IN THE SUPREME COURT OF FLORIDA

CASE NO. 09-821

JOHN MAREK,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

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

REPLY BRIEF OF APPELLANT

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

ARGUMENT IN REPLY

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

The weakness of the State's position as to Argument I is as clear from what it does not address in its motion (the specific order in which Judge Kaplan recused himself) as is from the fact that the State has to argue that courts have been reading Rule 2.330 too broadly and that this Court needs to narrow the generally accepted reading of the rule (Answer Brief at 40).

A. Why Judge Kaplan recused himself.

The State does say that Judge Weinstein was correct in ruling that the motion for disqualification was successive (Answer Brief at 31). In support of this, the State includes a lengthy quote from Judge Weinstein at the May 6th hearing which really comes down to one sentence: "I still thinks it's a subsequent motion at that point because he did disqualify himself and I think that's the governing point." (Answer Brief at 33, quoting Transcript of May 6th hearing at 24-25).

The specific argument as to the core issue is in one brief paragraph consisting of two sentences that is buried in seemingly endless verbiage. This paragraph provides:

> The trial court ruled that based on what had transpired in this case, this was a successive disqualification motion by Marek under Rule 2.330(g). Marek asserts that **Judge Kaplan's removal from the Marek case**, because of his close personal relationship with defense counsel, was an inadequate basis to find that the

> instant motion to disqualify the entire Seventeenth Judicial Circuit Criminal Division, was a successive motion.

(Answer Brief at 35-36)(emphasis added). The highlighted words are the critical words to the State's sleight of hand argument. The sentence structure and the use of the words ("Judge Kaplan's removal") were clearly used to imply that the decision was forced upon Judge Kaplan by Mr. Marek. However, this is not what occurred. Judge Kaplan raised the matter on his initiative and recused himself.

After this carefully worded paragraph, the State never addresses the order drafted and signed by Judge Kaplan in January of 1997. The State clearly does not want to discuss, talk about, or even mention that order. Its endless verbiage is designed to camouflage that it will not address the very order that is the crux of whether Mr. Marek's motion for judicial disqualification filed on May 6th was successive within the meaning of Rule 2.330(g).

The January 15, 1997, order signed by Judge Kaplan stated:

> 1. **This Court finds that all of the grounds of the Defendant's several Motions to Disqualify are legally insufficient to disqualify the trial judge.**
>
> 2. Over many years this Judge's personal relationship with Attorney Hilliard Moldof has developed into a close friendship with Attorney Moldof, his wife, Mrs. Zena Moldof, as well as the Moldof's children.
>
> 3. The court still feels it could be fair and impartial in this matter.

> 4. **However, the court believes that the manifest appearance of impartiality is just as important as actual impartiality.**
>
> 5. Accordingly, based upon the possible appearance of the court not being impartial, based upon the above stated reasons **(and for these reasons only),**
>
> It is hereby,
>
> ORDERED AND ADJUDGED that the **undersigned Judge hereby recuses himself** from further proceedings in this matter.

(Order filed January 15, 1997)(emphasis added).

The State chooses to not address paragraph 1 of this order in which Judge Kaplan specifically finds the "several" motions to disqualify him that had been filed over a number of years "legally insufficient". The controlling language of Rule 2.330(g) provides: "If a judge has been previously disqualified on motion for alleged prejudice or partiality". Judge Kaplan's order clearly indicates that he found Mr. Marek's motions "legally insufficient." This demonstrates that Judge Kaplan's decision to recuse himself was not "on motion".

Judge Kaplan's recusal was premised upon his friendship with Hilliard Moldof. Mr. Marek knew nothing about this close friendship. Mr. Marek did not file a motion seeking disqualification because of the close friendship between Judge Kaplan and Hilliard Moldof. In fact, Mr. Marek's motion to vacate included a claim premised upon an affidavit from Mr. Moldof (2PC-R. 380-81). Since Mr. Moldof signed an affidavit in

support of Mr. Marek's Rule 3.850 and since Mr. Marek intended to call Mr. Moldof as a witness testifying in support of his claim for relief, Judge Kaplan's close friendship with Mr. Moldof was not disadvantageous to Mr. Marek as to the then pending Rule 3.850 motion.

Clearly, the record shows that Judge Kaplan's decision was not on the basis of matters raised in a motion to disqualify filed by Mr. Marek. Judge Kaplan's decision upon information unknown to Mr. Marek which in the unique circumstances of the specific motion to vacate then pending inured to Mr. Marek's benefit. And Judge Kaplan made it clear that his recusal resulted only for the reasons that he stated.

B. The State's argument is dependent upon this Court declaring that Rule 2.330 has been read too broadly.

The State in its Answer Brief argues as its second point that Rule 2.330 has been read too broadly by the courts and that this Court needs to narrow it:

> Second, the State would contend that the courts have too broadly applied Rule 2.330, in circumstances where, like in this case, the motion for disqualification has nothing to do with a particular judge but rather, constitutes a broad-sided attack on an entire circuit with no allegations that are anything but speculation.

(Answer Brief at 40). After asking this Court to narrow the scope of the rule, the State never cites to any cases in which it believes the rule has been read too broadly.

The case that is problematic for the State, and which the State never once refers to in its brief, is Randolph v. State,

853 So. 2d 1051 (Fla. 2003), a decision by this Court on which Mr. Marek specifically relied in his motion for disqualification. The ruling this Court made that the State needs for this Court to retract[1] was set forth in Mr. Marek's motion, and is as follows:

> 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."

(Motion for Judicial Disqualification at 5-6).

C. The requirement that the legal sufficiency of the motion be determined on the face of the motion.

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[1]However, the State is apparently too reticent to specifically advise this Court that it is a ruling by this Court premised upon Florida's Code of Judicial Conduct that it wants overturned so that the circuit court's denial of the motion for judicial disqualification can be affirmed.

Though the State concedes that Judge Weinstein went beyond the face of the motion for judicial disqualification and conducted an inquiry into the facts set forth in the motion, the State conveniently overlooks the very clear rule of law that the act of going beyond the face of the motion that qualifies as an initial motion under Rule 2.330(f), itself is an act that requires disqualification.[2] When a judge goes beyond the facial sufficiency of an initial motion for judicial disqualification, the act of addressing the merits of the specific allegation of partiality and responding to those allegations itself requires

[2]The State includes some language in its Answer Brief alleging that the motion was premised upon wild speculation. In making this assertion, the State conveniently ignores the clearly established facts. Jim Lowry, a clerk with Judge Weinstein, emailed the April 24th order to the parties at 4:44 PM on April 24th. A copy of this email was attached to the motion for judicial disqualification. Carolyn McCann stood up at the May 6th hearing and represented as an officer of the Court that Sharon Ireland found her outside a courtroom before a hearing in another case began at 4:00 PM on April 24th to hand an envelop containing the orders that were later emailed to the parties at 4:44 PM. As noted by Mr. Marek in his Notice of Filing on May 8, 2009, the envelop provided to his counsel containing the orders was not hand delivered to him on April 24th like they were to Ms. McCann by Ms. Ireland before the email went out. But instead, the envelop was placed in the mail to undersigned counsel three days later. There is no speculation there. These are the facts that are clear from the record. And other facts clear from the record is the State's action in contacting Mr. Conley on the morning of May 4th hours before the judge entered his order setting an evidentiary hearing for May 6th, in order to arrange travel and purchase tickets for Mr. Conley and his health care provider to travel to Fort Lauderdale on May 5th and return to Maine on May 7th, coincidently making Mr. Conley available to testify on May 6th, the day that the judge had not yet set as the date of the evidentiary hearing.

judicial disqualification. Suarez v. Dugger; Lake v. Edwards, 501 So. 2d 759, 760 (Fla. 5th DCA 1987).

ARGUMENT II: 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.

In addressing Argument II, the deficiencies are too numerous in the State's hole laden argument to fully or even adequately address in the four hours that this Court has allotted to Mr. Marek to file this Reply Brief. All that undersigned counsel can do is to commence typing as fast as possible as was done on racehorse essay exams he endured in law school. There is no time to address anything but the most obvious and no time to insure that the writing has clarity.

A. Procedural bar.

The State relies heavily on its argument made to Judge Weinstein which he placed in his order that this newly discovered evidence claim is procedurally barred. However, the State weaves through its argument the suggestion that the procedural bar was premised upon more than a *res adjudicata* bar.[3] Herein, Mr. Marek will attempt to address the various procedural bars that the

[3]The State's unwillingness to rely only on the procedural bar found by Judge Weinstein is certainly consistent with a recognition by the drafters of the State's Answer Brief that its *res adjudicata* argument is beyond ridiculous.

State shotguns into the Answer Brief in addition to the only procedure bar actually relied upon by Judge Weinstein.

1. *res adjudicata*

The notion that Mr. Marek's argument that his newly discovered evidence claim premised upon the sworn testimony of Conley and Bannerman and the stipulated testimony of Pearson is *res adjudicata* is just absurd.[4] There is no contention by the State and no suggestion by Judge Weinstein that Conley, Bannerman, and/or Pearson previously testified in Mr. Marek's case or that their statements were previously included in any pleading filed by Mr. Marek. Since the claim is one premised upon newly discovered evidence and since this Court has repeatedly recognized that newly discovered evidence claims are cognizable in Rule 3.850 proceedings, unless the newly discovered evidence now relied upon was previously presented, the claim cannot have already been heard and decided by a court. Jones v. State, 591 So. 2d 911 (1991); Scott v. Dugger, 604 So. 2d 465

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[4]The State also includes in this argument the claim that since Mr. Marek always knew that he did not kill the victim, the new evidence that Wigley admitted that he killed the victim is barred:

> "the newly discovered evidence" was always known to Marek, since the time of Marek's trial.

(Answer Brief at 58). Of course, the same can be said of Greg Mills in State v. Mills who knew in 1980 that he had not been the triggerman, but did not present the "new" evidence to support the long known fact until 2001. Yet, Mills got Rule 3.850 relief on the "new" evidence in 2001. State v. Mills, 788 So. 2d 249 (Fla. 2001).

(Fla. 1992). Because *res adjudicata* is a bar to reconsidering claims already addressed, it does not apply to newly discovered evidence claims when the newly discovered evidence has not been previously presented to the courts. Lightbourne v. State, 742 So. 2d 238 (Fla. 1999)(previously rejected Brady had to be reconsidered in light of newly discovered witness); Swafford v. State, 679 So. 2d 736 (Fla. 1996)(evidentiary hearing ordered in light of new affidavits which required revisiting issues previously presented).

In fact, this case is similar to the circumstances in State v. Mills, 788 So. 2d 249 (Fla. 2001).[5] There, Mills presented a Rule 3.850 motion in April of 2001 that contained a newly discovered evidence claim premised upon an affidavit from Anderson who had been incarcerated in 1980 with Mills' co-defendant, Ashley. In this affidavit filed in April of 2001, Anderson said Ashley told him in 1980 that he, Anderson, had been the triggerman and that Mills had not shot the victim.

In February of 2001, Mills had filed a newly discovered evidence claim based upon a statement Ashley made in early 2001 to Mills' attorney in which he provided a version of the homicide

[5]Though the State does reference State v. Mills in its Answer Brief, the State fails to recognize that Mr. Marek relies upon State v. Mills as to the validity of the *res adjudicata* bar. As a result, the State fails to address why State v. Mills does not demonstrate that Mr. Marek's newly discovered evidence claim is not barred by *res adjudicata*.

at variance with his trial testimony; however, it did not change from the evidence at trial that Mills was the shooter. This newly discovered evidence claim was rejected on the merits and the denial of relief was affirmed by this Court in Mills v. State, 786 So. 2d 547 (Fla. 2001). This Court's opinion in Mills v. State issued on April 25, 2001.

Despite this Court's rejection of the newly discovered evidence claim presented in Mills v. State, the newly discovered evidence claim presented days later was not barred as *res adjudicata* because it was premised upon the affidavit of Anderson which had never been previously considered by the courts. And on the basis of the Anderson affidavit, an evidentiary hearing was ordered after which Rule 3.850 issued and Mills' death sentence was vacated. State v. Mills.[6]

2. due diligence.

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[6]The State makes a ridiculous argument in its Answer Brief that is totally at variance with State v. Mills:

> Marek cannot overcome a procedural bar that applies here. He is merely attempting to argue more "remote in time evidence" than previously acquired to circumvent the ruling on the merits on direct appeal that Marek was guilty of Ms. Simmons' murder.

(Answer Brief at 56-57). Not only is this argument inconsistent with State v. Mills, it cannot be reconciled with Lightbourne v. State, 742 So. 2d 238 (Fla. 1999), where this Court ordered an evidentiary hearing on a previously rejected Brady claim because subsequent to the rejection of the claim a witness was located who had not been available at the previous hearing when the Brady claim was first heard on the merits.

Despite the fact that Judge Weinstein did not find that Mr. Marek had not been diligent in locating Conley, Bannerman and Pearson, the State asserts that "due diligence would have unearthed the evidence" (Answer Brief at 49).[7] During the evidentiary hearing, Judge Weinstein repeatedly told Mr. Marek's counsel that he had no criticism of the manner in which counsel had pursued his case:

> THE COURT: Okay, as far as I'm concerned, the issue of delay is a non-issue. You did file a motion. You explained to the court that after -- you did do the public records requests, you've had a personal situation with your family.
>
> You've explained to the court that you moved as expeditiously as you could and nobody is criticizing that.

(Transcript of May 7th at 257-58).

The State's argument that due diligence was lacking comes down to the two following sarcastic paragraphs:

> While, Conley "seemed more difficult to find, in 2001," when first searched for by Marek's defense team, it seems miraculous that it only took a week after the warrant was signed to find him, secure a declaration and secure purportedly newly discovered evidence.

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[7]Mr. Marek did not brief the issue of due diligence because Judge Weinstein heard testimony and the representations of Mr. Marek's counsel and did not find a lack of due diligence. Judge Weinstein made no credibility findings against Mr. Marek's witnesses on the due diligence issue. Since the issue of due diligence is a factual one dependent upon the credibility of witness, a judge's failure to find an absence of due diligence after hearing the testimony precludes the matter from being raised *sua sponte* by the State unless the State demonstrates that there was no evidence presented in the circuit court on which the judge could find diligence.

> It would appear that due diligence was not undertaken in this instance based on the failure of counsel to pursue locating Conley and any other named person from the DOC files secured in 2001.

(Answer Brief at 63)(footnote omitted).

But what the State fails to address is what did Mr. Marek's counsel know that would cause a reasonable diligent attorney to specifically be looking for Conley, Bannerman, and Pearson. What Mr. Marek's counsel knew was that they along with many thousands of other DOC prisoners had been incarcerated with Wigley during the 17 years that Wigley was housed in a prison facility.

In State v. Mills, Ashley had also been housed in jails and prisons, but for a shorter time and with far fewer individuals that were housed with Wigley. In Mills, the collateral attorneys did not search DOC and jail records for names of people who had been incarcerated with Ashley. It was not until Ashley mentioned Anderson's name in 2001 that any attempt was undertaken to find other prisoners who had served time with Ashley. Yet, this Court and the trial court in State v. Mills found that counsel had used due diligence on behalf of Mills.

How can it possibly be that because Mr. Marek's counsel took a shot in the dark and made an effort in 2001 to find some people who had been housed with Wigley in prison, that they were less diligent than counsel for Mills? By doing more than the attorneys in Mills, according to the State's argument they were less diligent. Surely, due diligence has a reasonableness

component. It cannot be required that collateral counsel have to search through every haystack within one year because if they don't and something falls out of the haystack later it will barred. Perfection is not required of trial counsel under the Sixth Amendment and surely it cannot be required of collateral counsel either. Ultimately, that is what the State is arguing for - perfection.

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.

As to this issue, the State initially relies on the fact that Mr. Marek received a clemency proceeding with appointed counsel in 1988 ("Based on the materials provided, the interview of Marek with counsel present and any application prepared by Marek's counsel, clemency was denied, when the Governor signed his first death warrant.")(Answer Brief at 70).

In relying on this observation, the State ignores what the United States Supreme Court has said about the clemency process in a capital case: "Far from regarding clemency as a matter of mercy alone, we have called it 'the "fail safe" in our criminal justice system.'" Harbison v. Bell, Slip Op. at 12. The Court further explained that federal habeas counsel may develop in the course of his representation "the basis for a persuasive clemency application" which arises from the development of "extensive information about his [client's] life history and cognitive

impairments that was not presented during his trial or appeals." Slip Op. at 13.

In Mr. Marek's case, no investigation as to Mr. Marek's background was conducted by trial counsel.[1] Consequently, the process that occurred in 1988 before the life history was investigated and developed cannot be the "fail safe" that is envisioned by the United States Supreme Court.[2]

Interestingly, the State does concede what Mr. Marek has been alleging all along, that the clemency 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 (See Answer Brief at 70, fn 11) ("Email exchanges between the Governor's Office and agencies with information regarding Marek, reflects that the Governor pursuant to the clemency rule governing death cases, recently obtained an update on Marek's status."). As Mr. Marek

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[1]The only evidence presented by trial counsel at the penalty phase was from a detention officer who described Mr. Marek's good behavior in jail (R. 1297-99).

[2]Since Mr. Marek's 1988 clemency proceeding, extensive mitigation has been uncovered by postconviction counsel. This mitigation substantiates the fact that literally from birth, Mr. Marek's life was one of abandonment, abuse, and neglect. This pathetic story emerged from voluminous foster care records, from Mr. Marek's natural parents who abandoned and neglected him, from foster parents who failed to provide the stability required by a psychologically and organically damaged child, and from numerous psychological evaluations beginning when Mr. Marek was only nine years old.

asserted in his initial brief, 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.

Finally, the State asserts that Mr. Marek had "ample opportunity to seek re-visitation of his 1988, clemency attempt." (Answer Brief at 73). According to the State, Mr. Marek did not need the decision in Harbison to re-apply for clemency consideration (Answer Brief at 73). The State's argument here is disingenuous and smacks of gamesmanship. Just ten days ago, on April 30, 2009, the State represented to this Court, "For the Court's benefit, it should be noted, first that Mr. McClain has asserted he will not have adequate time to properly litigate Marek's case, however, **in spite of the state statute barring CCRC and registry appointed counsel from handling clemency**, he will devote his time to the preparation of a clemency application. *See* Sections 27.51(5)(a); 27.511(9); and 27.5303(4), Fla. Statutes." (April 30, 2009 Answer Brief at 45, Archer v. State, Case No. 09-765)(emphasis added). The State's continuous manipulation of the

facts to suit its needs further demonstrates that a one-sided clemency process is nothing short of arbitrary.

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 addressing Mr. Marek's claim that the State drafted the order denying Rule 3.851 relief in 1988, the State asserts that Mr. Marek's proof is insufficient and that even if the State did prepare the 1988 order[3], the State and/or Judge Kaplan had no responsibility to alert Mr. Marek's postconviction counsel of the due process violation.

As to the State's assertion that the claim was not sufficiently proved, Mr. Marek presented evidence to the circuit court that demonstrated: 1) Judge Kaplan had previously had the prevailing party prepare orders, including orders denying Rule 3.851 relief. This was so until this Court held that such a practice violated due process and required reversal. See Rose v. State, 601 So. 2d 1181, 1183 (Fla. 1992). Rose was the change in the law to which Judge Kaplan referred in his testimony on May 6, 2009. Thus, the order denying Mr. Marek Rule 3.851 relief in 1988 was at the time when the judge permitted the practice of the prevailing party to prepare his order – in this case the State. 2) The postconviction prosecutor who prepared the ex parte orders

[3]Curiously, the State has never denied preparing the order before the circuit court or this Court.

denying Rule 3.851 in Rose and Smith v. State, 708 So. 2d 253 (Fla. 1998), was the same postconviction prosecutor involved in the Marek case. 3) While the State suggests that the fact that 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 is insignificant, it is exactly these type of differences that have triggered inquiries and substantiated claims like Mr. Marek's. And, 4) no notice was provided to Mr. Marek's postconviction counsel.[4]

In addition, Mr. Marek has previously proven that Judge Kaplan and the postconviction prosecutor have engaged in ex parte communications to have orders prepared in Mr. Marek's case. See PC-R. 416. In fact, an order was prepared ex parte by the State in Mr. Marek's case, just a month before the order at issue here. Id.

The circumstances present here are not coincidence. Rather, the circumstances here support only one conclusion – the State, through and ex parte communication prepared the 1988 order denying Rule 3.851 relief to Mr. Marek.

The State also contends, as it did in the circuit court, that the claim is procedurally barred. The State claims that it

[4]The State's reliance on Dillbeck v. State, 964 So.2d 95, 98 (Fla. 2007), is misplaced because Mr. Marek had no notice of the judge and State's conduct.

is neither the responsibility nor obligation of the State, or apparently the postconviction judge, to alert a capital defendant that the process denying him relief was unfair and violated due process.

However, this Court has long held that the State is obligated to disclose Brady material which is exculpatory. See Johnson (Terrell) v. Butterworth, 713 So. 2d 985, 986 (Fla. 1998)(citations omitted); Roberts v. Butterworth, 668 So. 2d 580 (Fla. 1996)(finding that *Brady* obligation continues in postconviction). Certainly, exculpatory information concerning a constitutional violation of the process is just as critical to a capital defendant, like Mr. Marek, as exculpatory information concerning the substance of a claim. If this were not the case, then, the State could attempt to subvert the process at every turn, hoping that the defendant did not learn of the violation until a point that the State could claim it was too late, and no consequences would ever be suffered by the State.

As the United States Supreme Court held in Banks v. Drehtke:

> Our decisions lend no support to the notion that defendants must scavenge for hints of undisclosed *Brady* material when the prosecution represents that all such material has been disclosed. As we observed in *Strickler*, defense counsel has no "procedural obligation to assert constitutional error on the basis of mere suspicion that some **prosecutorial misstep** may have occurred." 527 U.S. 263 at 286-287, 144 L. Ed. 2d 286, 119 S. Ct. 1936.

540 U.S. 668, 695-6 (2004)(emphasis added).

In Banks, the United States Supreme Court also stated: "A rule thus declaring "prosecutor may hide, defendant must seek," is not tenable in a system constitutionally bound to accord defendants **due process**." 540 U.S. at 696 (emphasis added). That is what occurred in Mr. Marek's case. 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, yet, the State failed to alert Mr. Marek of this constitutional violation. Relief is warranted.

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, and/or any other relief which this Court deems appropriate.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by U.S. Mail delivery to Carolyn Snurkowski, Assistant Deputy Attorney General, Department of Legal Affairs, The Capitol PL01, Tallahassee, Florida 32399-1050 on May 10, 2009.

CERTIFICATE OF FONT

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

MARTIN J. MCCLAIN
Attorney at Law
Florida Bar No. 0754773
141 N.E. 30th Street
Wilton Manors, FL 33334
(305) 984-8344

COUNSEL FOR APPELLANT