IN THE SUPREME COURT OF FLORIDA

JOHN RICHARD MAREK,

Appellant,

v. CASE NO. SC09-821

STATE OF FLORIDA,

Appellee.
_____/

STATE'S MOTION TO STRIKE NOTICE OF NEWLY DISCOVERED ADDITIONAL PROOF

Marek has now filed before this Court, additional affidavits from inmates in support of his successive Rule 3.851 motion, which was denied by the trial court and the appeal of which is currently pending. The State files this motion to strike and would show:

Marek has not provided any legal basis which would authorize the submission of additional affidavits that were not presented to the trial court. Indeed, the instant filing is contrary to Rule 9.200 (a) regarding what constitutes an appellate record upon which review is based. Moreover, the affidavit of an investigator for Marek presents additional information that is dehors the record before the court.

Additionally, the affidavits presented are cumulative to evidence that was presented at the evidentiary hearing May 6-7, 2009, where the trial court found in material part that:

> The Defense argued during the evidentiary hearing that Wigley's statements made to the three individuals was "newly discovered evidence" not available at the time of trial. Had the evidence that Wigley, and not Marek, killed Ms. Simmons been available, the Defense claimed that it was probable that the outcome of Mr. Marek's trial would have been different. This Court disagrees.
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> For a successive motion under Rule 3.851 (d) (2) each claim must be based on either (1) facts that were unknown to the defendant or his attorney and "could not have been ascertained by the exercise of due diligence," or (2) a "fundamental constitutional right" that was not previously established, and which "has been held to apply retroactively." Fla. R. Crim. P. 3.851 (d)(2). Claims of newly discovered evidence must be brought within a year of the date the evidence was or could have been discovered through due diligence. See *Glock v. Moore*, 776 So.2d 243, 251 (Fla. 2001). *See, also, Jiminez v. State*, 997 So.2d 1056, 1064 (Fla. 2008), cited by *Milford Wade Byrd v. State of Florida*, ____ So.2d ____; 34 Fla. Law Weekly S 307, 2009 WL 857409 (Fla. April 2, 2009)(slip opinion). *See also, Cherry v. State*, 959 So.2d 702 (Fla. 2007) in which the Florida Supreme Court stated:
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> > "First, [the defendant] must show that the evidence could not have been discovered with due diligence at the time of trial. *Torres-Arboleda v. Dugger*, 636 So.2d 1321, 1324-25 (Fla. 1994). Moreover, "any claim of newly discovered evidence in a death penalty case must be brought within one year of the date such evidence was discovered or could have been discovered through the exercise of due diligence." *Glock v. Moore*, 776 So.2d 273 (Fla. 2001). Second, [the defendant] must show that the evidence would probably produce an acquittal or a lesser sentence on retrial. *Jones v State*, 591 So.2d 911, 915

> (Fla. 1991). In considering whether this evidence would affect the outcome at the guilt or penalty phase of a trial, courts consider whether the evidence would have been admissible at trial, the purpose for which the evidence would have been admitted, the materiality and relevance of and any inconsistencies in the evidence, and the reason for any delays in the production of the evidence. *Jones v. State*, 709 So.2d 512, 521-22 (Fla. 1998)."

As the State correctly asserted in its Response and closing argument, having considered the testimony of the witnesses and the evidence presented, this Court finds that Claim I is procedurally barred. Marek is attempting to relitigate his prior assertions that Wigley was the murderer, and that he should not be sentenced to death while Mr. Wigley was sentenced to life in Florida State Prison. This Court, its predecessor, and other reviewing courts have held that the Defendant was the dominant actor in this crime. This issue was raised previously and decided adversely to the Defendant on the merits. *Marek v. State*, 492 So.2d 1055 (Fla. 1986). The Florida Supreme Court, in its opinion, when discussing the evidence, stated that "[a] fingerprint expert testified that six prints lifted from the lifeguard shack matched appellant's fingerprints and one matched Wigley's. Only Appellant's print was found in the observation deck, where the body was discovered." *Id*. At 1056.

This Court further finds that the statements allegedly made by Mr. Wigley and 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. Assuming arguendo that Wigley's statements via the three witnesses were theoretically admissible, the statements of Conley, Bannerman and Pearson do not necessarily establish that Wigley was the prime actor or that these witnesses even believed him. Conley and Bannerman testified that Wigley was a wimp and that he may have been trying to appear tough in order to protect himself from unwanted advances by other inmates. Bannerman also testified that Wigley was

intoxicated when he made the alleged confessions. The evidence at trial clearly indicated that Marek was the dominant actor.

> Both appellant and the victim's traveling companion testified that appellant talked to the two women for approximately forty-five minutes after he stopped, purportedly to aid them. During most of this conversation, Wigley remained in the truck. When Wigley got out of the truck to join appellant, he remained silent. Appellant, not Wigley, persuaded the victim to get in the truck with the two men. That evidence was reinforced by the testimony of three witnesses who came into contact with the appellant and Wigley on the beach at approximately the time of the murder, which indicated that appellant appeared to be the more dominant of the two men. Finally, only appellant's fingerprint was found inside the observation deck where the body was discovered. This evidence, in our view, justifies a conclusion that appellant was the dominant participant in this crime."
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> *Marek v. State*, 492 So.2d 1055 (Fla. 1986).

With respect to the Defendant's first claim, this Court finds it to be without merit.

While Marek characterizes these latest affidavits as "newly discovered additional proof," each is hearsay, and not admissible under any legal theory or bring into question or impeach any evidence presented during Marek's original trial in 1984.

CONCLUSION

Absent a legal basis for either their submission herein or undermining the validity of Marek's trial as to guilt or

penalty, the State's motion to dismiss should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing STATE'S MOTION TO STRIKE has been furnished by hand to Martin J. McClain, McClain & McDermott, PA, 141 NE 30th Street, Wilton Manors, FL 33334 this 19th day of May, 2009.

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Carolyn M. Snurkowski
Attorney for Appellee