IN THE SUPREME COURT OF FLORIDA

JOHN MAREK

Appellant,

v. CASE NO. SC65821

STATE OF FLORIDA,

Appellee.

_____/

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

ANSWER BRIEF OF THE APPELLEE

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PRELIMINARY STATEMENT

References to the appellant will be to "Marek" or "Appellant". References to the appellee will be to the "State" or "Appellee".

The record on appeal will be referenced as "TR" followed by the appropriate volume and page number. Reference to the State trial court evidentiary hearing record will be "CH" followed by the appropriate volume and page number. Reference to the State trial court successive, post-conviction evidentiary hearing record will be "PC" followed by the appropriate volume and page number. References to Marek's initial brief will be to "IB" followed by the appropriate page number.

INTRODUCTION

On April 20, 2009, Governor Crist signed a third death warrant setting the warrant week beginning at 12:00 noon on May 8, 2009, through 12:00 noon on May 15, 2009, with the execution set for Wednesday, May 13, 2009, at 6:00 p.m. At the present time no stays of execution exist.

STATEMENT OF THE CASE

a. PROCEDURAL HISTORY

The Florida Supreme Court on direct appeal affirmed Marek's conviction and sentence of death for the first degree murder of Adella Marie Simmons in Marek v. State, 492 So. 2d 1055, 1057-1058 (Fla. 1986). The Court held as to the penalty phase:

> Sentencing Phase
>
> Appellant challenges his death sentence on four grounds. Appellant first contends that the trial judge erred in sentencing him to death in view of the fact that the judge had previously sentenced Wigley to life in prison for the same offense. **This disparate sentencing, according to appellant, should be prohibited as cruel and unusual, arbitrary, and unequal. We reject this argument. In prior cases we have approved the imposition of the death sentence when the circumstances indicate that the defendant was the dominating force behind the homicide, even though the defendant's accomplice received a life sentence for participation in the same crime.** See Tafero v. State, 403 So. 2d 355 (Fla. 1981), *cert. denied*, 455 U.S. 983, 71 L. Ed. 2d 694, 102 S. Ct. 1492 (1982); Jackson v. State, 366 So. 2d 752 (Fla. 1978), *cert. denied*, 444 U.S. 885, 62 L. Ed. 2d 115, 100 S. Ct. 177 (1979); Witt v. State, 342 So. 2d 497 (Fla.), *cert. denied*, 434 U.S. 935, 98 S. Ct. 422, 54 L. Ed. 2d 294 (1977). **The evidence in this case clearly established that appellant, not Wigley, was the dominant actor in this criminal episode. 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.**

(Emphasis added).

b. STATEMENT OF THE CASE

Marek was indicted on July 6, 1983, for first degree murder, kidnapping, burglary, sexual battery, and aiding and abetting a sexual battery of Adella Marie Simmons. He was found guilty on June 1, 1984, and on June 5, 1984, at a separate sentencing proceeding, the jury, by a vote of 10-2, recommended a sentence of death. The trial court followed the jury's death recommendation and imposed the death penalty, finding four (4) statutory aggravating circumstances proven beyond a reasonable doubt and no mitigating circumstances applicable.

The Florida Supreme Court affirmed, Marek v. State, 492 So.2d 1055 (Fla. 1986), and no petition for writ of certiorari was filed in the United States Supreme Court.

On October 10, 1988, Marek filed his initial postconviction motion pursuant to Fla.R.Crim.P. 3.850,

raising twenty-two (22) claims, and filed his state habeas corpus petition in the Florida Supreme Court October 12, 1988, urging sixteen (16) issues for review, thirteen (13) of which paralleled his Rule 3.850 motion. Based upon the claims raised, the trial court granted Marek an evidentiary hearing which was held November 3-4, 1988, before Judge Kaplan. The trial court denied the post-conviction relief, and the Florida Supreme Court, denied Marek's state habeas and the appeal from the denial of his 3.850 motion, in Marek v. Dugger, 547 So.2d 109 (Fla. 1989).

Marek's federal petition for writ of habeas corpus filed in the Southern District of Florida, raised twenty-two (22) claims. That court denied relief in Marek v. Dugger, Case No. 89-6824-Civ-Gonzalez, October 1, 1990. On appeal to the Eleventh Circuit Court of Appeals, Marek abandoned all but five (5) issues on appeal. The court affirmed the denial of federal habeas corpus relief. Marek v. Singletary, 62 F.3d 1295 (11th Cir. 1995).

During federal litigation, Marek also returned to state court and filed a successive state rule 3.850 on July 22, 1993. On January 24, 1994, Marek filed a "supplemental motion." In 2001, Marek filed amended claims. One of the claims raised was a newly discovered evidence claim that "established his innocence". Specifically he argued at

Claim IX p. 98-103 of his Second Amended Motion filed September 27, 2001, (TR V 799-804 in Marek v. State, SC04-229) that:

> ….The state's case rested on the premise that Mr. Marek was in control of the situation (R 423, 1137-38). The State's case was based upon their argument that Mr. Marek was the person who killed Ms. Simmons (R 421) But the sentencing judge found that Raymond Wigley was involved in the crime (R 1341) and that Wigley strangled the victim (R 1344). The court further found that Wigley and Mr. Marek acted in concert together (R1348-50). However, Mr. Marek received a sentence of death while Mr. Wigley received a lesser sentence.
>
> **Since the time of Mr. Marek's trial, evidence has been discovered indicating that Wigley warranted further investigation by police as he was the person who raped and killed Ms. Simmons. A previously unavailable mental health evaluation provided evidence consistent with Wigley being the principle.**

(Emphasis added)

The trial court on September 30, 2003, denied all relief including this issue finding it procedurally barred at TR Supplemental Record V 658-659 in Marek v. State, SC04-229, holding:

> Defendant claims that he gained access to "newly discovered evidence" which establishes his innocence. Defendant alleges that a "previously unavailable" mental health evaluation is relevant to the issue of his guilt or innocence and his sentencing. Defendant argues that evidence has been discovered supporting his allegation that the co-defendant, Raymond Wigley, raped and killed Adella Simmons. Defendant argues that while he, himself, has no prior convictions for

> violent felonies at the time of his trial, Mr. Wigley has a history of violence, mental illness, and substance abuse. Furthermore, defendant argues that the jury, as co-sentencer, should have been made aware of the fact that Mr. Wigley received a "lesser sentence" of life in prison.
>
> Defendant does not present any new circumstances which would warrant an evidentiary hearing on this claim. Defendant argued that Mr. Wigley was the murderer at trial, as well as on appeal to the Florida Supreme Court of Florida. Each court has decided that it was Mr. Marek who was the killer, planner, and more dominant force, and that Mr. Wigley was the lesser participant in commission of the crime. This claim is procedurally barred because it has been raised previously and decided on its merits adversely to Defendant. On appeal, the Supreme Court of Florida held that "the record of Appellant's trial is replete with evidence which justifies the conclusion that Appellant committed premeditated murder." Marek v. State, 492 So. 2d 1055, 1057 (Fla. 1986). See SMR. P. 86-88. Accordingly, Defendant's claim must be denied.

Rehearing was subsequently denied on January 8, 2004. The Florida Supreme Court denied all appellate review, Marek v. State, 940 So. 2d 427 (Fla. 2006), *cert. denied*, April 23, 2007.

> John Marek, a prisoner under sentence of death, appeals the denial of his successive motion for postconviction relief under rule 3.850 and, for the third time, petitions this Court for a writ of habeas corpus. We have jurisdiction. See art. V, §§ 3(b)(1), (9), Fla. Const. Although we initially scheduled oral argument in this case, upon further review we have concluded that it is unnecessary in light of the clarity of the issues and the successive posture of the case. **Finding no merit to any of Marek's claims, we affirm the**

denial of his 3.850 motion and deny his habeas petition.

On May 11, 2007, Marek filed another successive post-conviction motion asserting two claims, a challenge to Florida's method of execution and the newest 2006 ABA report. The trial court denied all relief on April 23, 2009. On April 27, 2009, Marek filed a Motion for Rehearing/Motion to Amend Motion to Vacate, raising three additional claims and rearguing previously denied claims. Those additional claims were that his death sentence violated the Eighth Amendment, based on the state's use of inconsistent theories to convict; a Lackey v. Texas, claim; and an argument that the pendency of Caperton v. Massey, in the United States Supreme Court might impact his case.

After hearing oral argument, the trial court denied relief April 27, 2009. On May 8, 2009, the Florida Supreme Court concluded Marek was entitled to no relief. Marek v. State, Case No. SC09-765 (Fla. May 8, 2009).

In the interim, on May 1, 2009, Marek filed yet another successive motion for post conviction relief asserting that: 1.) newly discovered evidence has come to light which demonstrates Marek's conviction and sentence are not constitutionally reliable, Pet. p. 8-18; 2.) that the state clemency process is arbitrary and capricious,

Pet. p. 18-22; and 3.) that an assistant state attorney, who represented the State in 1988, drafted the order denying post-conviction relief on an *ex parte* basis, Pet. P 22-25.

On May 4, 2009, Marek filed a Motion For Leave To Supplement Pending Rule 3.851 Motion, providing the name, without further explanation, of an inmate Jessie Bannerman DOC# 024468, who was an inmate with Raymond Wigley from 1984-1988. Wigley, one evening while drinking moonshine with Mr. Bannerman, told Mr. Bannerman he, Wigley, had raped and killed a woman, because he was afraid she "would identify him, so he choked her." An Emergency Motion for Writ of Habeas Corpus Ad Testificandum was filed on May 5, 2009, for production of Robert Pearson, without any explanation.

An evidentiary hearing was held on May 6-7, 2009. The Order denying relief was entered May 8, 2009, finding all claims to be either procedurally bared and/or meritless.

1. PERTINENT FACTS AT TRIAL

The State's opening statement can be found at (TR IV 420-434), wherein the State informed the jury that, based upon the grand jury's indictment, the State would prove that Marek "committed murder in the first degree by killing

Adella Marie Simmons; that he kidnapped her; that he raped her and in the process he committed a burglary. That's what the evidence is going to show." (TR IV 421) The State then presents a summary of the witnesses to be called, including Jean Trach, Ms. Simmons' traveling companion, (TR IV 423-424); Dennis Satnick, the Dania police officer who spoke to Marek and Wigley that night on the beach within 100 feet of the murder scene, (TR IV 429-430); Jerome Kasper, the lifeguard who found Ms. Simmons, (TR IV 431); and police officer Schafer who arrested Marek and Wigley. (TR IV 431-433)

Additionally, Marek testified on his own behalf. Marek testified that on Monday, June 13, 1983, he and Raymond Wigley left Texas to come to Florida for a "fun-loving" two weeks (TR 940). He had known Wigley for a couple of months prior to the trip and they had been drinking two to four cases of beer a day during the trip to Florida (TR 936, 940). Marek testified that he was driving down the turnpike when he noticed the victim's car off of the turnpike (TR 942). Marek testified that he stopped and offered to take both women to a filling station. After the women talked between themselves, the victim agreed to go with Marek and Wigley for help (TR 940, 946). Marek was the one who invited the victim to ride with him and that he, not

Wigley, did all of the talking (TR 972). Marek testified that Wigley drove the truck and that, he fell asleep in the passenger seat approximately two minutes after he, Wigley and the victim got into the truck (TR 947). When Marek woke up "sometime later" and asked Wigley if he dropped the victim off since he didn't see the victim in the cab of the trunk (TR 948), Wigley told him that he dropped the victim off at a gas station (TR 948). Marek testified he fell asleep again and, when he next woke up he was on the beach (TR 949). Marek looked for Wigley and found him up on the observation deck of the lifeguard stand (TR 950). Marek climbed up on top of a trash can, grabbed one of the railings and swung himself up to meet Wigley (TR 951). He testified that he knew he was "trespassing" when he entered the observation deck (TR 954). He stated, he never saw the victim's body inside the observation deck because it was dark inside and a chair was obstructing his view (TR 856). Marek testified that he "felt" his way along the walls of the deck and opened a shutter in order to exit the deck (TR 954-956). Marek testified that he was in the shack for 15 to 18 minutes (TR 957).

Marek testified that he and Wigley left their shirts on the beach to make it look like they were "messing around with the water or something" (R 957).

Marek and Wigley were confronted by police after they left the observation deck. Wigley was standing nearby with his head “hung down”, while Marek joked with the police (TR 960-961).

Marek testified that he drove the truck away from the beach (TR 960), then, recalled that he had left his clothes on the beach. He drove back to the beach to pick them up (TR 962-963). Marek testified that he never knew there was a body in the observation deck and that he had never asked Wigley what had happened to the victim, Adella Simmons (TR 978).

Marek also testified that he never knew Wigley’s last name even though he had known him for a couple of months before the trip. He also admitted that he drank sixty (60) beers on Thursday, June 16, 1983 (TR 969).

Marek testified that he did not know where he was when he was at the beach but had told the police on the beach that he was looking for a couple of college friends (TR 976-977). Marek explained “We1l, I knew they was in Florida. I don’t know where abouts they was.” (TR 977). Marek testified that he told police that he went to college (TR 977), and also admitted to having been previously convicted of a felony (TR 977).

Marek never heard any yelling or struggling while he was asleep in the truck on the way to the beach (TR 973). Marek denied strangling the victim or burning her pubic hair (TR 976). He denied burning the victim's finger to see if she was dead (TR 976).

Marek explained that he denied knowing Wigley when he was picked up on Daytona Beach because he didn't know Wigley's last name (TR 978-980). Marek admitted hearing Detective Rickmeyer tell him while he was in a holding cell in Daytona Beach, "Congratulations, you made it to the big times" (TR 1013). Marek admitted that he then told Detective Rickmeyer, "SOB must have told all" (TR 1014). Marek denied knowing that the Ford truck he was driving was stolen (TR 1015).

The closing arguments by the State at the guilt and penalty phases of Marek's trial were premised upon the evidence and arguments there from derived. (TR VIII 1132-1154, 1206-1217) and (TR IX 1299-1309) In closing, the State argued that there were a number of ways to convict Marek for the first degree murder of Ms. Simmons and, all of the alternatives proved Marek, based on his actions, was a principal in the murder.

At the penalty phase held June 5, 1984, defense counsel Moldof informed the court that he was not going to

mention Wigley's sentence of life imprisonment because he did not want to open the door to the prosecution regarding Wigley's confession. Moldof wanted to introduce the report of Dr. Krieger limited to the doctor's initial comments and evaluation of Marek. (TR IX 1283). The trial court stated that it would not be fair to introduce Dr. Krieger's report where he had not testified and it would result in hearsay which would deny the State cross—examination of him. (TR IX 1284). **Moldof also stated that he was not going to mention anything concerning Marek's criminal history and therefore the State was precluded from arguing same to the jury. (TR IX 1284). The court specifically provided that if Moldof introduced any evidence regarding Wigley's life sentence, the State had the right to instruct the jury as to the difference between Wigley's culpability and that of Marek's. (TR IX 1285). Based upon the court's ruling, defense counsel affirmatively determined that he would not mention Wigley's life recommendation. (TR IX 1288).**

The record reflects the State presented no further evidence at the penalty phase. Defense counsel called Terry Webster on Marek's behalf, (TR IX 1295), who testified that she was a jail detention officer who knew Marek. She stated she never had a problem with Marek. (TR IX 1295-1299). No other witnesses were called.

The closing arguments by the State and defense counsel consisted of the following. The State argued that Appellant never displayed any emotion during the course of the trial and seemed to be sleeping through parts of it. He apparently never reacted and apparently never showed any remorse through any of his actions. The prosecutor observed that when Deputy Webster testified, in particular that he cried, those tears were not for remorse but rather that Marek got caught. (TR 1306—1309)

Moldof discussed in great detail, Marek's drinking problem (TR IX 1315-1316), and talked about Marek's accomplice, specifically Wigley's involvement in the crime. Moldof informed the jury that there was no evidence that Marek knew what happened in the shack. He further observed:

> The other mitigating circumstance would be the age of Mr. Marek and I think Mr. Carney (prosecutor) is incorrect in one respect. He was twenty-one at the time, not twenty—two. Again I think that probably just speaks of perhaps a little lack of insight into how much liquor one can endure and how much one should be drinking and how much part the liquor did play in whatever Mr. Marek's actions were that caused you to render your verdict on Friday.
>
> The only other aspects of mitigation that I think are relevant is which is any other aspect of his character or record or any other circumstance of the offense.

> I think you have heard from Deputy Webster, who is really the only other person called that had nothing to do with the case. Deputy Webster can give you some insight into John Marek; what type of person he is. He's been, as she's testified, in jail at least since December and she probably knows since June, and during the entire time she's been on duty and had an opportunity to observe Mr. Marek even prior to the trial.
>
> Mr. Carney would like you to believe that well Mr. Marek is now putting on a show for Deputy Webster and you being on the verge of tears and being upset and being quite human about this but Mr. Marek, up until this time, has not displayed any of the characteristics like she said of some of the male inmates that display some very distasteful, disrespectful, foul language at a female detention officer and act very disrespectful and quite often either attacked them – at least attack them verbally. Mr. Marek has been, at least while incarcerated, courteous, respectful and she had no problem with him. I think that does speak to his character and the type of individual he is and something you can take into consideration in determining what your sentence should be.

(TR IX 1317—1319)

Defense counsel also informed the jury that there were no eyewitnesses to this crime. It was a circumstantial evidence case. He observed that this was a valid case to recommend a life sentence. He further noted that if the jury had any lingering doubt with regard to whether Marek committed the crime it would be horrible for the jury to recommend a death sentence and a number of years hence;

someone comes in and confesses that they actually killed Ms. Simmons. (TR IX 1320).

During the State's penalty phase closing, the evidence in aggravation and mitigation was discussed and the State concluded its presentation that the aggravation outweighed the mitigation in Marek's case.

In sentencing Marek to death, the trial court observed:

> The evidence dictates that either Wigley or Marek strangled the victim to death. Wigley's confession indicates that Marek choked the life from the victim after he and Marek repeatedly raped her both in the truck and in the tower but since that confession was not admissible in evidence in Marek, this Court cannot consider its contents.
>
> Wigley was convicted of murder in the first degree, kidnapping, burglary and a sexual battery.
>
> **To the benefit of Mr. Marek, this Court will assume for the moment that Marek's accomplice, Wigley, strangled the victim to death. Could the jury have reasonably inferred from the evidence that Marek by his conduct intended or contemplated the lethal force might be used by Wigley or that Wigley might take the victim's life?**
>
> **This Court feels that not only could the jury have answered that question in the affirmative but evidenced by the solid vote of 10 to two for the imposition of the death penalty that they did so find.**
>
> (TR IX 1343-1344)(Emphasis added).

No portions of the co-defendant Wigley's trial transcripts were introduced during Marek's trial.[1]

2. **TESTIMONY AT 3.850 EVIDENTIARY HEARING, NOVEMBER 3-4, 1988.**

Hilliard Moldof, trial defense counsel called by the State, testified regarding his representation of Marek:

Hilliard Moldof testified he handling probably 5 or 6 death cases prior to Marek's case. (CH 312-313). He spoke to Marek about talking with Marek's family for the penalty

[1] In Marek's recital of the facts, he has selected excerpts taken out of context from the Wigley trial. Marek argues that his "direct appeal attorney would have been unaware of the different positions the State took at Wigley's trial." The record shows at the post-conviction hearing Hilliard Moldof, defense counsel for Marek, testified that he spoke to Wigley's defense counsel and monitored Wigley's trial. (CH 400) Had some inconsistencies as to the State's presentation in the case come to pass, Mr. Moldof was in the best position to question the State's presentation in his client's case. Moreover he was never asked at the evidentiary hearing whether there were inconsistencies in the State's cases. And based on his testimony as a whole, he benefitted from what he knew and what the State stated as to co-defendant Wigley. **Moldof testified that he had seen the reports on Marek's co-defendant Wigley's mental condition. He knew about the trial because he had gone to court and monitored it. He clearly did not want Wigley's mental reports to come in at Marek's trial because they reflected that Wigley was dominated by Marek and he was afraid of Marek. (CH 348-351). Moldof believed that the reports on Wigley would have helped to prove the State's theory that Marek was the "main character" and the "perpetrator of the murder."** (CH 353).

phase, however, Marek told him that he (Marek) had been in foster homes since he was a young kid and did not think the foster parents would know much about him. (CH 316-317). Marek told him that the foster people he last lived with might not be good persons to call because they were involved in some criminal activity, something having to do with homosexuality. (CH 318). Moldof testified that in considering circumstances for possible mitigation, he looked at Marek's age, his lack of serious criminal background, and Marek's mental condition. (CH 320). Although he received a report from Dr. Krieger, he did not use it. Moldof reiterated that while he thought about looking at the fact that Marek had been in foster care and that his parents had abandoned him, everything Marek told him about his past seemed and was negative. Marek's foster parents were mad at him because he had stolen from them. Marek told Moldof that he had no clues as to how to find them. (CH 322). Moldof testified he just could not argue that Marek was retarded because the State would have "killed him" on that topic. Based upon his conversations with Marek, Moldof believed that Marek's distant past was bad and, that his more recent past may have involved a homosexual relationship. (CH 322—324). In reviewing the "new" materials forthcoming at the 3.850 hearing by post-

conviction counsel, Moldof said he still did not know if he would have used it “based on everything he knew.” (CH 329-330).

Moldof observed that Marek was not too responsive at trial, and although he was cooperative, he was not “very” cooperative. Marek continued to reinforce Moldof’s opinion that the people in Texas, Marek’s past, would not help him and that information regarding Marek’s recent past would be very negative. (CH 333-334)

The mental health expert, Dr. Krieger told Moldof that his report found Marek was competent. However, Moldof asked Dr. Krieger to do more tests, (CH 340), specifically addressing statutory mitigating factors. The reason why Moldof did not get another, second, written report, was because Dr. Krieger believed Marek was falsifying answers. His belief was bottomed upon the fact that if Marek’s test results were correct, Marek would have been “seeing pink elephants, etc.” Moldof was afraid that this information would come out, and Marek would be seen as manipulating both his lawyer and his doctor. (CH 342). With regard to whether Marek could remember the events of the murder, Dr. Krieger said Marek was being less than truthful. (CH 343)

Moldof also testified that he had seen the reports on Marek’s co-defendant Wigley’s mental condition. He knew

about the trial because he had gone to court and monitored it. He clearly did not want Wigley's mental reports to come in at Marek's trial because they reflected that Wigley was dominated by Marek and he was afraid of Marek. (CH 348-351). Moldof believed that the reports on Wigley would have helped to prove the State's theory that Marek was the "main character" and the "perpetrator of the murder." (CH 353). While Moldof testified that he also knew about the prior criminal record in Texas, he avoided presenting "no significant criminal history" to the jury because he was afraid of what could come out. He believed it was "too risky." (CH 355). Moldof testified that he did not believe that there was a valid intoxication defense, based upon the physical evidence presented at trial–the medical examiner's testimony about the victim's body, that she was tortured and physically moved; the fact that within minutes of the murder, Marek had a coherent and jovial conversation with police officers; and the fact that Moldof felt the jury did not believe Marek's testimony that he drank a huge quantity of beer that day and still functioned as he did. (CH 356-357).

Moldof also stated that he discussed with Marek whether Marek should take the stand in his own behalf. He

told Marek not to exaggerate any of his testimony. And, it was Moldof's belief that Marek wanted to testify. (CH 359).

On cross examination by Marek's collateral counsel, Moldof testified that he generally did not object "too much" at closing because he does not want to appear to be over—objecting if it wasn't necessary. After reviewing the "new stuff" presented, Moldof stated he did not believe it would have changed the outcome, either to the jury or to the trial judge. (CH 371—372).

Moldof observed that Marek was not the most helpful client, but Marek did not evidence any retardedness or slowness. (CH 376-377). He prepared a number of pretrial motions and he did receive information and background information in his discussions with Marek. He felt that the "natural" family information was very remote and that the foster family information was not positive. (CH 380). He specifically observed that he did not want the jury to know that Marek had been kicked out of his foster family's home. (CH 382). Moldof told Marek to tell the truth to Dr. Krieger because he wanted the doctor to check out Marek's "partial amnesia". (CH 385). He testified he made a strategic decision not to call Dr. Krieger because he did not want a report or the testimony about a second set of tests brought to the attention of the jury. (CH 387).

Moldof observed that he had reservations about Marek testifying but that Marek wanted to testify.

He further testified that at Marek's penalty phase he did not want to suggest Marek "might be retarded" because he felt it was negative and not a positive factor for the jury to consider. (CH 392). This was premised upon the fact that, any statements regarding retardedness were totally contrary to Marek's appearance in court and his testimony. (CR 393). He stated that he, Moldof, elected not to perhaps insult the jury's intelligence with an intoxication defense based on the State's evidence and the physical evidence presented at trial. (CH 394).

On redirect examination, Moldof testified that he did look at alternative ways of getting information into evidence without opening the door to the State. (CH 394). He noted that he did not believe Marek's history would portray Marek in a sympathetic light. He believed that his best strategy was to argue that it was unclear whether Marek or Wigley was the more culpable in this crime and therefore, they should be punished equally. He stated that he did not believe the court would override a life recommendation by the jury if he received one. (CH 398-399). His strategy was based on the history provided to him by Marek, Dr. Krieger's review of Marek and what he had

gleaned from his discussions with Wigley's counsel and monitoring Wigley's trial. (CH 400)

In response to why Mr. Moldof believed Marek's history would be bad, he stated:

> I thought a lot of it would have been not something the jury would feel sorry for. Your intent seems to be I should have let them hear all these tales about his upbringing so they will feel sorry for him. I thought some of that would have the opposite impact. Here is a guy that's very dangerous and here's the reason why. He's abandoned. This confirms.
>
> I think part of my attack was to say you said he's guilty beyond a reasonable doubt but you don't know for sure. What if ten years from now Wigley says I did all that. You don't want to put him to death. If I was going to make that argument I couldn't also say look at all this history. That shows he's probably the guy that did it.
>
> That's a definite problem to bring that out to the jury and say don't give a death recommendation. I made the decision it was a better tact to go to the jury and say you still can't be sure. It was a horrendous affair but you still don't know who did that. (CH 398).

In response to why Moldof believed residual doubt was better than a life history defense, he observed:

> It would be crazy if I said no it's not important to know. Certainly it is once you have tried the case and you have seen where the jury has gone and some arguments you can see the jury has been receptive to, some they are not and use all that in determining what is going to play best to the jury in the sense of the ultimate goal of having them give a life recommendation.

> Although they came back guilty on him they found Wigley as guilty. I thought there was ample evidence that Wigley was involved. Because Wigley was sentenced to life I thought I could convince this jury still they were not sure what Marek had done versus Wigley….
>
> I don't want to sound presumptuous. In all the times I've been in front of Judge Kaplan my experience has been that if you can get a jury's recommendation he won't override it and if he would override he had override it your way. I've seen him override a death sentence to life. Doing the opposite. . (CH 399).

In response to why Moldof believed the life history was bad, he observed finally:

> What he told me. What Dr. Krieger had in his report. What I gleaned from Jimmy Cohn. You know, we talked about Wigley and Marek and how we might – I was thinking of calling Wigley and there is a lot there that I probably can't tell you now but I knew a lot about Marek in the sense I thought I knew a lot about him, had a feel for what I would get and a lot of it I didn't think would play to the jury in the sentencing phase, looking at how bad he was coming up. (CH 400).

3. <u>Facts From May 6-7, 2009, Hearing</u>

Marek's counsel called a number of witnesses at the May 6-7, 2009, evidentiary hearing on the newly discovered evidence claim.

The trial court in his May 8, 2009, Order denying relief succinctly summaries the relevant evidence from that hearing as follows:

"Michael J. Conley testified during the evidentiary hearing that he met Ray Wigley in Belle Glade Correctional Institution in 1990 or 1991 and they became friends. The two met again at Columbia Correctional Institution. Mr. Conley testified regarding a conversation he had with Wigley while at Columbia CI in 1996 or 1997. Wigley asked for Conley's help because Conley's wife worked at a law firm. Conley testified that he asked Wigley to tell him about his case. Wigley told him that he was involved in a murder, that they took a woman, beat her and raped her. Conley testified that he asked Wigley if he killed the woman. Wigley twice answered that he did not. The third time Conley asked, Wigley said that he strangled her with a scarf. Conley testified that Wigley felt guilty because he should be on death row too. Conley testified that Wigley was crying as he confessed. Conley also testified that Wigley was a coward, a real wimp and a heck of an actor. In his statement given to Sgt. Gould of the Waterville, Maine Police Department, Mr. Conley stated 'whether he did it or not, I don't know. In my opinion I think he was a wimp. I don't see how he could murder anybody.' *Interview of Michael J. Conley, pp 15-16.*

Conley also testified that after his release from prison, he moved to North Carolina with his wife.

Following a divorce, he moved to Tennessee. He worked as an entertainer under the stage name of Michael Conley Ellis. Conley testified that in spite of what was included in his written declaration, specifically paragraph 13, it was not virtually impossible for anyone to locate him. Conley also corrected paragraph 8 of the declaration, stating that Wigley told him that he strangled the victim because he did not want her to identify them [he and Marek].

Jessie Bannerman testified during the evidentiary hearing that he met Raymond Wigley in the Broward County Jail in 1983. The two men met again at Union Correctional Institution. While at Union CI, Wigley, Bannerman and a few others were drinking moonshine when Wigley was asked why other men approached him as allegedly homosexual. Wigley responded that he was not and told Bannerman that he had killed and will kill again. Bannerman testified that while the two were at Martin CI, Wigley had trouble with other male inmates.

Bannerman testified that Wigley told him 'I'm not no homosexual. He said I done killed before and I'd kill again.' *Proceedings of May 6, 2009*, vol. 2, p. 179. Wigley had to be segregated several times for his protection. Wigley told Bannerman 'man, I'm not a homosexual. I'm in

here for killing a woman.' *Proceedings of May 6, 2009*, vol. 2, p. 180. Wigley told Bannerman that he had sex with her and then he choked her because he did not want to be identified. Bannerman never knew before the evidentiary hearing that Wigley had a codefendant. Bannerman testified that Wigley was a small, wimpy guy of about 130 pounds. Bannerman testified that during the conversation at Union CI, the men were intoxicated on moonshine, and during the conversation at Martin CI, the men were smoking marijuana. Bannerman testified that he gave the foregoing information to Daniel Ashton, a private investigator, approximately a week before he testified. The affidavit was prepared for him and he signed it. The only other person Bannerman ever spoke of this to was 'Wigley's old man.'

The Defendant has alleged that similar statements were made by Robert Pearson, an inmate at Zephyrhills Correctional Institution. Due to the time constraints in this case, the Defense and the State agreed to the stipulation 'that this individual [Pearson] will testify that Wigley told him that he killed Adella Simmons sometime within the last 25 years.'

Hilliard Moldof, Esq., Defendant's trial counsel, testified during the evidentiary hearing that he wanted to present evidence of Wigley's life sentence to the jury, but

the trial judge indicated that such evidence would open the door to introducing Wigley's statement which he gave to the police. As a matter of trial strategy, Mr. Moldof did not present evidence of the disparate sentencing because the State would be permitted to instruct the jury regarding the difference between Marek and Wigley's culpability. Wigley stated that Marek was the killer.

Linda McDermott, Esq., testified regarding her alleged diligence in her efforts to locate the witnesses. Ms. McDermott testified that she had been representing the Defendant in his postconviction case since 1999. In 2000, she became lead attorney while working at the Office of Capital Collateral Northern Region. After learning that Raymond Wigley had been murdered in prison, she submitted public records requests regarding Wigley. Based on information she received from the Department of Corrections, Ms. McDermott compiled a list of the names of 8 to 10 inmates with whom Wigley had come in contact. She testified that she asked investigator Terry Rhines with CCRC to locate the inmates. Included on the list were Michael Conley and Robert Pearson. Conley could not be located because he had been released from prison. Pearson was located but was not willing to talk with the investigator. Bannerman's name was not on the list that

Ms. McDermott initially compiled. Following the recent April 20, 2009 issuance of the Warrant for Execution, she decided to make a broader list. This new list contained 40 to 50 names. Bannerman was included on the second list. She testified that she sent Daniel Ashton to locate witnesses. Bannerman and Pearson were located in the custody of the Department of Corrections. Michael Conley was located following a database search which indicated that he resided in Waterville, Maine. Daniel Ashton testified that he located Conley by driving through the small town looking for a specific vehicle with a specific tag number. He testified that he got lucky. This Court finds that he found Conley with little difficulty."

ORDER DENYING DEFENDANT'S SUCCESSIVE MOTION TO VACATE AND SET ASIDE JUDGMENT OF CONVICTION AND SENTENCE AFTER EVIDENTIARY HEARING, dated May 8, 2009, (p. 2-5).

SUMMARY OF THE ARGUMENT

ISSUE I: Marek now seeks to disqualify the entire seventeenth judicial circuit court based on insufficient allegations that a staff attorney handed over papers to an assistant staff attorney during a hearing in another unrelated death case proceeding in the circuit. The trial

court did not err in denying the motion during the evidentiary hearing on Marek's latest successive motion.

ISSUE II: Marek's death sentence was appropriate. The Florida Supreme Court's opinion in Marek v. State, 492 So. 2d 1055, 1058 (Fla. 1986), resolved any contention that there was disparate treatment in Marek's and his codefendant's sentences. The trial court properly found following the May 6-7, 2009, evidentiary hearing on this issue that, the issue is procedurally barred. The instant claim is merely an attempt to re-litigate Marek's prior assertions that Wigley was the murderer, and therefore Marek should not have been sentenced to death. This issue has been repeatedly rejected by all the courts that have entertained the claim and every permutation of it.

ISSUE III: Marek's successive issue as to clemency and the manner in which clemency is determined in Florida, is procedurally barred and without merit. The Florida Supreme Court in Marek v. State, Case No. SC09-765, (Fla. May 8, 2009), (in Marek prior successive motion), rejected the claim finding that:

> "Marek asserts that the clemency process is one-sided, arbitrary, and standardless. Again, his argument is without merit. In Rutherford v. State, 940 So. 2d 1112 (Fla. 2006), the defendant – relying on the ABA Report—argued that Florida's

> clemency process is arbitrary and capricious. This Court rejected the argument 'that the ABA Report requires us to reconsider our prior decisions rejecting constitutional challenges to Florida's clemency process.' Id. at 1122."

ISSUE IV: Marek's next issue is equally without merit and procedurally barred. His contention, based on the font and style of the post-conviction order, that said order was drafted by someone other than the trial court is spurious. He has insufficiently pled and not proven that there was any truth to this rank allegation.

ARGUMENT

ISSUE I

THE TRIAL COURT DID NOT ERR IN TREATING MAREK'S MOTION FOR JUDICIAL DISQUALIFICATION AS SUCCESSIVE AND DENYING A SAID MOTION

Prior to the commencement of the May 6-7, 2009, evidentiary hearing, Marek's counsel filed a Motion for Judicial Disqualification for the entire Seventeenth Judicial Circuit because of his allegation that a staff attorney for the criminal bench had been seen handing over an envelop to an assistant state attorney.[2] "Ms. Eckert saw

[2] May 6, 2009, hearing Vol. 1, p 12, which reads in material part:

> THE COURT: Before we even get into those issues, here's the first question I have. In reading the rule -- and this is not a motion to disqualify me, personally, but the entire Seventeenth Judicial

Sharon Ireland and briefly spoke to her. When Carolyn McCann, Assistant State Attorney, arrived, Ms. Ireland excused herself and said that she has something to give Ms. McCann in a death 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…." (Motion to Disqualify dated May 6, 2009, paragraph 6.)

The trial court, in reviewing the matter first, had to assess whether the instant motion fell under the provisions of Rule 2.330(f) or 2.330(g). The record in this case reflects a long history of Marek repeatedly filing motions for recusal of Judge Kaplan, the trial judge and post-conviction judge on his case. Aware of the plethora of recusal motions, Judge Weinstein concluded that:

> THE COURT: All right. Okay, we'll deal with that issue. But it is my interpretation of the fact that Judge Kaplan, you know, had multiple motions to disqualify, ultimately disqualified himself, but on

---

> Circuit --and in reading the rule, I'm interpreting this as a subsequent motion for disqualification. 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.

> the basis of the order of the motion that was made, even though he says, I don't think those grounds are good grounds but I'm going to do it anyway, I still think it's a subsequent motion at that point because he did disqualify himself and I think that's the governing point.
>
> So, for that reason, I'm going to give the state a chance to respond at this point.

(May 6, 2009, Hearing Vol. 1, p 24-25)

Following that ruling, the State was permitted to explain that Ms. Ireland handed over an envelop containing the State's copies of the trial court's orders dated April 24, 2009, regarding the public records hearing set for April 27, 2009, at 10:15 a.m.

Rule 2.330 Fla. R. Jud. Admin., provides:

> Disqualification of Trial Judges
>
> (a) Application. --This rule applies only to county and circuit judges in all matters in all divisions of court.
>
> (b) Parties. --Any party, including the state, may move to disqualify the trial judge assigned to the case on grounds provided by rule, by statute, or by the Code of Judicial Conduct.
>
> (c) Motion. --A motion to disqualify shall:
>
> (1) be in writing;
>
> (2) allege specifically the facts and reasons upon which the movant relies as the grounds for disqualification;
>
> (3) be sworn to by the party by signing the motion under oath or by a separate affidavit; and
>
> (4) include the dates of all previously granted motions to disqualify filed under this rule in

the case and the dates of the orders granting those motions. The attorney for the party shall also separately certify that the motion and the client's statements are made in good faith. In addition to filing with the clerk, the movant shall immediately serve a copy of the motion on the subject judge as set forth in Florida Rule of Civil Procedure 1.080.

(d) Grounds. --A motion to disqualify shall show:

(1) that the party fears that he or she will not receive a fair trial or hearing because of specifically described prejudice or bias of the judge; or

(2) that the judge before whom the case is pending, or some person related to said judge by consanguinity or affinity within the third-degree, is a party thereto or is interested in the result thereof, or that said judge is related to an attorney or counselor of record in the cause by consanguinity or affinity within the third-degree, or that said judge is a material witness for or against one of the parties to the cause.

(e) Time. --A motion to disqualify shall be filed within a reasonable time not to exceed 10 days after discovery of the facts constituting the grounds for the motion and shall be promptly presented to the court for an immediate ruling. Any motion for disqualification made during a hearing or trial must be based on facts discovered during the hearing or trial and may be stated on the record, provided that it is also promptly reduced to writing in compliance with subdivision (c) and promptly filed. A motion made during hearing or trial shall be ruled on immediately.

(f) Determination--Initial Motion. --The judge against whom an initial motion to disqualify under subdivision (d)(1) is directed shall determine only the legal sufficiency of the motion and shall not pass on the truth of the facts alleged. If the motion is legally

> sufficient, the judge shall immediately enter an order granting disqualification and proceed no further in the action. If any motion is legally insufficient, an order denying the motion shall immediately be entered. No other reason for denial shall be stated, and an order of denial shall not take issue with the motion.
>
> (g) Determination--Successive Motions. --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 based on a successive motion by the same party unless the successor judge rules that he or she is in fact not fair or impartial in the case. Such a successor judge may rule on the truth of the facts alleged in support of the motion.
>
> (h) Prior Rulings. --Prior factual or legal rulings by a disqualified judge may be reconsidered and vacated or amended by a successor judge based upon a motion for reconsideration, which must be filed within 20 days of the order of disqualification, unless good cause is shown for a delay in moving for reconsideration or other grounds for reconsideration exist.
>
> (i) Judge's Initiative. --Nothing in this rule limits the judge's authority to enter an order of disqualification on the judge's own initiative.
>
> (j) Time for Determination. --The judge shall rule on a motion to disqualify immediately, but no later than 30 days after the service of the motion as set forth in subdivision (c). If not ruled on within 30 days of service, the motion shall be deemed granted and the moving party may seek an order from the court directing the clerk to reassign the case.

(Emphasis added)

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.

Marek relies on Wickham v. State, 998 So. 2d 593 (Fla. 2008), for support of his complaint. However the Court held that this was a very unique case and concluded:

> Wickham asserts that the postconviction court erred by denying his motion to disqualify all Second Circuit judges from deciding his rule 3.851 motion. In light of the unique and extraordinary circumstances in this case, Wickham's motion to disqualify should have been granted.
>
> Wickham's motion to disqualify is governed substantively by section 38.10, Florida Statutes (2001), and procedurally by Florida Rule of Judicial Administration 2.160 (1992). *See Cave v. State*, 660 So. 2d 705, 707 (Fla. 1995). "Whether the motion is 'legally sufficient' is a question of law, and the proper standard of review is de novo." *Chamberlain v. State*, 881 So. 2d 1087, 1097 (Fla. 2004). Under rule 2.160, a motion to disqualify must show "that the party fears that he or she will not receive a fair trial or hearing because of specifically described prejudice or bias of the judge," or that the judge or any relative is interested in the result of the case, or that the judge is related to counsel, or that the judge is a material witness. "The facts alleged in a motion to disqualify must demonstrate that the party has a well-grounded fear that he will not receive a fair trial before

> the judge." *Doorbal v. State*, 983 So. 2d 464, 476 (Fla. 2008).Wickham's motion demonstrated a well-grounded fear of judicial bias. In his 3.851 motion, Wickham raised numerous ineffective assistance of counsel claims against his trial counsel, Philip Padovano. Judge Padovano ran for a circuit court judgeship while Wickham's case was still pending and became a judge on the Second Circuit shortly after Wickham's trial. He served as a circuit court judge for almost eight years and was Chief Judge of the Second Circuit from 1993 to 1996. Currently an appellate judge on the First District Court of Appeal, Judge Padovano hears appeals from numerous judicial circuits, including the Second Circuit. After Judge Padovano's appointment to the appellate bench, his wife also joined the Second Circuit as a judge. Under these extraordinary circumstances, it is reasonable for a defendant in Wickham's position to fear that a Second Circuit judge hearing Judge Padovano's testimony in determining Wickham's ineffective assistance of counsel claims would be biased in favor of Judge Padovano and against Wickham. Thus, Wickham's motion to disqualify was based on a well- grounded fear and should have been granted.

Wickham, 998 So. 2d at 596.

Nowhere in Marek's motion does he assert that the unique circumstances existing in the Wickham case, to-wit: that under Rule 2.160, a motion to disqualify must show that the party fears that he or she will not receive a fair trial or hearing because of specifically described prejudice or bias of the judge. Like Wickham, Marek's reference to State v. Farr, SC05-1289, Order December 5, 2006), addresses the same notion, that a defendant may fear not obtaining a fair trial where the lawyers all sit on the

bench. And, in Suarez v. Dugger, 527 So. 2d 190, 191-92 (Fla. 1988), the court therein concluded there was a well-founded fear present:

> The judge with respect to whom a motion to disqualify is made may only determine whether the motion is legally sufficient and is not allowed to pass on the truth of the allegations. *Livingston v. State*, 441 So.2d 1083 (Fla. 1983); *Bundy v. Ru*dd, 366 So.2d 440 (Fla. 1978). As we noted in Livingston, "a party seeking to disqualify a judge need only show 'a well grounded fear that he will not receive a fair trial at the hands of the judge. It is not a question of how the judge feels; it is a question of what feeling resides in the affiant's mind and the basis for such feeling.'" 441 So.2d at 1086, quoting *State ex rel. Brown v. Dewell*, 131 Fla. 566, 573, 179 So. 695, 697-98 (Fla. 1938).
>
> [*192] We find that the trial judge erred in denying the motion to disqualify him. We find no merit to any of the allegations except to those addressed to the news item. We agree with appellant that the allegation in the motion that the nature of the statements attributed to Judge Hayes in the Naples Daily News on April 4, 1988 established that the judge was prejudiced against Suarez, was legally sufficient to demonstrate a basis for relief and the motion should have been granted. 1 Fla.R.Crim.P. 3.230. These statements were made subsequent to the signing of the death warrant by Governor Martinez. We agree with Suarez that these statements are sufficient to warrant fear on his part that he would not receive a fair hearing by the assigned judge.

However, in the instant case, Marek’s reliance on these cases is misplaced.

First, the trial court properly found that he was a successor judge and under the rule he was justified in

seeking out the circumstances as to the allegations made that the State was receiving assistance from a staff attorney working in the criminal division. Judge Kaplan disqualified himself from Marek's case when it became apparent to the judge that his personal relationship with Hilliard Moldof could warrant fear on the part of Marek that he would not receive a fair trial. At the time of the proceedings in post-conviction, Marek's counsel had made many motions to disqualify Judge Kaplan, based on an assortment of remarks and other circumstances outlined in the litigation. Albeit the court denied that those factors were sufficient to grant a motion to disqualify, the court did do so based on a personal relationship with Moldof. The record bares out that there were a number of allegations made before Judge Kaplan as to Moldof's representation of Marek. Based on those allegations and the deepening relationship between Judge Kaplan and former defense counsel Moldof, Judge Kaplan disqualified himself. Marek has pointed to no case authority to suggest such a circumstance would not qualify per Rule 2.330(g). See, Walls v. State, 910 So. 2d 432, 433 (Fla. 4DCA 2005), where the court held:

> This case is similar to *Mulligan v. Mulligan*, 877 So. 2d 791 (Fla. 4th DCA 2004), in which we granted a petition for writ of prohibition to

> disqualify the judge where he had recused himself from one case involving an attorney with whom he was friendly but denied a motion to disqualify himself in another case involving the same attorney. We held the motion was legally [*433] sufficient to warrant disqualification. *Id.* at 792. We said, "'Any time a judge feels it is necessary to recuse himself from an attorney's case on account of an overriding friendship with the attorney then he should do so in all, not just some of that attorney's cases.'" Id. (quoting *Leigh v. Smith*, 503 So. 2d 989, 991 (Fla. 5th DCA 1987)). We think the same holds as true for adversarial relationships as it does for friendships.

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. In this instant the motion is insufficiently pled. In Carrow v. Fla. Bar, 848 So. 2d 1283 (Fla. 2DCA 2003), the court therein held:

> Carrow also appeals the order denying his motion to disqualify the trial judge. An order denying a motion to disqualify a trial judge is reviewed by a petition for writ of prohibition. *Bundy v. Rudd*, 366 So. 2d 440 (Fla. 1978); *Rucks v. State*, 692 So. 2d 976 (Fla. 2d DCA 1997); *Time Warner Entm't Co. v. Baker*, 647 So. 2d 1070 (Fla. 5th DCA 1994). Accordingly, we treat this portion of the appeal as a petition for writ of prohibition.
>
> A motion to disqualify a trial judge must comply with the requirements of Florida Rule of Judicial

> Administration 2.160. *Time Warner*, 647 So. 2d at 1071. If the motion does not comply with the requirements of the rule, the writ will not issue. Id. Rule 2.160(c) requires a motion to disqualify a trial judge to be in writing, specifically allege the facts and reasons relied upon for disqualification, and be sworn to by the party signing the motion. In addition, rule 2.160(d) requires that the motion show that the party fears that he or she will not receive a fair trial based on a specifically described prejudice or bias of the judge or that the judge is related to a party or other attorney in the case.
>
> Here, it is clear from the transcript of the hearing that Carrow's motion did not allege any facts or reasons to disqualify Judge Holder and did not include any facts "specifically describing" any prejudice or bias of Judge Holder. Rather, Carrow's motion was a blanket motion asking any trial judge assigned to the case to recuse himself or herself if he or she could not be fair. This motion is legally insufficient pursuant to rule 2.160 and impermissibly shifts the burden of identifying prejudice or bias from the litigant onto the trial court. Therefore, we deny the writ of prohibition.

And, third, in order to properly comprehend the scope of the motion to disqualify and whether it was sufficient, the court is permitted to entertain information clarifying the motion. When faced with a motion to disqualify, a trial judge must determine whether the alleged facts would create in a reasonably prudent person a well-founded fear of not receiving a fair and impartial trial. See Zuchel v. State, 824 So. 2d 1044, 1046 (Fla. 4th DCA 2002). Of course a judge confronted with a motion to disqualify "may

only determine whether the motion is legally sufficient and is not allowed to pass on the truth of the allegations." Livingston v. State, 441 So. 2d 1083, 1086 (Fla. 1983).

In the instant case the trial court never ruled on the truth of the allegation presented in hearing the circumstances of the allegations for disqualifying the entire seventeenth judicial circuit, rather he heard the facts and determined that the motion should be denied.

In Denny v. State, 954 So. 2d 1221 (Fla. 4DCA 2007), the Court held:

> Appellants argue that their allegations regarding Judge O'Connor's apparent role in procuring the UFAP warrant for Charafardin were sufficient to create in a reasonably prudent person a well-founded fear of not receiving a fair and impartial trial. They assert that their motions and "the records" showed that Judge O'Connor "had some function in a prosecutorial capacity in this case prior to indictment, assisting law enforcement in obtaining an interstate arrest warrant." However, neither the allegations in their motions nor any attachments to the motions sufficiently established this. Although appellants did allege that a federal warrant issued for Charafardin and that Broward detectives obtained a confession from him implicating appellants, appellants did not allege that Judge O'Connor actually participated in procuring the arrest warrant. At best, the motions to disqualify suggest that Judge O'Connor may have participated in obtaining the warrant because the UFAP request letter was addressed to her. Further, even if appellants had alleged some actual participation by the judge, appellants did not allege a sufficient connection between the judge's role in the Charafardin warrant and the prosecution of appellants in this case for the

motion to have been legally sufficient. The warrant that was sought and issued for Charafardin was based on his flight from prosecution on an unrelated "Theft of Identity" charge. The motions did not allege that Judge O'Connor was made aware of any connection between Charafardin and the murder charges against appellants or that she sought the warrant to secure him as a witness against appellants in this murder case. We believe that Canon 3E(1) of the Code of Judicial Conduct is instructive on this point.

Subsection (1) of Canon 3E requires that "a judge disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where . . . (b) the judge served as a lawyer . . . in the matter in controversy . . . ." Here, there is no allegation that Judge O'Connor ever served as a lawyer in this murder prosecution. The fact that Charafardin, upon his arrest on the UFAP warrant for identity [*1225] theft, ended up confessing and implicating appellants in this murder case does not qualify Judge O'Connor as having previously served as a lawyer in this case. *Cf. Penoyer v. State*, 945 So. 2d 586 (Fla. 2d DCA 2006) (holding that a defendant's allegation that the trial judge also served as prosecutor for the underlying conviction entitled him to have his postconviction motions heard by another judge); *Ryals v. State*, 914 So. 2d 285 (Miss. App. 2005) (holding that judge was required to recuse himself from hearing post-conviction relief motion because he served a prosecutorial role in the same underlying criminal case).

Here, appellants' motions failed to set forth legally sufficient reasons for disqualification. The motions were based on speculation and were too vague in alleging that the judge had "some prosecutorial involvement in the case." We hold that the facts alleged would not create in a reasonably prudent person a well-founded fear of not receiving a fair and impartial trial. In so holding, we distinguish this case from those

> wherein the judge is alleged to have been actually involved in the prosecution of the defendants moving for disqualification….

See also Stein v. State, 995 So. 2d 329, 334 (Fla. 2008):

> The standard of review of a trial judge's determination on a motion to disqualify is de novo. *Gore v. State*, 964 So. 2d 1257, 1268 (Fla. 2007). Whether the motion is legally sufficient is a question of law. *Id*. In determining the legal sufficiency of a motion to disqualify, the court asks "whether the facts alleged, which must be assumed to be true, would cause the movant to have a well-founded fear that he or she will not receive a fair trial at the hands of that judge." *Id*. (citing Fla. R. Jud. Admin. 2.330(d)(1)).
>
> Initially, we hold that because Stein's motion was predicated solely upon the unexplained presence of an unsigned sentencing order in the State's file, it was legally insufficient. Hence, the trial judge did not err in initially denying the motion as legally insufficient. We conclude that the mere presence of a copy of an unsigned sentencing order in the State's file, without more, should not give rise to a well-founded fear that a defendant will not receive a fair trial at the hands of that judge. That was the only claim here. *Cf. Rodriguez v. State*, 919 So. 2d 1252, 1276-77 (Fla. 2005) (holding that postconviction judge was not required to disqualify himself where his testimony as to the physical description of missing documents, his recollection of how he handled the documents, and his efforts to locate them, was strictly informational and did not qualify him as a material witness). Accordingly, in Stein's case, the hearing in which Judge Wiggins testified was unnecessary.

Marek is entitled to no relief as to this issue.[3]

[3] See Arbelaez v. State, 775 So. 2d 909, 916 (Fla. 2000) (holding that neither the trial judge's "tough on

ISSUE II

MAREKS'S SENTENCE OF DEATH VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS BECAUSE IT PERMITS AN ARBITRARY AND CAPRICIOUS IMPOSITION OF A SENTENCE OF DEATH IN LIGHT OF NEWLY DISCOVERED EVIDENCE

The trial court in denying relief in its May 8, 2009, Order, found that the claim was procedurally barred and without merit following an evidentiary hearing May 6-7, 2009. The court observed that "The newly discovered evidence, according to counsel, consisted of statements that Raymond Wigley made to Michael J. Conley, Jessie Bannerman and Robert Pearson at various times during their incarceration. Wigley allegedly stated to each witness that Wigley had raped and killed a woman." (Order May 8, 2009 p. 2)

Following a detailed review of the evidence presented at the hearing, the pleadings of the parties and the applicable caselaw, the court found that:

> 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

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crime" stance nor her former employment as a prosecutor constituted legally sufficient grounds for disqualification); Tafero v. State, 403 So. 2d 355, 361 (Fla. 1981) (finding that a trial judge's former employment as highway patrol officer did not constitute legally sufficient grounds for disqualification in first-degree murder trial where victim was a highway patrol officer).

"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:

> "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."
>
> *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.

In Marek's assertion that newly discovered evidence exists as a result of a recent investigation which "uncovered that in 1996 or 1997, Wigley told his best friend, Michael Conley, that he had 'strangled the victim with a handkerchief after raping her.'" (May 1, 2009, Successive Motion, p. 9.)(Hereinafter referred to a "Successive Motion"), is wanting. He attached to Marek's motion in Attachment A, a Declaration of Michael Conley, which provided in "paragraph 8", the following:

> I told Wigley that I would need to know more about his case before I asked my wife to assist him. Wigley became very emotional and confessed many details that I had never known about his case. He told me that he had strangled the victim with a handkerchief after raping her. He strangled the victim because he did not want her to identify him.

This claim was correctly denied below because it is procedurally barred. The State has likewise argued not only a procedural bar, but also that the "newly discovered evidence" is not newly discovered evidence as defined or in fact--because, due diligence would have unearthed the evidence; these statements are merely hearsay, without any justifiable exception for admission and, could not have been admitted;[4] and most importantly, defense counsel made a tactical decision not to bring in any evidence regarding Wigley for fear that evidence might be more harmful, albeit, Marek's defense was he did not murder Ms. Simmons.

a. Procedurally barred

The fact that Mr. Conley was told by Wigley at some point in 1996 or 1997 that Wigley "strangled the victim with a handkerchief after raping her," (Attachment A, Paragraph 8), is simply hearsay that goes to a claim raised by Marek in his **September 27, 2001, Second Amended Motion**, wherein he argued that he has recently received previously

[4] Wigley never testified in Marek's trial.

unavailable mental health records on Wigley showing how Wigley "had to be the murderer."[5]

Specifically Marek argued at Claim IX p. 98-103 of his Second Amended Motion filed September 27, 2001, (TR V 799-804 in Marek v. State, SC04-229), in material part, that:

> …2. Evidence uncovered since the time of Mr. Marek's capital trial establishes that Mr. Marek's conviction and sentence are constitutionally unreliable. Mr. Wigley provided a release for this material in June 1996. The material was received in July 1996. Consideration of this evidence is required, for it establishes that Mr. Marek's conviction and death sentence violate the Eighth and Fourteenth Amendments.
>
> 3. Mr. Marek was convicted and sentenced to death for the murder of Adella Simmons. The State's case rested on the premise that Mr. Marek was in control of the situation (R. 423, 1137-38). The State's case was based upon their argument that Mr. Marek was the person who killed Ms. Simmons (R. 421). But the sentencing judge found that Raymond Wigley was involved in the crime (R. 1341) and that Wigley strangled the victim (R. 1344). The court further found that Wigley and Mr. Marek acted in concert together (R. 1348-50). However, Mr. Marek received a sentence of death while Mr. Wigley received a lesser sentence.
>
> 4. **Since the time of Mr. Marek's trial, evidence has been discovered indicating that Wigley warranted further investigation by police as he was the person who raped and killed Ms. Simmons. A previously unavailable mental health evaluation provided evidence consistent with Wigley being the principle.**

[5] The affidavit by Jessie Bannerman, executed late May 1, 2009, provided the same information that Conley conveyed, that Wigley said he killed a woman.

5. Raymond Wigley's life has the hallmarks of a violent rapist. Wigley and his life have been examined by mental health experts. These analyses reveal that he has the attributes and qualities of a man who fantasized about violence to the point that he acted the fantasies out.

6. Wigley fits the classic violent rapist pattern. At the time of the crime he was under the age of thirty years. Wigley was raised in a under class situation. Wigley's life was marked violence. He has a history of brutality and conflict. Wigley's mother was a domineering figure in his life with whom he struggled and persistently rejected. Wigley sought power and domination over women. He had no empathy for the circumstances of others. He suffered from mental illnesses including paranoid schizophrenia, anxiety, and depression. He abused substances. He had a low aptitude and dropped out of school after the ninth grade. He did not have close relations with his parents and was shuffled from foster home to foster home eventually. He never married. He suffered mood swings between anger and depression. He had suicidal tendencies and experienced paranoid delusions. He had little respect for the law or police. Prior to meeting Ms. Simmons, he had a string of arrests and was convicted for burglary. Most significant are Mr. Wigley's history of violence, his mental illness, and his substance abuse.

7. At Mr. Marek's trial, the State presented a circumstantial evidence case. After lengthy deliberations the jury returned a verdict finding Mr. Marek not guilty of burglary. They also found Mr. Marek not guilty of sexual battery and aiding and abetting sexual battery. John Marek had no prior convictions for violent felonies at the time of his murder trial. John Marek does not fit the typical rapist pattern.

8. The Florida Supreme Court has held that Mr. Marek is entitled to relief if newly discovered evidence "would have probably resulted in an acquittal." Jones v. State, 591 So. 2d 911, at 916 (Fla. 1991). For a criminal defendant to be

> entitled to an acquittal, there must be a reasonable doubt about guilt. Here, such a doubt exist.
>
> 9. The evidence of the mental health examinations is relevant to the issue of Mr. Marek's guilt or innocence and his sentencing….
>
> …In Mr. Marek's penalty phase proceedings, substantial mitigating evidence, both statutory and nonstatutory, was not presented for the consideration of the judge and jury, both of whom sentence in Florida. Espinosa v. Florida, 112 S.Ct. 2926 (1992)….
>
> …13. The court found that Wigley strangled the victim (R. 1344). However, Mr. Marek received a sentence of death while Mr. Wigley received a lesser sentence. The jury was not made aware of this finding. But as a co-sentencer should have been informed as to the identification of the actual killer when considering their recommendation. Hawkins v. State, 436 So. 2d 44 (Fla. 1983).

(Emphasis added)

The trial court on September 30, 2003, denied all relief including this issue finding it procedurally barred at TR Supplemental Record V 658-659 in Marek v. State, SC04-229, holding:

> Defendant claims that he gained access to "newly discovered evidence" which establishes his innocence. Defendant alleges that a "previously unavailable" mental health evaluation is relevant to the issue of his guilt or innocence and his sentencing. Defendant argues that evidence has been discovered supporting his allegation that the co-defendant, Raymond Wigley, raped and killed Adella Simmons. Defendant argues that while he, himself, has no prior convictions for violent felonies at the time of his trial, Mr. Wigley has a history of violence, mental illness,

> and substance abuse. Furthermore, defendant argues that the jury, as co-sentencer, should have been made aware of the fact that Mr. Wigley received a "lesser sentence" of life in prison.
>
> Defendant does not present any new circumstances which would warrant an evidentiary hearing on this claim. Defendant argued that Mr. Wigley was the murder at trial, as well as on appeal to the Florida Supreme Court of Florida. Each court has decided that it was Mr. Marek who was the killer, planner, and more dominant force, and that Mr. Wigley was the lesser participant in commission of the crime. This claim is procedurally barred because it has been raised previously and decided on its merits adversely to Defendant. On appeal, the Supreme Court of Florida held that "the record of Appellant's trial is replete with evidence which justifies the conclusion that Appellant committed premeditated murder." Marek v. State, 492 So. 2d 1055, 1057 (Fla. 1986). See SMR. P. 86-88. Accordingly, Defendant's claim must be denied.

The Court affirmed the lower court's findings in Marek v. State, 940 So. 2d 427 (Fla. 2006), *cert. denied*, April 23, 2007.

The crux of this evidence via the Conley declaration and Bannerman's affidavit is that Marek now has more information regarding co-defendant Wigley's involvement in Ms. Simmons' murder.

The issue is procedurally barred because, while couched in terms of newly discovered evidence, the fact remains that Marek is again merely attempting to reargue that Wigley was the murderer. The record reflects at

trial, and in previous post-conviction litigation, the reviewing courts have found that Marek was the dominant character in the murder of Adella Simmons. At trial, Marek's counsel presented a defense that Marek was sleeping in his truck and that he knew nothing about the murder and that, in fact, Wigley was the one who killed Ms. Simmons.[6]

The issue has been resolved adversely to him by all courts who have reviewed the evidence pointing to the fact Marek was the killer, planner and the more dominant person. And, that Wigley while a participant, was the lesser participant in this horrendous crime. See Turner v. Dugger, 614 So. 2d 1075, 1078 (Fla. 1993) (barring claims for postconviction relief "because they, or variations thereof, were raised on direct appeal"); Waterhouse v.

[6] Evidence was always available that could have been used to attack Wigley with regard to his participation and domination in this crime. Marek has never challenged the physical evidence that only his fingerprint was found inside the observation deck where the body was discovered. 492 So.2d at 1056. And, the original trial record reflects that while Marek challenged the trial court's denial of his motion for judgment of acquittal founded on an asserted lack of evidence of premeditation or evidence to indicate that the killing took place during the commission of a felony, Marek never challenged the sufficiency of the evidence with regard to the fact that he committed the murder. The Florida Supreme Court found: "The record of Appellant's trial is replete with evidence which justifies the conclusion that Appellant committed premeditated murder." Marek, 492 So.2d at 1057.

State, 792 So. 2d 1176 (Fla. 2001)(Although Waterhouse now frames the issue as one of ineffective assistance of counsel, the appellant is merely trying to re-litigate the same issue using different words.); Sireci v. State, 773 So. 2d 34 (Fla. 2000)(To the extent that Sireci uses a different argument to re-litigate the same issue, the claims remain procedurally barred, *citing e.g.*, Harvey v. Dugger, 656 So. 2d 1253, 1256 (Fla. 1995)). See Stein v. State, 995 So. 2d 329, 341-342 (Fla. 2008) wherein the Court held:

> "When a codefendant . . . is equally as culpable or more culpable than the defendant, disparate treatment of the codefendant may render the defendant's punishment disproportionate." *Larzelere v. State*, 676 So. 2d 394, 406 (Fla. 1996). "However, '[w]here the circumstances indicate that the defendant is more culpable than a codefendant, disparate treatment is not impermissible despite the fact that the codefendant received a lighter sentence for his participation in the same crime.'" *Marquard v. State*, 850 So. 2d 417, 423 (Fla. 2002) (quoting *Brown v. State*, 721 So. 2d 274, 282 (Fla. 1998)).
>
> Although not always the case, we acknowledge we have sometimes characterized the "triggermen" to be the more culpable of codefendants. *See, e.g.*, *Ventura*, 794 So. 2d at 571; *Foster v. State*, 778 So. 2d 906, 922 (Fla. 2000); *Groover v. State*, 703 So. 2d 1035, 1037 (Fla. 1997). However, the triggerman has not been found to be the more culpable where the non-triggerman codefendant is "the dominating force" behind the murder. *See Larzelere*, 676 So. 2d at 407 (finding death sentence for non-triggerman defendant proportional despite triggerman's life sentence because non-triggerman defendant planned,

> instigated, and was the "mastermind" behind the murder).
>
> In this instance, however, Stein has not established that his codefendant Christmas was the dominating force. Indeed, we [*342] held on direct appeal that "no evidence was presented to support a finding that Stein merely acted as an accomplice . . . [and] that his participation was relatively minor." *Stein*, 632 So. 2d at 1366. Further, because we find substantial evidence that Stein was the triggerman in this case we agree with the trial court that the newly discovered evidence of his codefendant's life sentence would not entitle Stein to a life sentence. *See Blake v. State*, 972 So. 2d 839, 849 (Fla. 2007) ("We have rejected relative culpability arguments where the defendant sentenced to death was the 'triggerman.'"), *cert. denied*, 128 S. Ct. 2442, 171 L. Ed. 2d 242 (2008). We conclude that Stein has failed to establish his claim of less culpability because the record in fact reflects the existence of substantial evidence that he was the more culpable one in the murders. In the Christmas sentencing order, the trial court found that Stein shot the victims while Christmas held a .38-caliber revolver on them. In the Stein sentencing order, which we cited in our initial reviews of Stein's sentence, the sentencing court found that "[t]here was strong evidence indicating that Steven Edward Stein did kill or did attempt to kill Dennis Saunders and Bobby Hood." In support of that finding, the trial court stated, "The murder weapon, a rifle, belonged to Stein. Stein and Stein alone was seen carrying the rifle before the robbery-murders. At the time Stein was arrested, the box that the rifle came in was in Stein's room." Thus, the record reflects strong evidence that Stein was the triggerman.

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. See: Van Poyck v. State, 564 So. 2d 1066, 1070-1071 (Fla. 1990)(while not the killer, Van Poyck was the instigator and prime participant in the crime).

Marek now offers State v. Mills, 788 So. 2d 249 (Fla. 2001), for the proposition that a codefendant's prior inconsistent statements can be admissible for impeachment purposes. In that case, this Court upheld a trial court's decision to grant a new sentencing in a capital case on the basis of the defendant's postconviction newly discovered evidence claim, which concerned statements his codefendant made to a third party, Anderson, indicating that Mills was not the triggerman. Id. at 250. In agreeing that the evidence could be admissible as newly discovered evidence, this Court noted that "[t]he evidence presented by Anderson was unknown at the time of trial and neither Mills nor his counsel could have discovered it with due diligence; the evidence would have been admissible at trial, if only for impeachment; and the newly discovered evidence, when considered in conjunction with the evidence at Mills' trial and 3.850 proceedings, would have probably produced a different result at sentencing." Id.

Mills, supra., was not in the same posture as Marek and, upon a review of each, demonstrates distinguishing factors that support the State argument that "the newly discovered evidence" was always known to Marek, since the time of Marek's trial. See Cherry v. State, 959 So. 2d 702, 707-08 (Fla. 2007)(discussion of the factual differences between Mills and otherwise procedurally barred statements.).

b. Newly discovered evidence

To set aside a conviction based on newly discovered evidence, first, the evidence "must have been unknown by the trial court, by the party, or by counsel at the time of trial, and it must appear that defendant or his counsel could not have known [of it] by the use of diligence." And second, the newly discovered evidence must be of such nature that it would probably produce an acquittal on retrial. Robinson v. State, 865 So. 2d 1259, 1262 (Fla. 2004) (citation omitted) (quoting Jones v. State, 709 So. 2d 512, 521 (Fla. 1998)). The "two elements of a newly discovered evidence claim apply equally to the issue of 'whether a life or death sentence should have been imposed.'" Ventura v. State, 794 So. 2d 553, 571 (Fla. 2001) (quoting Scott v. Dugger, 604 So. 2d 465, 468 (Fla. 1992)).

In Marek's case, based on the unsworn affidavit of Mr. Conley, the "newly discovered information" was only known as early as 1996 or 1997, when Wigley confided in Conley, what Wigley's participation was, that he raped and strangled Ms. Simmons so she could not identify him. That "information" could not have existed or was not known to Marek at the time of his trial. While Marek's defense was that Wigley was the murderer; there was no crystal ball available that Wigley would tell his best friend in prison years later that he strangled Ms. Simmons. Likewise inmates and others presumably, like Mr. Bannerman, are not newly discovered evidence, since Mr. Bannerman admitted that his knowledge of the murder was incomplete, he did not know Wigley had a co-defendant, and Wigley's statements were told to Mr. Bannerman, one night between 1984 and 1988, when the two were drinking moonshine and repeated some time later, when the two were smoking marijuana.

In Buenoano v. State, 708 So.2d 941, 950-51 (Fla. 1998), the Court held: ". . . the court reasoned that even if the information is considered newly discovered because it could not have been known by Buenoano or her counsel at the time of trial by the use of due diligence, it is not of such a nature that it would probably produce a

different result on retrial." Jones v. State, 591 So.2d 911, 916 (Fla. 1991). Relying on the record evidence outlined above, the court concluded that "either with impeachment evidence regarding Roger Martz or without any reference whatsoever to the attempted murder of John Gentry, there was ample evidence to show beyond a reasonable doubt that Buenoano committed the murder of James Goodyear. . . . We agree that on this record there is no reasonable probability that the new evidence would result in an acquittal or recommendation of life on retrial. See Williamson v. Dugger, 651 So.2d 94, 89 (Fla. 1994). . . ." See also Sireci v. State, 773 So.2d 33, 43-44 (Fla. 2000) (defendant not entitled to relief where DNA was known 9 years); Glock v. Moore, 776 So.2d at 250; Kight v. State, 784 So.2d 396, 400-01 (Fla. 2001); Ventura v. State, 794 So.2d 553, 570-71 (Fla. 2000) (codefendant's sentence of life affirmed one year after Ventura's sentence was affirmed where not equally culpable codefendants no error - not entitled to further review - Ventura failed to meet second prong of Jones); Groover v. State, 703 So.2d 1035, 1037 (Fla. 1997); Johnson v. State, 696 So.2d 317, 326 (Fla. 1997).

In Marek's case he fails on both of the newly discovered evidence prongs. These declarations cannot meet

the definition of newly discovered evidence and what impact they would have had on the trial is slight. There was no mystery as to Marek's defense at trial. He took the stand and testified he did not do it. He did not know what happened to Ms. Simmons. He did not find her body in the small lifeguard shack although he was inside for 15 to 18 minutes. He did not know Wigley's last name and testified that he told the police he was a college student looking for friends. He had to go back to the lifeguard shack to retrieve his shirt, and Marek admitted that when Detective Rickmeyer told him, while he was in a holding cell in Daytona Beach, "Congratulations, you made it to the big times" (TR 1013), Marek responded to Detective Rickmeyer, "SOB must have told all" (TR 1014).

There is no probability Marek would have received a life sentence had this information been proffered by Marek. See Van Poyck v. State, 961 So. 2d 220, 224-229 (Fla. 2007). The State would have countered with Wigley's June 18, 1983, statement wherein Wigley, following Miranda warnings, told Detective Henry Rickmeyer that they both raped Ms. Simmons and Marek tied the red bandana around her neck. (June 18, 1983, Statement of Raymond Dewayne Wigley, at the Daytona Beach Shores Police Department taken by Detective Henry Rickmeyer at 0835 hours.)

c. Due diligence

Marek presents the affidavit of one of his post-conviction counsel in Attachment B, below, and presented her testimony at the evidentiary hearing, to show that his post-conviction defense has used due diligence to locate Conley. Counsel admits that they acquired public records of co-defendant Wigley following his murder in 2000, and engaged an investigator to interview those named in DOC files "whose names appeared in Wigley's records. A search was made for Conley, however he was not found until April 29, 2009, living in Maine. Interestingly, Mr. Conley was found when a second investigator did some more checking after the April 20, 2009, warrant was signed by the Governor. Counsel noted that the investigator declared that finding Conley was like "finding a needle in a haystack."

Conley was released from prison in 1999, and did not stay in one place too long, albeit he spent time in Florida. He also testified he used a stage name, Michael Ellis. Although, post-conviction counsel and their investigator tried to track down Conley, they were not successful; this was in spite of the fact that a casual

checking of the DOC website for inmates incarcerated and released shows that one of Conley's aliases is Mike Ellis.

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.

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[7] secured in 2001. See Jones v. State, 591 So. 2d 911 (Fla. 1991) or Rule 3.851(d)(2)(c), Fla. R. Crim. P.

d. Hearsay

In order to determine the viability of Conley's declaration or Mr. Bannerman's affidavit, it would seem only logical that Marek would present some legal theory as to how this "rank hearsay" would be admissible at trial.

[7] Mr. Bannerman was not as difficult to locate because he has been continually incarcerated in DOC since July 17, 1984, on a life sentence. There is nothing in the affidavit of Mr. Bannerman or any creditable explanation from Ms. McDermott regarding the due diligence undertaken to secure this affidavit. Further as to Mr. Pearson, while the State did stipulate that he would say Wigley told him that he, Wigley killed a woman, sometime within the last 25 years, additional evidence was introduced by Marek through Ms. McDermott and the private investigator Ashton, that they had no statement from Pearson and he had not been willing to cooperate with Marek's defense.

He has not. First, the facts at the guilt portion of Marek's trial went uncontested as to who was the dominate character in this murder. No witness was impeached by the defense; Wigley did not testify at Marek's trial, and the physical evidence showed that only Marek's fingerprint was found in the lifeguard shack where Ms. Simmons's body was found. Moreover, Marek took the stand and testified that while he was present and was the one who invited Ms. Simmons to go with them to get help, he knew nothing about her murder.

Conley's declaration and/or Bannerman's affidavit do nothing more than relate what Wigley told Conley and Bannerman **after** the murder, after Wigley's trial and Marek's trial. The crucible of cross examination for the State has not occurred. Neither Conley's nor Bannerman's testimony would and could impeach any witness at Marek's trial. Wigley did not testify therefore, Conley's and Bannerman's information could not serve as impeachment or recantation of any testimony at Marek's trial. Moreover, the circumstances of "how Wigley got a life sentence" was never divulged at Marek's trial, **because** of defense trial strategy not to bring Wigley's sentence to issue.

Marek presently has identified the exception to the hearsay rule that would allow the testimony of Conley,

Bannerman and Pearson into any new trial.[8] Specifically he points to Section 90.804(2)(c), statements made by Wigley to Conley, Bannerman and Pearson, which constitute, presumably, statements against penal interest. First, these new statements did not exist at the time of Marek's trial, rather these "conversations" about Wigley admitting he killed Adella Simmons came long after the murder and Marek's trial. Wigley was tried first and convicted of first degree murder. His statement that Marek killed the victim was introduced at his trial. Wigley did not testify in Marek's case and his statement was not introduced because defense counsel elected not to tell the jury that Wigley got life. See Dailey v. State, 965 So. 2d 38, 45-46 (Fla. 2007) wherein the court observed:

> First, he argues that a 1993 sworn statement by Jack Pearcy constitutes newly discovered evidence. The trial court ruled that Pearcy's statement was uncorroborated hearsay which failed to qualify as a statement against interest. The trial court did not admit the statement into evidence. The criteria for evaluating whether a hearsay statement is against a declarant's interest were set forth in *Lightbourne v. Sta*te, 644 So. 2d 54 (Fla. 1994):
>
> > [A statement is against the declarant's interest if] at the time of its making, [it] was so far contrary to the

[8] These statements of Conley, Bannerman and Pearson would only be introduced should a new trial obtain, a new strategy for the defense be employed and Wigley's statement in June 1984, be admitted.

> defendant's pecuniary or proprietary interest or tended to subject him to liability or to render invalid a claim by him against another so that a person in the defendant's position would not have made the statement unless he believed it to be true. A statement tending to expose the [*46] declarant to criminal liability and offered to exculpate the accused is inadmissible, unless corroborating circumstances show the trustworthiness of the statement.
>
> *Id.* at 57 (quoting § 90.804(2)(c), Fla. Stat. (1991)). As the trial court noted, at no point in the statement does Pearcy admit to the murder of Shelley Boggio or the commission of any other crime. Pearcy has had numerous opportunities to testify on Dailey's behalf, and has repeatedly declined to do so.

Second, these new statements from Conley, Bannerman and Pearson are not statements against penal interest since Wigley was no longer in jeopardy of being tried, therefore these "statements" did not tend "to expose the declarant to criminal liability" and there were no "corroborating circumstances" to show "trustworthiness of the statement." Davis v. State, 990 So. 2d 459, 469 (Fla. 2008)(Traina did not have the corroborating evidence that section 90.804(2)(c) required. "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.").

In fact, a casual review of the post-conviction testimony of Conley and Bannerman reflects that neither necessarily believed the truth of the statement made to them by Wigley. Rather, they reported "truthfully" that Wigley made the statement to them. Note Gosciminski v. State, 994 So. 2d 1018, 1026-27 (Fla. 2008).

As the Court observed in Taylor v. State, 3 So. 3d 986 (Fla. 2009), in a very similar circumstance:

> To obtain a new trial based on newly discovered evidence, Taylor must meet two requirements: first, the evidence must be newly discovered and not have been known by the party or counsel at the time of trial, and the defendant or defense counsel could not have known of it by the use of diligence; second, the newly discovered evidence must be of such quality and nature that it would probably produce an acquittal on retrial. See Jones v. State, 709 So. 2d 512, 521 (Fla. 1998) (citing Jones v. State, 591 So. 2d 911, 915 (Fla. 1991)). **In determining whether the evidence compels a new trial, the trial court must "consider all newly discovered evidence which would be admissible," and must "evaluate the weight of both the newly discovered evidence and the evidence which was introduced at the trial."** Jones, 591 So. 2d at 916.
>
> This determination includes
>
> > whether the evidence goes to the merits of the case or whether it constitutes impeachment evidence. The trial court should also determine whether the evidence is cumulative to other evidence in the case. The trial court should further consider the materiality and relevancy of the evidence and any inconsistencies in the newly discovered evidence.

Jones, 709 So. 2d at 521 (citations omitted). As noted above, the second prong of Jones requires a showing of the probability of an acquittal on retrial.

On review, "[t]his Court does not substitute its judgment for that of the trial court on issues of fact when competent, substantial evidence supports the circuit court's factual findings." Smith v. State, 931 So. 2d 790, 803 (Fla. 2006) (citing Windom v. State, 886 So. 2d 915, 921 (Fla. 2004)); see also Blanco v State, 702 So. 2d 1250, 1252 (Fla. 1997) (citing Demps v. State, 462 So. 2d 1074, 1075 (Fla. 1984)). In essence, the postconviction court concluded that, at trial, Dr. Miller testified that the lacerations were not, within reasonable medical probability, caused by a kick. Similarly, at the evidentiary hearing, Dr. Miller testified that it was his opinion that there was only a one-in-a-million chance that the lacerations could have been caused by a kick. Hence, because the record refutes Taylor's contrary interpretation of the testimony, Taylor fails to show that Miller's postconviction testimony qualifies as newly discovered evidence. While it is true that Miller's trial testimony did not admit to this one-in-a-million possibility, we find this omission insufficient to overturn the trial court's conclusion that sufficient "new evidence" had not been established.

Additionally, we note the jury was not instructed to and did not differentiate between first-degree premeditated murder and first-degree felony murder in determining Taylor's guilt. There is no indication that Taylor was convicted of first-degree murder predicated solely upon the felony of sexual battery. This Court previously detailed the massive injuries sustained by the victim to support the State's alternative theories of premeditation and felony murder:

> [T]he jury reasonably could have rejected as untruthful Taylor's testimony that he beat the victim in a

> rage after she injured him. Although Taylor claimed that the victim bit his penis, an examination did not reveal injuries consistent with a bite. According to Taylor, even after he sufficiently incapacitated the victim by choking her so that she released her bite on him, he continued to beat and kick her. The medical examiner testified that the victim sustained a minimum of ten massive blows to her head, neck, chest, and abdomen. Virtually all of her internal organs were damaged. Her brain was bleeding. Her larynx was fractured. Her heart was torn. Her liver was reduced to pulp. Her kidneys and intestines were torn from their attachments. Her lungs were bruised and torn. Nearly all of the ribs on both sides were broken. Her spleen was torn. She had a bite mark on her arm and patches of her hair were torn off. Her face, chest, and stomach were scraped and bruised. Although Taylor denied dragging the victim, evidence showed that she had been dragged from one end of the dugout to the other. The evidence was sufficient to submit the question of premeditation to the jury.

Taylor, 583 So. 2d at 329.

Accordingly, even if Dr. Miller's alleged change in testimony were considered sufficient to call into question Taylor's sexual battery conviction, it would not be sufficient to outweigh the evidence that Taylor committed premeditated murder or to cast doubt on his conviction for first-degree murder based upon premeditation. Ultimately, then, even if we were to construe Dr. Miller's testimony at the evidentiary hearing the way Taylor seeks, there remains an abundance of evidence the jury could have used to convict Taylor of premeditated first-degree murder. Hence, we conclude the trial court did not err in denying this claim.

While not unmindful that Conley's or Bannerman's statements would never come in at the guilt phase of Marek's trial, the question as to its admissibility at the penalty phase is reviewed under Rutherford v. State, 926 So. 2d 1100, 1108 (Fla. 2006)(whether the "newly discovered evidence" is of such a nature that it would **probably produce** a life sentence recommendation.).

The answer is no. See: Henyard v. State, 992 So. 2d 120 (Fla. 2008):

> Hence, considering the totality of evidence and even if Smalls was determined to be the triggerman, the death penalty would not be a disproportionate sentence for Henyard. *See Cardona v. State*, 641 So. 2d 361 (Fla. 1994); *Larzelere v. State*, 676 So. 2d 394 (Fla. 1996) (holding that codefendant's acquittal was irrelevant to proportionality review of defendant's death sentence because codefendant was exonerated from culpability as a matter of law); *Cave v. State*, 476 So. 2d 180 (Fla. 1985), *cert. denied*, 476 U.S. 1178, 106 S. Ct. 2907, 90 L. Ed. 2d 993 (1986) (death sentence proportionate where coperpetrators abducted, raped, and killed victim and defendant was not actual killer). Accordingly, it is not probable that this evidence, if true, would have resulted in a less severe penalty.

While at first reading it would appear that Conley's or Bannerman's remarks are new and useful, the fact is that there was clear trial strategy articulated at the penalty phase for not informing the jury of Wigley's life

sentence. Nothing in the Conley statement or Bannerman's affidavit changes the viability of that strategy.

At the penalty phase held June 5, 1984, **Moldof informed the court that he was not going to mention Wigley's sentence of life imprisonment because he did not want to open the door to the prosecution regarding Wigley's confession.**[9] Moldof wanted to introduce the report of Dr. Krieger only to the doctor's initial comments and evaluation as to Marek. (TR IX 1283). The trial court stated that it would not be fair to introduce Dr. Krieger's report where he had not testified and it would result in hearsay which would deny the State cross—examination of him. (TR IX 1284). **Moldof also stated that he was not going to mention anything concerning Marek's criminal history and therefore the State was precluded from arguing same to the jury. (TR IX 1284). The court specifically provided that if Moldof introduced any evidence regarding Wigley's life sentence, the State had the right to instruct the jury as to the difference between Wigley's culpability and that of Marek's. (TR IX 1285). Based on the court's ruling, defense**

[9] The record shows that Moldof was well aware of Wigley's incriminating statement, he, as well as the State, had it when it was introduced at the joint motion to suppress hearing held pre-trial, to show why Miranda warnings given to Wigley prior to his confession were purportedly insufficient.

counsel affirmatively determined that he would not mention Wigley's life recommendation. (TR IX 1288).

Based on this trial record Marek cannot now properly suggest Conley's declaration or Bannerman's affidavit would be admitted at a penalty phase.

e. Trial strategy

As previously discussed, there was a clear trial strategy in place distancing Marek from evidence that would have come forward had Wigley's life sentence been made known to the jury and court. The tactical strategy utilized to withhold Wigley's life sentence being made known has suffered the test of time and litigation.

Marek is not entitled to any further consideration on this otherwise barred claim.

ISSUE III

CLEMENCY

The second issue raised by Marek, is another attack upon Florida's clemency procedures. The trial court found as to this matter:

> In Claim II of the Defendant's motion, the Defendant alleged that "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." This Court found during the evidentiary hearing that the clemency process is

> an executive and not a judicial function. *See, Rutherford v. State*, 940 So.2d 1112 (Fla. 2006); *King v. State*, 808 So.2d 1237, 1241, n. 5, 1246 (Fla. 2002); *Glock v. Moore*, 776 So.2d 243, 252 (Fla. 2001); and, *Bundy v. State*, 497 So.2d 1209, 1211 (Fla. 1986), and the cases cited therein. See also, the State's argument on clemency which correctly distinguishes *Furman v. Georgia*, 408 U.S. 238 (1972) and the other cases relied on by the Defendant from the facts in the instant case.

(Order May 8, 2009, p. 8)

Marek contends that under Furman v. Georgia, 408 U.S. 238 (1972)(*per curiam*), the Florida Clemency process is "freakishly imposed", because the Governor sought out information before he made a decision to sign Marek's third warrant for execution, and did not ask Marek. Citing Harbinson v. Bell, 129 S. Ct. 1481, 173 L. Ed. 2d 347 (2009), he has modified the holding in Harbinson, from a decision that allows for the federal payment for counsel in State cases, to a a Furman attack against the state's clemency model. In support of this notion he points to 50 named cases that are "ripe for warrants" based on the oversight Capital Commission on Death Cases, and states nothing more.[10]

[10] This issue is procedurally barred because Marek raised a very similar claim, based almost on the identical facts, in his previously litigated successive motion, denied relief in Marek v. State, Case No. SC09-765, (Fla. May 8, 2009).

In fact, Marek received a full blown clemency proceeding with appointed counsel, for the sole purpose of handling his clemency effort, on February 10, 1988, prior to the first of Marek's three death warrants signed against him. 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.[11]

In Ohio Adult Parole Authority v. Woodard, 523 U.S. 272, 282-283 (1997), the Supreme Court observed:

> Ohio's clemency procedures do not violate due process. Despite the Authority's mandatory procedures, the ultimate decisionmaker, the Governor, retains broad discretion. Under any analysis, the Governor's executive discretion need not be fettered by the types of procedural protections sought by respondent. See Greenholtz, supra, at 12-16 (recognizing the Nebraska parole statute created a protected liberty [*283] interest, yet rejecting a claim that due process necessitated a formal parole hearing and a statement of evidence relied upon by the parole board). There is thus no substantive expectation of clemency. Moreover, under Conner, 515 U.S. at 484, the availability of clemency, or the manner in which the State conducts clemency proceedings, does not impose "atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." Ibid; see 107

[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.

F.3d at 1185-1186. A denial of clemency merely means that the inmate must serve the sentence originally imposed.

The Court further observed:

> An examination of the function and significance of the discretionary clemency decision at issue here readily shows it is far different from the first appeal of right at issue in Evitts. Clemency proceedings are not part of the trial -- or even of the adjudicatory process. They do not determine the guilt or innocence of the defendant, and are not intended primarily to enhance the reliability of the trial process. They are conducted by the Executive Branch, independent of direct appeal and collateral relief proceedings. Greenholtz, 442 U.S. at 7-8. And they are usually discretionary, unlike the more structured and limited scope of judicial proceedings. While traditionally available to capital defendants as a final and alternative avenue of relief, clemency has not traditionally "been the business of courts." Dumschat, 452 U.S. at 464. [**1252] Cf. Herrera v. Collins, 506 U.S. 390, 411-415, 122 L. Ed. 2d 203, 113 S. Ct. 853 (1993) (recognizing the traditional availability and significance of clemency as part of executive authority, without suggesting that clemency proceedings are subject to judicial review); Ex [*285] parte Grossman, 267 U.S. 87, 120-121, 69 L. Ed. 527, 45 S. Ct. 332 [***399] (1925) (executive clemency exists to provide relief from harshness or mistake in the judicial system, and is therefore vested in an authority other than the courts).
>
> Thus, clemency proceedings are not "an integral part of the . . . system for finally adjudicating the guilt or innocence of a defendant," Evitts, supra, at 393. Procedures mandated under the Due Process Clause should be consistent with the nature of the governmental power being invoked. Here, the executive's clemency authority would cease to be a matter of grace committed to the executive authority if it were constrained by the

> sort of procedural requirements that respondent urges. Respondent is already under a sentence of death, determined to have been lawfully imposed. If clemency is granted, he obtains a benefit; if it is denied, he is no worse off than he was before. 5
>
> 5 The dissent mischaracterizes the question at issue as a determination to deprive a person of life. Post, at 1. That determination has already been made with all required due process protections.

Except to express his disagreement with the signing a third death warrant, Marek can point to no circumstance that has occurred to suggest he has been deprived of clemency consideration. Marek has been treated like every other death row inmate regarding clemency consideration and is entitled to no further consideration or review on this point. See Rutherford v. State, 940 So. 2d 1112, 1122 (Fla. 2006)(rejecting arbitrary attack on Florida's clemency procedures); Glock v. Moore, 776 So.2d 243, 252 (Fla. 2001)(rejecting a claim that Glock was entitled to second clemency proceedings to present mitigating evidence and a second lawyer to represent him at the second proceeding); Bundy v. State, 497 So.2d 1209, 1211 (Fla. 1986). Marek was treated the same as Rutherford, Glock and Bundy, and all other named death row inmates listed in his pleadings.

Since Marek is on his third death warrant, he certainly had ample opportunity to seek re-visitation of his 1988, clemency attempt. The underlying information as to his lifetime hardships and circumstances were known to him and counsel of record for over twenty years. He did not need the decision in Harbinson v. Bell, or any other decision, to re-apply for clemency consideration. As such, Marek's clemency issue is groundless.

ISSUE IV

STATE DRAFTED 1988 ORDER DENYING 3.850 ON AN *EX PARTE* BASIS

Marek belately asserts through counsel's empty allegation, that because, the same prosecutor was counsel at Marek's Rule 3.850 proceedings, as in the Rose v. State, 601 So. 2d 1181, 1183 (Fla. 1992), case, that prosecutor drafted the denial order in the instant case.

The trial court below observed that the claim was wanting and procedurally barred, finding:

> In Claim III of the Defendant's Motion, the Defendant alleged that the 1988 order denying the Defendant's postconviction motion signed by Judge Stanton Kaplan was drafted by the Assistant State Attorney without advising Marek or his counsel, violating the Defendant's due process rights. The Defense argues that the prosecutor in *Rose v. State*, 601 So.2d 1181 (Fla. 1992) improperly drafted the order denying Rose's postconviction motion. Therefore, because the font and the

> format of the order in the Marek case were similar in type and style, a *Brady* violation occurred because the Defense was not informed. This Court disagrees.
>
> Judge Stanton Kaplan testified during the evidentiary hearing that he did not have a specific recollection of writing the order in question. He testified that he would generally dictate orders to his secretary. Sometimes he would ask the prevailing party to prepare a proposed order and if he did not like it, he would change it. As to the format used, he testified that whatever his secretary did, she did.
>
> This Court finds that the Defendant's allegations based upon the font and the style of the Order drafted in 1988 does not state a claim for relief. The Defense speculates that in 1988 the order denying the Defendant postconviction relief was improperly drafted. One cannot suggest that by viewing a standard font or a style that someone other than the judge drafted or dictated the document. Furthermore, there was no evidence to suggest that the facts in this case, or for that matter, the trial judge, were similar to those in Rose, supra. Moreover this Court finds that the claim is procedurally barred as the Court order has been in the Court record and available for review since 1988. This claim is likewise without merit.

(Order May 8, 2009, p. 8-9)

It is not improper for a trial court to delegate the drafting of an order denying post-conviction relief to the prevailing party in open court. Dillbeck v. State, 964 So.2d 95, 98 (Fla. 2007)(rejected challenges to a trial court's adoption of the State's proposed post-conviction order where the defendant had notice of the request for

proposed orders and an opportunity to submit his or her own proposal and/or objections); See: Pietri v. State, 885 So. 2d 245 (Fla. 2004) citing Glock v. Moore, 776 So.2d 243, 248-249 (Fla. 2001):

> As to the issue of the adoption of the State's order, this Court has rejected similar challenges where the defendant had notice of the request for proposed orders and an opportunity to submit his or her own proposal and/or objections. *See, e.g., Patton v. State*, 784 So. 2d 380, 25 Fla. L. Weekly S749, S750-51, 2000 WL 1424526 (Fla. Sept. 28, 2000); *Groover v. State*, 640 So. 2d 1077, 1078-79 (Fla. 1994). In *Groover*, for example, this Court held that the trial court's adoption of the State's proposed order denying a capital defendant relief on his 3.850 motion did not constitute a due process violation where the trial court signed the State's proposed order three days after defense counsel received a copy and the defendant had an opportunity to argue all of the issues in his brief and at a hearing. 640 So. 2d at 1079. The Court explained that even though the defendant did not have the ability to file his own proposed order, his ability to raise objections negated any due process concerns. *See id.; see also Hardwick v. Dugger*, 648 So. 2d 100, 104 (Fla. 1994) (holding that verbatim adoption of State's proposed order on a capital defendant's 3.850 motion was not error because both parties stipulated to the filing of post-hearing memoranda, the State served its proposed order on defense counsel months before the trial court signed the State's order, and defense counsel filed an extensive response to the State's proposed order).

In the instant case, the "only evidence" Marek's counsel points to as "proof" of an *ex parte* communication is the "font" and "style" of the order. Here, opposing

counsel, with nothing more, asserted the trial court delegated the drafting of the post-conviction order. He surmised that there were *ex parte* communications regarding the drafting-- based merely upon the type and style of the order and the fact that the same prosecutor was involved in both Rose v. State, supra., and Smith v. State, 708 So. 2d 253 (Fla. 1998) and this case. In Rodriquez v. State, 919 So. 2d 1252, 1268-1269 (Fla. 2005), the Court observed:

> In reviewing the denial of a 3.850 claim where the trial court has conducted an evidentiary hearing, this Court generally affords deference to the trial court's factual findings. *See Blanco v. State*, 702 So. 2d 1250, 1252 (Fla. 1997). "As long as the trial court's findings are supported by competent substantial evidence, this Court will not 'substitute its judgment for that of the trial court on [*1269] questions of fact, likewise of the credibility of the witnesses as well as the weight to be given to the evidence by the trial court.'" *McLin v. State*, 827 So. 2d 948, 954 n.4 (Fla. 2002) (quoting *Blanco*, 702 So. 2d at 1252).
>
> In the instant case, the trial court's findings involve questions of fact and the credibility of the witnesses. Moreover, these findings are supported by competent, substantial evidence in the record of the evidentiary hearing. Both the prosecutor and the trial judge offered unqualified testimony about the authorship of the sentencing order. Rodriguez presented no evidence to contradict this testimony.
>
> Rodriguez's claim is almost identical to that presented in *Jones v. State*, 845 So. 2d 55, 64 (Fla. 2003), which this Court characterized as "ultimately based on speculation." As in *Jones*, *Rodriguez* "produced no direct evidence that the prosecutor . . ., and not the trial judge, wrote

> the sentencing order." *Id.* at 63. Similarly, the prosecutor in the instant case testified without qualification that he did not write the sentencing order and offered a plausible explanation as to why he possessed a copy of a proposed sentencing order. "Without more, [this does not] constitute evidence of improper *ex parte* contact." Id. At 64. "Postconviction relief cannot be based on speculative assertions." Id.
>
> **Rodriguez offers nothing more than such "speculative assertions" in the face of direct testimony that refutes his claim that the State drafted his sentencing order. He is not entitled to relief on this claim.**

(Emphasis added)

In the instant case the record on appeal shows that before the post-conviction hearing was over, the court informed the parties that, with the exception of the following, other of the 22 claims before the court were denied:

> THE COURT: I'll defer ruling on 7. So I think that covers them all. I deferred ruling on 7, 8, 12, 17 and 20. Is that right?
>
> MCCLAIN: Yes, Your Honor.
>
> THE COURT: Anything further?
>
> MCCLAIN: Your Honor, I would renew my application for a stay of execution.
>
> THE COURT: I'll deny that at this time. And I will rule on Monday. I'll let you know Monday or I'll let Mr. Zacks know and maybe you can call.
>
> MR. ZACKS: Yes, sir. I'll let everybody know the second I hear from you.

THE COURT: I'll review this.

(TR XVIII 492)

At the evidentiary hearing, on May 6, 2009, Judge Kaplan, the post-conviction judge, testified he could not recall the Marek post-conviction hearing. (PC Vol. 2, 25, 28) While he was able to talk generally about his normal practice, he had no recollection of what happened in Marek's case. He testified that he would write some, sometimes ask "the party that I was ruling in favor of. . . prepare me an order. . .even put it on the record. (PC Vol. 2, 26) When asked about style or formatting, Judge Kaplan said that he relied upon whatever his secretary did. (PC Vol. 2, 26-27)

Marek failed to sustain his burden because his claim was insufficiently pled and more importantly not proven.

Marek's "Brady" argument in his reliance on Banks v. Dretke, 540 U.S. 668, 675-76, 124 S.Ct. 1256, 157 L.Ed.2d 1166 (2004) is misplaced. While the State may have an ethical obligation after conviction to disclose "truly exculpatory evidence," Brady does not extend to post-conviction matters and certainly not to procedural post-conviction matters. Grayson v. King, 460 F.3d 1328, 1337-1338 (11th Cir. 2006), *cert. den.*, 549 U.S. 1117, 127 S.Ct.

1005, 166 L.Ed.2d 712 (2007)(noting that there was no authority for the proposition that Brady extended beyond trial to post-conviction matters because Brady is premised on the right to a fair trial; explaining footnote in Imbler v. Pachtman, 424 U.S. 409, 427 n. 25, 96 S.Ct. 984, 993 n. 25, 47 L.Ed.2d 128 (1976), refers to an ethical obligation, not a due process obligation and concluding that Brady only covers suppression of evidence before and during trial); note Duckett v. State, 918 So.2d 224, 239 (Fla. 2005).

Even if Brady extended to post-conviction procedural matters, the drafting of an order is not exculpatory or impeachment evidence. Marek's guilt or culpability was not lessened, in any way, based on who drafted a post-conviction order. Nor would any fact witness be impeached based on the drafting of the post-conviction order. Whether any *ex parte* communication occurred regarding the drafting of the post-conviction order is simply not Brady material.[12]

Marek's claim is insufficiently pled and he is entitled to no relief.

[12] While Marek has seemingly targeted one particular prosecutor, the trial judge in this case was not the trial judge in either Rose, or Smith v. State, 708 So. 2d 253 (Fla. 1998).

CONCLUSION

Based on the foregoing, all relief should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to Martin McClain, Esq., McClain & McDermott, P.A., 141 N.E. 30th Street, Wilton Manors. Florida 33334-1064; and to Carolyn McCann and Susan Bailey, Assistants State Attorney, Office of the State Attorney, 201 SE Sixth Street, Fort Lauderdale, Florida, 33301, this 10th day of May, 2009.

_____
CAROLYN M. SNURKOWSKI
Assistant Deputy Attorney General

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the instant brief has been prepared with 12 point Courier New type, a font that is not spaced proportionately.

_____

CAROLYN M. SNURKOWSKI
Assistant Deputy Attorney General