutor may hide, defendant must seek,' is not tenable in a system constitutionally bound to accord defendants due process." Id. at 1275. However, that is what occurred. The State after the decisions in Rose and in Smith knew that the *ex parte* procedure employed in Rose and Smith had been employed in Mr. Marek's case in violation of the due process.

Of course, the party excluded from *ex parte* contact is unaware that it has occurred until someone who was there apprises him. Porter v. Singletary, 49 F.3d 1483 (11th Cir. 1995)(litigants are entitled to assume that judges have complied with the code of judicial conduct and not investigate for misconduct until a specific basis for such an investigation is present). In this instance, neither the judge nor the State advised either Mr. Marek or his counsel what occurred while the matter was pending in circuit court. It was only while working

on drafting the initial brief filed on April 29, 2009, that counsel noticed that in the record the type and the style of the ordering denying Rule 3.850 entered in November of 1988 was the same as the type and style of the response to the motion to vacate that had been prepared by the same prosecutor involved in Rose and Smith. It was only then that undersigned counsel figured out what the State had been hiding all these years, that the unconstitutional procedure employed in Rose and Smith had been employed in Mr. Marek's case. Because the State never complied with its due process obligation and informed Mr. Marek or his counsel of this constitutional violation, Banks v. Dretke stands for the proposition that Mr. Marek can raise it at this juncture when through serendipity he figured out that the due process violation had occurred. Thus, the circuit court's finding that Mr. Marek should have raised his claim earlier is in error.

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, impose a sentence of life imprisonment 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 9, 2009.

CERTIFICATE OF FONT

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

MARTIN J. MCCLAIN
Florida Bar No. 0754773
McClain & McDermott, P.A.
Attorneys at Law
141 N.E. 30th Street
Wilton Manors, FL 33334
(305) 984-8344

COUNSEL FOR APPELLANT