

IN THE SUPREME COURT OF FLORIDA

JOHN MAREK,

Appellant

v.

CASE NO. SC09-821

STATE OF FLORIDA,

Appellee.

_____ /

MOTION TO STRIKE STATE'S NOTICE OF COMPLIANCE

COMES NOW, JOHN MAREK, by and through undersigned counsel, in the above-entitled matter and respectfully requests that this Court strike the "State's Notice of Compliance; Request for Briefing Schedules and Motion to Consolidate Successive Postconviction Motions" as an unauthorized pleading that misrepresents the status of proceedings in circuit court. For his reasons, Mr. Marek states:

1. On June 22, 2009, undersigned counsel received in electronic form the pleading entitled "State's Notice of Compliance; Request for Briefing Schedules and Motion to Consolidate Successive Postconviction Motions."

2. This pleading is utterly baffling. Since when does one party get to announce to this Court that "compliance" has occurred in totally disregard of the other party's due process rights.¹ The State asserts in this pleading "that the May 21,

¹Is Mr. Marek's participation in the litigation completely unnecessary and superfluous? Is the fix in? Is it just for the State and the courts to get together and figure out how to

2009, remand order has been complied with". Notice of Compliance at 2. Glaringly absent from this "Notice" is any discussion of the fact that Mr. Marek has a right to file a motion for rehearing under Rule 3.851(f)(5)(7), and that there are glaring errors in the circuit court's orders that call for a motion for rehearing.² The proceedings are not over in circuit court until

proceed? Mr. Marek does not believe that the proceedings in the circuit court are completed. Doesn't that count?

²For example, in clear violation of Rule 3.851 the circuit court did not conduct a case management conference on Mr. Marek's Rule 3.851 motion filed on June 12, 2009. Rule 3.851(f)(5)(B) provides in pertinent part: "Within 30 days after the state files its answer to a successive motion for postconviction relief, the trial court **shall hold** a case management conference." (Emphasis added). The case management conference is required by due process as explained in *Huff v. State*, 622 So. 2d 982 (Fla. 1993), in order to allow the movant an opportunity to orally argue the basis of the motion to vacate and/or the need for evidentiary development. The circuit court discard the requirement in Rule 3.851(f)(5)(B) like yesterday's newspaper, as if Mr. Marek's due process right under *Huff* are of no import.

The circuit court also cast aside Mr. Marek's challenge to the accuracy of the transcript of Leon Douglass' testimony without affording Mr. Marek to present his evidence that the transcript is in error and without allowing the parties an opportunity to listen to the backup tape of the testimony. Before undersigned counsel filed the motion to correct the transcript, he called the court reporter who immediately said that he knew exactly what aspect of the transcript counsel was going to inquire about. Later in the conversation the court reporter explained that he too had been surprised by the quote attributed to Leon Douglass in the transcript. The court reporter advised that he did not recall Mr. Douglass describing Raymond Wigley as a black male, but that was what it soundly like Mr. Douglass said on the backup tape. The court reporter offered to play the tape for counsel. When he attempted to arrange for counsel to hear the tape over the telephone, however, counsel was unable to hear anything other than just the sound of voices - the words were indecipherable. The circuit court's refusal to permit evidentiary development regarding the accuracy of the transcript

Mr. Marek's motions for rehearing have been heard and resolved and until Mr. Marek files a notice or notices of appeal. Until that time this Court lacks jurisdiction and the State's notice is unauthorized.

I HEREBY CERTIFY that a true copy of the foregoing motion has been furnished by United States Mail, first class postage prepaid, to Carolyn Snurkowski, Assistant Deputy Attorney General, Department of Legal Affairs, The Capitol PL01, Tallahassee, Florida 32399-1050, on this 23rd day of June, 2009.

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violated Mr. Marek's due process rights.

Finally as to the order denying Mr. Marek's newly discovered evidence claim, the circuit court describes Raymond Wigley's statements as not credible. In reaching this conclusion, the circuit court relied upon the testimony of Bannerman, Pearson, Conley, Mitchell and Green to conclude that Raymond Wigley's statements that he committed the murder were not necessary true. The circuit court's reasoning ignores the fact that the testimony of Banner, Pearson, Conley, Mitchell, and Green would have led to the introduction of Wigley's life sentence at Mr. Marek's penalty phase. The issue is not whether the jury would have likely believed Wigley's statements, but whether the introduction of those statements and the fact that he received a life sentence would have led to a different outcome before the jury, on direct appeal, or in postconviction. In this regard, the circuit court completely overlooked what in fact was and is Mr. Marek's claim.

