IN THE SUPREME COURT OF FLORIDA

CASE NO. SC09-____

JOHN MAREK,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

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

INITIAL BRIEF OF APPELLANT/NOTICE OF APPEAL

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PRELIMINARY STATEMENT

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

"R." -- record on direct appeal;

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

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

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

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

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

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

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

"5PC-R." -- record on appeal after remand

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

REQUEST FOR ORAL ARGUMENT

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

STATEMENT OF THE CASE

On May 21, 2009, this Court issued an order reversing the circuit court's denial of Mr. Marek's Rule 3,851 motion and remanding for the assignment of a new judge before whom the evidentiary hearing would be reconducted.[1]

On May 27, 2009, the circuit court held a case management hearing at which time the evidentiary hearing was scheduled to begin on June 1, 2009. On May 29, 2009, a status hearing was held in anticipation of the evidentiary hearing beginning on June 1st.

The evidentiary hearing commenced on June 1st and concluded on June 2nd. The circuit court directed written closing arguments to be submitted the week of June 8th.

On June 19, 2009, the circuit court entered its order denying Rule 3.851 relief.[2]

ARGUMENT AS TO THE ISSUES HEARD AT THE EVIDENTIARY HEARING

I. NEWLY DISCOVERED EVIDENCE DEMONSTRATES THAT MR. MAREK'S CAPITAL CONVICTION AND DEATH SENTENCE ARE CONSTITUTIONALLY UNRELIABLE IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND

[1]Rather than repeat the entire procedural history which was just set forth in the briefing to this Court in May, some six weeks ago, Mr. Marek commences this Statement of the Case with this Court's May 21, 2009, order.

[2]Also on June 19th, the circuit court entered a separate order denying Mr. Marek's motion for correction of the transcript and a separate order denying Mr. Marek's Rule 3.851 motion filed on June 12, 2009, following the decision by the United States Supreme Court on June 8th in Caperton v. Massey Coal Co.

FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

A. Introduction

Newly-discovered evidence of innocence warrants a new trial where it establishes that had the jury known of the new evidence it probably would have found a reasonable doubt as to the defendant's guilt and thus acquitted or the outcome of the prior proceedings would have been different. Jones v. State, 591 So. 2d 911 (Fla. 1991). This means that in deciding whether in fact a new trial is warranted, the evidence, which qualifies under Jones v. State as a basis for granting a new trial, must be considered cumulatively with evidence that the jury did not hear because either the prosecutor or the defense attorney breached their constitutional obligations. State v. Gunsby, 670 So.2d 920 (Fla. 1996); Mordenti v. State, 894 So. 2d 161 (Fla. 2004). Thus, if the new evidence along with the evidence that the jury did not hear because the prosecutor withheld it in violation of Brady v. Maryland, 373 U.S. 83 (1963), and/or evidence the jury did not hear because of a violation of Strickland v. Washington, 466 U.S. 668 (1984), a new trial is warranted if confidence is undermined in the outcome.[3] Here, the new evidence of innocence

[3]Under the logic of Gunsby and Mordenti, if the new evidence would have probably convinced an appellate court that error was present (*i.e.* that a statement was erroneously admitted and its admission was not harmless beyond a reasonable doubt) which would have probably led to a different result as to an issue raised on appeal, then post conviction relief is warranted.

when evaluated cumulatively with the evidence presented at the 1988 evidentiary hearing as to ineffective assistance of counsel establishes that confidence is undermined in the outcome of Mr. Marek's trial. State v. Gunsby, 670 So. 2d 923 (Fla. 1995). Thus, Mr. Marek's conviction cannot stand.

However, even if this Court disagrees as to whether a whole new trial is required, the newly discovered evidence standard is the same whether it pertains to guilt/innocence or penalty. Scott v. Dugger, 604 So. 2d 465 (Fla. 1992). Thus, it is not just a question of whether confidence is undermined as to the guilt phase, consideration must also be given to whether the penalty phase result must be overturned. Since Mr. Marek presented a wealth of mitigating evidence at the 1988 evidentiary hearing that trial counsel failed to discover and present, this Court must consider whether the new evidence would have tipped the scales and resulted in a different outcome as to penalty phase ineffective assistance. Similarly, since Mr. Marek established in 1988 that his penalty phase was tainted by Eighth Amendment error when an aggravator was improperly found and weighed during the sentencing calculus but this Court concluded that this error was harmless beyond a reasonable doubt, the issue now is whether the error would have required penalty phase relief in light of the new evidence. Finally, a life sentence is required if the new evidence would probably have resulted in the

imposition of a life sentence on appeal under this Court's proportionality review or under the Enmund v. Florida, 458 U.S. 782 (1982), standard. The issue as to the death sentence is whether the new evidence would probably resulted in a different outcome before the jury, in post conviction proceedings, or an appeal had it been known previously. Had the jury known of Wigley's confession that he did the rape and committed the murder, it would have probably returned a life recommendation. Had this evidence been known when Mr. Marek's ineffective assistance of counsel claim was previously considered, it probably would have required post conviction relief. Had this evidence been known when this Court considered whether the Eighth Amendment error was harmless, it probably would have required a finding that the error was not harmless beyond a reasonable doubt. Had this evidence been known when this Court considered whether Mr. Marek's death sentence was proportional or whether it stood in violation of Enmund v. Florida, it probably would have led to the imposition of a life sentence. As a result, post conviction relief is warranted. State v. Mills, 788 So. 2d 249 (Fla. 2001).

B. The New Evidence

At the evidentiary hearing, Mr. Marek presented the testimony of six witnesses who related statements that they heard Raymond Wigley make while he was incarcerated. Jessie Bannerman

testified:

Q. And at that time, then, what did he tell you about his case, if anything?

A. He said that he was convicted for murdering a woman.

Q. Okay. Did he make any statements about killing someone?

A. Yes, he made a statement, because I made -- I asked him why was it that I see guys constantly approaching him on the compound as though he was a homosexual, or gay, and he told me he was not a homosexual, that he had killed before and if his life was in jeopardy he would kill again.

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Q. Now, did there come a time later when you asked him about what he meant by that?

A. Yes, sir.

Q. Can you explain.

A. Well, I had got transferred from Union Correctional to Martin Correctional, and about a year or more after I transferred, Raymond Wigley, he came to Martin also, and at this particular time we was sitting around smoking, and the same scenario like at Union Correctional where guys were stalking him there, the same thing was happening here at Martin Correctional, so I asked him again, I said, why do guys consistently approach you as though you was a homosexual man, and he said, man, I keep telling you I'm not gay, I'm not no homosexual, I have killed and I will kill again, and I said, well, referring back to this kill thing you keep telling me about, I said, do you want to explain that in more depth to me, he said, yeah, I was convicted for killing a woman, which I did; and he went into details, he told me how he did this out of fear that she would be able to identify him later on, he said he didn't have no other choice, 'cause I asked him, I said, why would you kill her if you had done got what you wanted from her.

Q. Did he indicate what her occupation was?

A. Yes. From my understanding, it was either she was a teacher at a university or she lived near a university or close to a university, it was something in relation to that, she was either a teacher or she lived close by a university, that was the understanding that I got of it.

Q. And you indicated that you said why did you kill her when you didn't get what you wanted?

A. When you already accomplished what you wanted to get from her.

* * *

Q. And what are you referring to when you say "when he got what he wanted"?

A. Money, sex.

Q. Okay. And so, did he indicate how he came to encounter her?

A. Yes, sir.

Q. What did he tell you in that regard?

A. He said that her car had malfunctioned or something and she was in the presence of another female at the time that he stopped, I guess to oblige some help.

Q. And did he explain how he killed her?

A. Yes, sir.

Q. What did he say?

A. He said he choked her because she started to scream.

Q. Now, did he indicate that anybody else was involved?

A. No, sir. Not until this day did I even discover that he had a codefendant. He never mentioned nobody but himself.

(T. 25, 27-29).

Robert Pearson was called to testify about his conversations

with Raymond Wigley. Mr. Pearson testified:

> Q. Now, while you were cellmates with him, did you have occasion to talk to him about his case?
>
> A. Yes. Yes.
>
> Q. Okay. And when I say "his case," I'm referring to the conviction that caused him to be incarcerated.
>
> A. Yes.
>
> Q. Okay. Did it come up a number of times, or did you have one main conversation?
>
> A. No, we spoke on it, well, he more or less spoke on it, on several different occasions, because we worked in the law library together, sometimes it would come up, or he would ask me about a case, or ask me to help him do some research, or he would just, you know, just speak on what happened, you know, just speak on what happened.
>
> Q. And so, you were in the law library a lot?
>
> A. We worked in the law library.
>
> Q. Okay. That's where you worked?
>
> A. Yes.
>
> Q. As like a law clerk to help other people, or...?
>
> A. Yes.
>
> Q. Okay. And from what he said -- What did he tell you --
>
> MS. BAILEY: Objection, hearsay.
>
> THE COURT: Overruled.
>
> BY MR. MCCLAIN:
>
> Q. -- about his case?
>
> A. He said that -- well, at one point he said that his codefendant was, I think this was like in '99 or 2000, his codefendant was supposedly about to be executed or

something, and he was like, well, you know, if this guy would just say that -- if this guy would go ahead on and say that he did it and free me, then, you know, I wouldn't be here, and I asked him, I said, well, you know, what happened, you know, that's not what you -- you know, earlier he had told me -- he fluctuated in what he said, but he told me about when he left, he left Texas, he took a truck, left Texas, and went by this guy, picked up his buddy, and then he went on a beer run, you know, grabbed some beers, and I think somewhere in, if I'm not mistaken, in New Orleans, or somewhere, he broke in a house or something because he needed some money, he made it down, he came down to Florida, and on the way here there was a car broke down and there was two females on the side of the road, and he said he passed them and then he came back and he got out and he was talking to the female, and one of them didn't want to come, but he convinced one of them he was going to take them -- take her to pick up, I guess to get some gas or something, a carburetor, something was wrong with the car, he said he looked in the hood, 'cause he knew about cars or something, and he was going to go and help them. So they got in the truck, they left, and -- excuse me -- he told me he had a gun and the girl had got it and threw it out the window, and I was just teasing him about it. Excuse me, that's why I was laughing. Anyway, he said they ended up at a beach. He gave me like -- you know, he would tell me the story like three or four different times and it would always fluctuate, you know. You know, sometimes I would ask him, you know, but you told me last time this, or you said last time that.

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Q. Okay.

A. In one version he gave me it was like his codefendant, the girl supposedly liked his codefendant, and they went in and they had -- I guess they partied, they had consensual sex, and the codefendant left, he was there with the girl, and he was -- he couldn't -- he couldn't -- he couldn't get...

Q. He was unable to get an erection?

A. Yes.

Q. Okay.

A. Right. And that's where it had got violent. She laughed at him, you know, picked at him, he took it bad, and that's where he would fluctuate a lot, he would say he passed out and when he woke up she was dead, and he tried to, like, prop her up, I remember he was always saying her blonde hair, he was like putting it in her face when he was trying to prop her up; and then he walked out and he looked around, and he ran back to the truck and he woke the guy up and was like, hey, man, hey, man, we got to go, we got to go, we got to go. You know what I mean? And then it would fluctuate again, the next thing I know he would be back saying that the guy was gone, he was in the truck by hisself, and the police pulled him over, you know.

Q. Okay. Well, in one version he passed out and he didn't know what happened?

A. Right. Right.

Q. But in that version was the codefendant present, or the codefendant had already left?

A. No, he was already gone.

Q. Okay. And in another version did he remember doing something, did he say he did something to the victim?

A. Well, he would say, one version, you know, he said that after he couldn't get an erection -- it was always that she teased him -- he got upset and he choked her, and I asked him, I said, man, why did you, you know, why did you -- why you choke the girl if you ain't going to have sex with her, and he was like, well, I don't really remember doing it, but if I did, you know, I ask God to forgive me.

Q. Okay.

A. And, you know...

Q. But in all the versions did she -- did he indicate that she laughed at him?

A. Yes.

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Q. What did he say as to how it affected him?

A. He got upset.

Q. Okay.

A. He got upset. And he would -- he would – either he -- either -- like I said, he'd fluctuate, at one point he'd talk to me about it and he'd be solid that he choked her, he pretty much killed her, and then the next version he would tell me is that he passed out and he didn't remember anything, but when he woke up she was there. And I remember he was saying like there was some rope or something around. He was just always – you know, either he was, you know, adding stuff or taking stuff away, he would never just -- there was always fluctuation in it.

Q. The time that he indicated that he choked her, did he indicate how, hands, or did he use something, if you recall?

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Q. What description did he use when he said he choked her?

A. He choked her.

Q. That's it?

A. (No verbal response).

Q. And you made reference to something Wigley said about her hair. What was that?

A. Well, when he said he passed out, he woke up and, you know, she was there and he said he tried to like prop her up, or sit her up, straighten her hair out, and I asked him, I was like, you know, why, you know, why, and he couldn't answer that, he just said, you know, I didn't think she was hurt. Then he said he left, he stood outside of the shack and he looked around and then he just left, he said he ran back to the truck and woke this guy up and was like, hey, man, we got to go, and he drove away.

Q. And was that consistent in all the versions, in terms of going to the truck?

A. Yes.

Q. And was it consistent in all the versions that the codefendant was in the truck?

A. Yeah. He was asleep.

Q. Okay. And then did he talk about getting stopped later by the police?

A. Yes.

Q. What did he tell you about that?

A. He just said they was -- he was in Daytona Beach and he got stopped and that's where he went to jail, that's pretty much all he said. But he -- and I asked him, I said, well, you know, what happened to the other guy, and either they got in an argument, sometimes they got in an argument and he left, or sometimes he put him out, or they separated some type of way. You know, that was also, you know, it was this way and that way.

(T. 54-56, 58-59, 60, 61-62).[4]

The May 7th testimony of Michael Conley was introduced because he was unavailable at the time of the June 1st hearing. Mr. Conley indicated that he had become good friends with Wigley while they were incarcerated together at Belle Glades Correctional:

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

A. Yes, I did.

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

[4]The State did not cross-examine Mr. Pearson.

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

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

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

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

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

A. Right.

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

A. Because my wife worked for a law firm.

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

A. Right.

Q. Okay.

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

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

A. Yes.

(Transcript of May 7th at 217).

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

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

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

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

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

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

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

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

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

BY MR. McCLAIN:

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

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

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

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

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

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

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

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

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

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

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

Q. Yeah.

THE COURT: Yes.

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

(Transcript of May 7th at 234-25).[5]

Leon Douglass was called as a witness by Mr. Marek. Mr. Douglas testified as to his conversations with Raymond Wigley in which Wigley indicated that he committed the murder:[6]

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

[6]Of the six individuals whose testimony Mr. Marek presented regarding statements made by Raymond Wigley while he was incarcerated, the State only challenged Mr. Douglass' testimony on the basis that prison records did not reflect that he and Wigley were incarcerated together. As to the other five individuals, there is no question that they were incarcerated with Wigley and in a position to hear him make the statements that they each reported.

As to Mr. Douglass, the State presented the testimony of Yolanda Proctor who indicated that the Department of Corrections' database showing inmate movement between correctional facilities did not show that Mr. Douglass was ever in the same facility that Raymond Wigley was in. However, Ms. Proctor on cross-examination acknowledged that the database was subject to error (T. 162-63). She indicated that the best records for determining an inmates movement and location within the prison system was the file kept on each individual inmate which traveled from prison to prison with the inmate's movement between facilities (T. 164-65).

After Ms. Proctor's testimony, Mr. Marek requested that the inmate files for Raymond Wigley and Leon Douglass be provided.

Q. Okay. So in the course of working with him, did you actually get into discussing the facts of the case?

A. Yes, I did.

Q. Now, what did Mr. Wigley tell you in terms of the crime?

A. During the time that we had had our discussions, we were pulling some books and I had some materials out, and I wanted to take a break, so Ray and I actually went outside of the library to like a little break area we had, and we had been pretty intense, he had practically relived the entire incident, and he was telling me during this break that in fact he was the one that had perpetrated the murder, he had actually done the killing by strangulation of the victim, and that he was quite upset with his codefendant, Mr. Marek, because he did not do something, and I really can't recall what that something was, but he didn't do what Mr. Wigley wanted him to do to help him perpetrate this murder, and Ray, he was quite adamant about it that this guy had wronged him in his own perception. He described, you know, going up into the lifeguard tower, and what have you, and actually wanting to commit a sexual battery, and then, of course, the actual murder.

Q. Did he indicate, in terms of alcohol consumption, had there been any alcohol consumption?

The circuit court ordered the production of these filed. The Department of Corrections responded by filing a pleading with the circuit court in which it stated: "There is no guarantee that Mr. Douglass' file contains forms reflecting all of his movements." The Department also advised the court and the parties that Raymond Wigley's files were destroyed after it was selectively scanned. "The scanned information would not include any transfer orders or other records relating to inmate housing."

The circuit court then ordered the production of Mr. Douglass' file. After the hearing concluded, the Department delivered the file in compliance with the order. However, the file delivered did not include any records regarding Mr. Douglass before June of 1996, even though Mr. Douglass has been incarcerated continuously since at least November of 1991, as the records produced by Ms. Proctor reflect. Thus, there is absolutely no way to determine the accuracy of the database printout that Ms. Proctor possessed when she testified which even she acknowledged was subject to error.

A. I believe he did, I believe he did, they were drinking and what have you. There was something else that he had mentioned about. Actually, I think him and his friend, or his buddy as he called him, Mr. Marek, they had actually separated after this crime because of a big argument, something he had related to me that they had argued about because he didn't do, there again, something that Ray thought was just absolutely unconscionable for him not to do as Ray requested.

Q. Had you ever looked up Mr. Wigley's case in the law library, or read anything about it?

A. Not prior to starting to assist him, no.

Q. Okay. And so, the details that you have in your mind is from what you recall Mr. Wigley told you?

A. That is correct.

Q. And did he indicate anything in terms of anger or emotions?

A. Towards the victim, or towards the entire circumstances?

Q. Either and both.

A. Yes. Quite a bit, as a matter of fact.

Q. Can you explain.

A. Ray seemed to be as -- well, let me explain it like this, perhaps. When these guys, myself included, when we work on our cases, we actually are reliving the case, and once you are getting back into it there is no third person, I mean, you're in the first person, and your memory is there. So there are things, your anger, your emotions, the remorse, if any, all of those types of things come out as you are actually working, you know, so vehemently trying to undo what you've done in your mind and in your subconscious. So all these types of anger and different things that you're relating, that I'm trying to explain to you now, they just come out spontaneously. And, yeah, Ray was extremely upset, upset of the fact that he had been wronged in his mind by his friend, Mr. Marek, the fact that he had been wronged by the system, quote/unquote, and the fact that, you know, he had actually kind of stretched the

truth a little here or there.

Q. What do you mean?

A. Ray pretty much told me that he had fabricated some details in some statements that he had made against Mr. Marek, and against others, I suppose, during the time.

Q. So that would have been after he would have been arrested; is that what you mean?

A. Yes, exactly.

Q. And did he explain why the murder happened?

A. I don't recall the specifics of why, other than the fact that a situation, car trouble or something, had perpetuated itself into the actual act of the murder over a period of time.

Q. At any time did he change his story as to who was the person who strangled the victim?

A. Never with me, Ray was always the one that actually perpetrated the killing, he actually did the act.

(T. 139-42).

Mr. Marek also presented the testimony of Carl Mitchell and William Green, both of whom testified that they overheard Raymond Wigley say that he killed before (T. 67, 277). Though neither remembered any more detailed statements than that, there testimony was certainly consistent with the testimony of Mr. Bannerman, Mr. Pearson, Mr. Conley and Mr. Douglass.[7]

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[7]One aspect of Mr. Green's testimony worthy of note is the fact that the conversation he overheard in which Wigley indicated that he had killed before was a conversation with Mr. Blackwelder, the individual who was Wigley's lover and who later murdered Wigley (T. 279). The fact that Wigley was apparently discussing with Mr. Blackwelder the murder that he had previously committed may have additional significance given Ms. Bailey's

C. Diligence.

This rule, Rule 3.851(d), states in pertinent part: "No motion shall be filed or considered pursuant to this rule if filed beyond the time limitation . . . unless . . . the facts on which the claim is predicated were unknown to the movant or the movant's attorney and could not have been ascertained by the exercise of due diligence." Here, there is no question that Mr. Marek first learned from Jessie Bannerman that Raymond Wigley had made statements to him concerning his case on April 27, 2009. There is no question that Mr. Marek first learned that Raymond Wigley had made statements to Robert Pearson concerning his case on April 28, 2009. And there is no question that Mr. Marek first learned that Raymond Wigley made statements to Michael Conley concerning his case on April 29, 2009. Mr. Marek learned of the statements made to Leon Douglass, Carl Mitchell and William Green even later in May of 2009.

Prior to April 27, 2009, what Mr. Marek's counsel knew was that Wigley had been incarcerated with many thousands of other DOC prisoners during the 17 years that he was housed in a prison facility.

In State v. Mills, Ashley had also been housed in jails and

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representation while examining Linda McDermott that when Wigley's body was found, "he was found dead, naked with a neckerchief around his neck" (T. 380). Ms. Bailey described this as "[s]trikingly similar to the death of Adel Simmons" (T. 380).

prisons, just as Raymond Wigley had. In Mills, the collateral attorneys did not search DOC and jail records for names of people who had been incarcerated with Ashley. It was not until Ashley mentioned Anderson's name in 2001 to collateral counsel that any attempt was undertaken to find other prisoners who had served time with Ashley. Yet, there the circuit court and this Court on appeal found that counsel had used due diligence on behalf of Mills, even though he had not sought to interview any inmates who had been incarcerated with Mills prior to 2001.

In Mr. Marek's case, collateral counsel made an effort to locate friends and fellow inmates of Raymond Wigley in 2001. In fact, counsel made a list of names that included Robert Pearson and Michael Conley. Even though there was absolutely no indication that Wigely had made any statements regarding his case while incarcerated, counsel did try to locate individuals on this list of names. As to Robert Pearson, he was in fact located in 2001, but he did not tell Mr. Marek's investigator anything that Raymond Wigley had said. As to Michael Conley, collateral counsel sought to find him. However, he had been released from prison and searches for his location failed to pan out. With absolutely no indication that Wigley had made any statements, collateral counsel had no basis to further pursue the matter.

How can it possibly be that because Mr. Marek's counsel took a shot in the dark and made an effort in 2001 to find some people

who had been housed with Wigley in prison, they were less diligent than counsel for Mills? By doing more than the attorneys in Mills, according to the State's argument they were less diligent than the attorneys in Mills who made no effort at all to locate inmates who had been incarcerated with Mr. Mills. Surely, due diligence has a reasonableness component. It cannot be required that collateral counsel have to search through every haystack within one year because if they don't and something falls out of the haystack later it will barred. Perfection is not required of trial counsel under the Sixth Amendment and surely it cannot be required of collateral counsel either.

D. Cumulative Consideration

1. Mitigating evidence trial counsel failed to investigate

This Court ruled in State v. Gunsby, 670 So. 2d 920 (Fla. 1996), that when analyzing a newly discovered evidence claim under Jones v. State, the newly discovered evidence must be evaluated cumulatively with evidence that the jury did not hear because of trial counsel's failure to adequately investigate, and it must evaluated cumulatively with a finding of constitutional error to determine if a finding that the was harmless would have been different had the new evidence been known. It must also be evaluated under the Eighth Amendment to determine whether the death sentence would have withstood scrutiny on direct appeal on proportionality grounds or Enmund v. Florida grounds.

Mitigating evidence that the jury did not hear because trial counsel failed to investigate Mr. Marek's background in Texas was substantial. Even though Judge Kaplan concluded that the failure to learned of this mitigating evidence did not undermine confidence in the outcome of the penalty phase, this evidence must be evaluated cumulatively with the new evidence presented on June 1st and 2nd. At the age of ten, John Marek told a mental health evaluator, "He wants to change from being a boy who is sad all the time to being a boy who is happy all the time" (PC-R. D-Ex. 1, Tab 4, p. 6). This sad little boy was born in Germany to an emotionally unstable mother who took large amounts of tranquilizers and diet pills during her pregnancy and to a largely absentee father (PC-T. 79). At the age of eight or nine months, John overdosed to the point of convulsions when his brother fed him some of his mother's medication (PC-T. 107-08, 211-12). Doctors said his mind would forever be affected, and his childhood development of such skills as walking and talking was markedly slow (PC-T. 88, 213-14). Labeled a "retard" throughout his childhood, John was rejected by his disappointed father and inadequately fed and clothed by his neglectful mother (PC-T. 93-94). Unable to speak intelligibly and suffering from constant enuresis, he was ridiculed by his peers. His parents divorced when he was seven years old. His mother remarried an alcoholic who spent the family money on liquor and who continued

the rejection John had experienced since he was a baby. John was a loving child and tried again and again to seek affection, only to be rejected again and again. After a family altercation in which John came close to being shot by his stepfather, John's mother gave up her children. John's brothers went to live with their father, who refused to take John--age 9, labeled a "retard", unable to speak (PC-T. 97-100).

At age nine, John Marek was placed in the custody of the Tarrant County, Texas, Child Welfare Unit (PC-R. D-Ex. 1, Tab 2, p. 3). Psychological testing done at that time revealed John was not retarded but of normal intelligence. However, psychologists reported John had not been able to develop normally because of cerebral dysfunction, deep feelings of inadequacy, and emotional deprivation. Over the ensuing years, psychological and child welfare reports continued to note John's emotional difficulties, his frustration and anger at his natural parents and stepfather, his learning disabilities resulting from psychological and neurological problems, his enuresis, and his feelings of inadequacy and rejection (PC-R. D-Ex. 1, Tab 4).

After passing through at least four foster families, at age 12, John was sent to a residential treatment facility, paid for by his father's insurance (PC-R. D-Ex. 1, Tab 5). John received therapy and responded well, beginning to exhibit some emotional stability and academic progress. However, when the insurance

company terminated the funding for this placement, John was returned to his foster family, despite the treatment facility's warnings that John's emotional and neurological disabilities required continued, intensive residential treatment, and prediction that removing John from residential treatment would destroy all the progress he had made (PC-R. D-Ex. 1, Tab 8, pp 27, 30, 34, 38-39).

After living briefly with his foster family, John was again placed in an institution, where psychological testing revealed that his previous progress had been lost (PC-R. D-Ex. 1, Tab 7). His scores on intellectual testing had plummeted, the result, evaluators noted, of organic brain damage and emotional disabilities. After about two years in this institution, John was again returned to his foster parents, who washed their hands of him four months later (PC-R. D-Ex 1, Tab 29).

Following a brief stay in a shelter, John was placed in yet another foster family (PC-T. 239). He was then seventeen years old, and heavily involved in drug use. A few months later, John was convicted of credit card abuse and placed on probation. After John violated his probation, a competency evaluation noted his limited intellectual capacity, possibly resulting from brain dysfunction, and recommended drug treatment in a structured environment, stating that intervention could well reshape John's behavior. No treatment was provided, and John was sentenced to

serve two years in prison (PC-R. D-Ex 1, Tab 30). After his release, with nowhere to go, John resumed his drug and alcohol abuse. At age 21, he traveled to Florida with Raymond Wigley. Drinking heavily, the two were arrested for murder shortly after arriving in Florida.

Mr. Marek's jury did not hear any of this mitigating evidence because trial counsel failed to investigate and prepare for the penalty phase. Counsel testified that he made no effort to discover whether he could obtain records from Texas regarding Mr. Marek having been in custody of the state as a child (PC-T. 317), although he knew Mr. Marek had been in foster care (PC-T. 321-22), and had information that when Mr. Marek was a toddler, "his natural father left the family and his mother remarried, this time to an abusive alcoholic. At age nine [Mr. Marek] was turned over to the State [of Texas] and lived in a variety of foster homes until striking out on his own at age 17" (PC-R. D-Ex 1, Tab 10).[8] Thus, counsel did not find Texas court records which said Mr. Marek was declared "a dependent child based on neglect" (1PC-T. 326). Counsel made no effort to obtain Texas prison records (PC-T. 336) or court records (PC-T. 337), although he knew that Mr. Marek had been in prison in Texas (PC-T. 336), and had a print-out in his file which revealed Mr. Marek's Texas

[8]This quote is from Dr. Krieger's report which Judge Kaplan refused to permit the jury to hear.

inmate number (PC-R. D-Ex 1, Tab 30). Counsel made no effort to check out the address on Mr. Marek's Texas driver's license (PC-T. 320), although he had a copy of it in his files (PC-T. 319).

Had counsel taken any one of these simple steps, the information detailed above would have flooded in. For example, records from the Texas Adult Probation Department contained a life history of Mr. Marek (PCR. D-Ex 1, Tab 19). This life history explained that Mr. Marek was placed in the custody of the Texas Department of Human Resources in October, 1970, and listed the names of the special schools Mr. Marek attended. With this one document, counsel would have had enough specific information to unearth the 99 pages of documents contained in the files of the Texas Department of Human Services (PC-R. D-Ex 1, Tab 29).

Similarly, had counsel checked the address on Mr. Marek's driver's license, he would have discovered the address was that of Sallie and Jack Hand, Mr. Marek's last foster parents(PC-T. 239-41), who lived at the same address at the time of the trial (PC-T. 245). They were never contacted by trial counsel (PC-T. 244-45, 320, 322-33). Counsel testified he never "independently" checked out the address on Mr. Marek's driver's license and therefore he had "[n]o idea" whether that address would have led to anyone (PC-T. 320). He also testified he "[o]bviously" did not know what information the foster parents would have led him to because "I never talked to them" (PC-T. 323).

Counsel testified that investigation was not conducted in part because of a shortage of time and money (PC-T. 330-31). In order to investigate, counsel "would have had to request the Court to appoint an investigator for a very oblique reason. I couldn't have given any real reason for it" (PC-T. 318).

It was clear at the 1988 hearing that counsel did not investigate Mr. Marek's background for the penalty phase, and Judge Kaplan so ruled (PC-T. 488). However, Judge Kaplan concluded that confidence was not undermined in the outcome.[9] Judge Kaplan said that the evidence of severe abuse, neglect, abandonment, and brain damage would make "any reasonable person[] want to make sure that Mr. Marek never ever walk the streets again" (PC-T. 488).

2. Improper aggravator found to be harmless beyond a reasonable doubt

In 1988, one of the aggravating circumstances considered by the jury and relied upon in the sentencing order was determined to have been improperly considered. In. Marek's case, the jury was given an invalid aggravating circumstance to weigh in its deliberation and the sentencing judge relied upon the invalid aggravator in imposing the death sentence. This Eighth Amendment error was found to be harmless beyond a reasonable doubt in 1988

[9]However, Moldof testified in 1988 that had he discovered the readily available information summarized herein, he would have presented it at the penalty phase (PC-T. 395-96).

only because Judge Kaplan had stated in his sentencing order that no mitigating circumstances were present. Since no mitigation existed to balance against the three remaining aggravating circumstances, the error was said to be harmless beyond a reasonable. However, evidence that Wigley confessed to six different individuals that he was the real killer would have constituted mitigation along with Wigley's life sentence which would have precluded a finding that the Eighth Amendment error was harmless beyond a reasonable doubt. Post conviction relief would probably have resulted and accordingly must issue now.

3. Enmund v. Florida and proportionality

The statements of Wigley to Pearson, Conley, Bannerman, Douglass, Mitchell and Green require a factual determination under Enmund in order for Mr. Marek's death sentence to be constitutional. Wigley's statements corroborate Mr. Marek's testimony that he was not the killer. This implicates Enmund. When considered along with the jury's acquittal of a sexual battery, the Eighth Amendment requires a finding after consideration of all of the evidence that if Mr. Marek did not kill that he intended or contemplated that killing would occur. Enmund has not been satisfied in light of the new evidence that the death sentence stands in violation of the Eighth Amendment.

Similarly, this Court was required on direct appeal to conduct a proportionality determination. Given the imposition of

a life sentence in Wigley's case, the new evidence would probably have led this Court to decide that a life sentence was also required in Mr. Marek's case. Scott v. Dugger, 604 So. 2d 465 (Fla. 1992).

4. Conclusion

To the extent that the State's evidence at trial was that Mr. Marek was the dominant actor, Wigley's statements to Conley, Bannerman, Pearson, Douglass, Mitchell and Green conflict with the State's evidence. By definition, that means that those statements impeach the State's case. Excluding evidence or discounting its value because of the perceived strength of the State's case violates due process as explained in Holmes v. South Carolina, 547 U.S. 319 (2006)(a state cannot exclude evidence that someone else committed the murder of the basis of the strength of the State's case against the defendant). The statements Wigley made to Conley, Bannerman, Pearson, Douglass, Mitchell and Green corroborate Mr. Marek's testimony at his trial that he did not kill, was not present when the killing occurred, did not know that a killing would occur, nor did he even contemplate that a killing may occur. The jury acquitted Mr. Marek of a sexual battery upon the victim. If Wigley's statements to Conley, Banerman, Pearson, Douglass, Mitchell and Green are true then Mr. Marek was not the dominant actor. He did not either rape or kill the victim. He was merely present in the

pickup when Wigley drove off with her in the vehicle.

There are six separate individuals who do not know Mr. Marek who have indicated that Wigley confessed to being the actual killer. The fact that there are six such witnesses provides corroboration to the separate testimony of each one regarding Wigley's confession. In State v. Mills, there was only one witness who said the co-defendant confessed to being the triggerman and that warranted penalty phase relief. Under the proper cumulative analysis, Mr. Marek is entitled to a new trial.

5. Circuit Court's Erroneous Ruling

In denying relief to Mr. Marek, the circuit court erred. As to the denial Mr. Marek's newly discovered evidence claim, the circuit court described Raymond Wigley's statements as not credible. In reaching this conclusion, the circuit court relied upon the testimony of Bannerman, Pearson, Conley, Mitchell and Green to conclude that Raymond Wigley's statements that he committed the murder were not necessarily true. The circuit court's reasoning ignored the fact that the testimony of Bannerman, Pearson, Conley, Mitchell, and Green would have led to the introduction of Wigley's life sentence at Mr. Marek's penalty phase. The issue is not whether the jury would have likely believed Wigley's statements, but whether the introduction of those statements and the fact that Mr. Wigley received a life sentence (a fact not known by the jury in 1984) would have led to

a different outcome before the jury, on direct appeal, or in the postconviction proceedings in 1988 during which an aggravating circumstances was found to have been erroneously applied to Mr. Marek at his sentencing. This legal error was found harmless beyond a reasonable doubt because Judge Kaplan concluded that there was no mitigating evidence before the sentencing jury.

In premising its ruling on Mr. Wigley's perceived lack of credibility,[10] the circuit court completely overlooked what in fact was and is Mr. Marek's claim. Mr. Marek's claim is premised upon the fact that the testimony of Jessie Bannerman, Robert Pearson, Michael Conley, Carl Mitchell and William Green was not known or presented at Mr. Marek's trial, nor for that matter was any testimony presented regarding statements made by Raymond Wigley that he killed Adela Simmons while Mr. Marek slept in the pickup truck. Had the testimony of Jessie Bannerman, Robert Pearson, Michael Conley, Carl Mitchell and William Green been available, or testimony of its equivalency, Hilliard Moldof testified the decisions he made at the penalty phase and the evidence he chose to present would have been different. He would have presented the fact that Mr. Wigley received a life sentence.

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[10]It is a perceived lack of credibility because Mr. Wigley did not testify. So based not upon its own observations of Mr. Wigley's demeanor, but upon testimony that the witnesses did not know if Mr. Wigley was telling the truth when he claimed to have been the killer, the circuit court said that the jury would not have found those statements as credible.

This would have put mitigating evidence into the record. The evidence that has been presented now was not in the record at the time of the direct appeal and thus it was not considered by this Court when it issued its opinion affirming Mr. Marek's sentence of death. In 1988 at the time of the "initial" Rule 3.850 motion, the testimony of Jessie Bannerman, Robert Pearson, Michael Conley, Carl Mitchell and William Green was not known or presented, nor for that matter was any testimony presented regarding statements made by Raymond Wigley that he killed Adela Simmons while Mr. Marek slept in the pickup truck. The evidence that has been presented now was not in the record at the time of the "initial" Rule 3.850 was heard and denied, and thus this evidence was not considered or addressed by the circuit court or this Court when Mr. Marek was denied collateral relief.

In addressing Leon Douglass' testimony, the circuit court completely overlooked the fact that the records that Yolanda Proctor testified was the best evidence of exactly when Leon Douglass and Raymond Wigley were incarcerated at what prisons, the files kept on individual inmates within the DOC, do not exist. The prison has destroyed the files as to Raymond Wigley, so there is no way to actually determine when he was at what prison. Similarly, DOC in complying with this Court's directive to produce all of its records concerning Mr. Douglass' incarceration within DOC only produced records that covered his

incarceration after 1996. No records were provided as to his location within DOC prior to 1996. As a result, there is no basis to conclude that the two individuals were never incarcerated together. The circuit court overlooked the records that DOC delivered to this Court and the parties after the conclusion of the hearing on June 2, 2009.

In its discussion of Mr. Marek's diligence, the circuit court used twenty-twenty hindsight to say that Ms. McDermott could have located the witness presented at the 2009 evidentiary hearing in 2001. Besides erroneously employing twenty-twenty hindsight, this Court overlooked the fact that Robert Pearson was contact and decided not to tell Mr. Marek's legal team what he knew. Similarly, this Court overlooked the fact that Mr. Marek's legal team in fact looked for Michael Conley in 2001, but that Mr. Conley's family members intentionally deceived Mr. Marek's legal team as to Mr. Conley's whereabouts and thwarted the efforts made in 2001 to find Mr. Conley. As to both, Mr. Pearson and Mr. Conley, factors externally to Mr. Marek and his legal team precluded Mr. Marek and his legal team of learning what Mr. Wigley told Mr. Pearson and Mr. Conley until 2009.

Even if this Court concludes a new trial is not warranted, the new evidence must at a minimum require this Court to reverse the circuit court's ruling and vacate Mr. Marek's sentence of death and grant Rule 3.851 relief.

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

Over thirty years ago, the United States Supreme Court announced that under the Eighth Amendment, the death penalty must be imposed fairly, and with reasonable consistency, or not at all. Furman v. Georgia, 408 U.S. 238, 310 (1972)(per curiam). At issue in Furman were three death sentences: two from Georgia and one from Texas. Relying upon statistical analysis of the number of death sentences being imposed and upon whom they were imposed, it was argued that the death penalty was cruel and unusual within the meaning of the Eighth Amendment. Five justices agreed, and each wrote a separate opinion setting forth his reasoning. Each found the manner in which the death schemes were then operating to be arbitrary and capricious. Furman, 408 U.S. at 253 (Douglas, J., concurring) ("We cannot say from facts disclosed in these records that these defendants were sentenced to death because they were black. Yet our task is not restricted to an effort to divine what motives impelled these death penalties. Rather, we deal with a system of law and of justice that leaves to the uncontrolled discretion of judges or juries the determination whether defendants committing these crimes should die or be imprisoned. Under these laws no standards govern the selection of the penalty. People live or die, dependent on the whim of one man or of 12."); Id. at 293 (Brennan, J., concurring) ("it smacks of

little more than a lottery system"); Id. at 309 (Stewart, J., concurring) ("[t]hese death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual"); Id. at 313 (White, J., concurring) ("there is no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not"); Id. at 365-66 (Marshall, J., concurring)("It also is evident that the burden of capital punishment falls upon the poor, the ignorant, and the underprivileged members of society. It is the poor, and the members of minority groups who are least able to voice their complaints against capital punishment. Their impotence leaves them victims of a sanction that the wealthier, better-represented, just-as-guilty person can escape. So long as the capital sanction is used only against the forlorn, easily forgotten members of society, legislators are content to maintain the status quo, because change would draw attention to the problem and concern might develop.")(footnote omitted). Thus, as explained by Justice Stewart, Furman means that: "The Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be . . . wantonly and . . . freakishly imposed" on a "capriciously selected random handful" of individuals. Id. at 310.

On April 20, 2009, the Governor signed a warrant scheduling

Mr. Marek's execution for May 13, 2009. As has now been revealed in the public records disclosed on Monday, April 27, 2009, the State Attorney's Office was in contact with the Parole Commission and the Governor's Office in September of 2008 regarding Mr. Marek's case and whether mercy was warranted or whether a death warrant should be signed (T. 237-39, 244-45). According to the recently disclosed email, a parole officer was attempting to obtain a copy of a mental health evaluation conducted on Mr. Marek and a copy of the medical examiner's autopsy report. (Def. Exh. 6). This lead to an email chain that was disclosed on April 27, 2009, documenting the frantic efforts to locate these "very important files." (Def. Exh. 6). The public records disclosed on April 27, 2009, also reveal that the mental health evaluation and the autopsy report were faxed to Sandra Pimental at the Parole Commission because "Gov's office wants info next week (Mon Sept 22)." (Def. Exh. 6).

Clearly, the Governor's office was evaluating whether to schedule Mr. Marek's execution and wanted to review materials that might warrant mercy. However the State may try to label this as something else, this was a process by which the Governor was deciding whether to proceed with Mr. Marek's execution, *i.e.* a clemency proceeding. This process was conducted without Mr. Marek's counsel's knowledge or for that matter without Mr. Marek having a clemency attorney who could provide the information that

may warrant a decision that the Governor should not proceed with Mr. Marek's execution.

A one-sided process that relies upon the prosecutors who have been urging that a death sentence be carried out and who have repeatedly misrepresented the facts and the record and displayed either cavalier ignorance or malevolence towards Mr. Marek and his case, cannot operate as the "fail safe" that the United States Supreme Court explained in Harbison v. Bell, – U.S. – (April 1, 2009), was expected and required. Such a process means that executions will be carried out on a completely arbitrary and random basis.

In fact, the signing of Mr. Marek's warrant on April 20, 2009, was nothing more than a lottery. There were over fifty death row resides whose cases were as ready for a warrant as Mr. Marek's. From the Capital Commission website it can be determined that the list at a minimum includes: Gary Alvord, Richard Anderson, Jeffrey Atwater, Chadwick Banks, McArthur Breedlove, Jim Eric Chandler, Oba Chandler, Loran Cole, Danny Doyle, Charles Finney, Charles Foster, Konstantinos Fotopoulose, John Freeman, Guy Gamble, Louis Gaskin, Olen Gorby, Robert Gordon, Marshall Gore, Martin Grossman, Jerry Haliburton, Robert Hendrix, John Henry, Paul Howell, James Hunter, Etheria Jackson, Edward James, Ronnie Johnson, Randall Jones, William Kelley, Gary Lawrence, Ian Lightbourne, John Marquard, Sonny Oats, Dominick

Occhiccone, Norman Parker, Robert Patten, Daniel Peterka, Kenneth Quince, Paul Scott, Richard Shere, Kenny Stewart, William Sweet, Melvin Trotter, William Turner, Manuel Valle, William Van Poyck, Peter Ventura, Anthony Wainwright, Robert Waterhouse, Johnny Williamson, and William Zeigler.[11] So along with Mr. Marek and David Johnston who both got warrants on April 20th, at least an additional 51 inmates were passed over. Mercy was extended to these other inmates and they were allowed to continue to live. Certainly, there may be very good reasons for extending mercy to a number of these individuals. That is not the point. The point is there are no standards. There is no guidance. There is absolutely no way to distinguish whose name the Governor places on warrant from the 50 plus names that are not placed on a warrant. The process can only be described as a lottery; the very kind of system that the United States Supreme Court in Furman v. Georgia said would no longer be allowed.

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[11]Carolyn Snurkowski in her testimony did not dispute that there were a large number of cases on which the Governor could sign a warrant. Ms. Snurkowski testified that she did not herself keep track of those cases and did not know the status of the litigation for all death row inmates even though her office was charged with representing the State in such litigation (T. 250-51). She only looks into the particulars of any given case when the Governor's Office calls and inquires. According to Ms. Snurkowski, the Governor's office only inquires of her as to the status of litigation in particular case. These calls occur from time to time and she "gets calls from the Governor's office giving me names and asking what the status of those cases are" (T. 251). At no time does the Governor's Office ever call Ms. Snurkowski "and solicit names" of individuals who are warrant eligible (T. 251).

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

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

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

Woodard, 523 U.S. at 289 (emphasis added). The arbitrary clemency process issue employed in Mr. Marek's case ignores Ohio Adult Parole Authority, et al. v. Woodard, in which the Supreme Court held that judicial intervention was warranted in a case where a clemency system was arbitrary. It also ignores the decision in Harbison v. Bell as to the role that the clemency process is to play. It is supposed to be the "fail safe", not some random drawing of a name on card out of a spinning drum filled with business cards that radio stations do for some give away promotion. Relief is proper.

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

This Court held in Rose v. State, 601 So. 2d 1181, 1183 (Fla. 1992), that when the prosecutor drafted an order for the judge denying a Rule 3.851 motion without notice to the defense, due process was violated: "a judge is placed in the position of possibly receiving inaccurate information or being unduly swayed by unrebutted remarks about the other side's case." In Rose, the Court did not impose a requirement that the defendant had to show

that the *ex parte* contact destroyed the judge's neutrality.

The prosecutor who drafted the order denying Rule 3.850 relief in Rose v. State, was the same prosecutor who represented the State at the evidentiary hearing in 1988 in Mr. Marek's case on his Rule 3.850 motion. In addition, the type and the style of the order denying Rule 3.850 entered in November of 1988 was the same as the type and style of the response to the motion to vacate that had been prepared by the Rose/Smith/Marek prosecutor.

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

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

I'm sure I've done it both ways.

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

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

Q. Okay.

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

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

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

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

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

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

* * *

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

A. Yes.

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

A. Okay.

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

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

A. Yes.

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

A. Can I look at it?

Q. Absolutely.

A. Your question again, is?

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

A. I don't have a clue.

(Transcript of May 6th at 113).

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

The common denominator in the Rose/Smith/Marek cases was the post conviction prosecutor, Paul Zacks. Mr. Zacks was the prosecutor who, in the same time frame as Mr. Marek's initial Rule 3.851 litigation, had been guilty in Rose of preparing an order denying Rule 3.851 relief without notice to defense counsel. He did the same things in Smith, two years later.

A review of the orders contained in the record on appeal demonstrates that Judge Kaplan (or his judicial assistant) prepared orders in a distinct fashion – the case number in the caption of the order included the judge's full name. Also, in

the judge's orders he did not use all capital letters when he referred to Mr. Marek. However, in the State's pleadings the caption is different – it does not include the judge's full name. Likewise, most noticeably in the State's response to Mr. Marek's Rule 3.851 motion, when referring to Mr. Marek, the State uses all capital lettering.

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

Moreover, the State had an obligation to disclose the existence of improper *ex parte* contact with the presiding judge which the defendant had no reason to know. As explained in Mr. Marek's Rule 3.851 motion, when Rose was decided, undersigned counsel was representing Frank Lee Smith in his appeal to the Florida Supreme Court from the denial of his Rule 3.850 motion. At the 1991 evidentiary hearing in Mr. Smith's case, the same prosecutor who engaged in the *ex parte* contact at issue in Rose also spoke with the presiding judge *ex parte* and the judge asked the prosecutor to draft the order denying relief. Mr. Smith's counsel was not privy to the discussion between the judge and the prosecutor, but learned of it when the prosecutor called to ask him to approve as to form the order he had drafted at the judge's

request. When undersigned counsel objected on behalf of Mr. Smith, the judge signed the order over objection and refused to disqualify himself. After Mr. Smith challenged this procedure on appeal, the decision in Rose was rendered and the State asked for a remand for an evidentiary hearing to get the facts and determine what had happened. Following the remand and after evidence was taken the case was returned to this Court, and this Court found that the *ex parte* communication between the prosecutor and the judge in the preparation of the order denying Rule 3.850 relief violated due process and required that a new evidentiary hearing before a different judge. Smith v. State, 708 So. 2d 253 (Fla. 1998).

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

Following either the decision in Rose or the decision in Smith, the State did not contact Mr. Marek or his counsel to inform them that the prosecutor representing the State at the 1988 evidentiary hearing had done what he did in Rose and what he did in Smith, drafting the order denying Rule 3.850 for the judge which he provided to the judge on an *ex parte* basis. "When police or prosecutors conceal significant exculpatory or impeaching material in the State's possession, it is ordinarily

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

Of course, the party excluded from *ex parte* contact is unaware that it has occurred until someone who was there apprises him. Porter v. Singletary, 49 F.3d 1483 (11th Cir. 1995)(litigants are entitled to assume that judges have complied with the code of judicial conduct and not investigate for misconduct until a specific basis for such an investigation is present). In this instance, neither the judge nor the State advised either Mr. Marek or his counsel what occurred while the matter was pending in circuit court. It was only while working on drafting the initial brief filed on April 29, 2009, that counsel noticed that in the record the type and the style of the ordering denying Rule 3.850 entered in November of 1988 was the same as the type and style of the response to the motion to vacate that had been prepared by the same prosecutor involved in Rose and Smith. It was only then that undersigned counsel figured out what the State had been hiding all these years, that

the unconstitutional procedure employed in Rose and Smith had been employed in Mr. Marek's case. Because the State never complied with its due process obligation and informed Mr. Marek or his counsel of this constitutional violation, Banks v. Dretke stands for the proposition that Mr. Marek can raise it at this juncture when through serendipity he figured out that the due process violation had occurred. Rule 3.851 relief is warranted and the 1988 order denying Mr. Marek's motion to vacate must be vacated, and Mr. Marek must be put back in the position he was in when the due process violation occurred. He is entitled to have his 1988 motion to vacate reheard and decided by a judge who has not engaged in *ex parte* contact with the State. He is entitled to the same relief that the Florida Supreme Court granted in Smith when it remanded for a new evidentiary hearing on the motion to vacate which had been denied through *ex parte* contact between the State and the presiding judge.

ARGUMENT AS TO THE ISSUES RAISED IN JUNE 12TH RULE 3.851 MOTION

I. THE CIRCUIT COURT ERRED IN FAILING TO HOLD A CASE MANAGEMENT HEARING.

On June 12, 2009, Mr. Marek filed his Motion to Vacate Judgments of Conviction and Sentence with Special Request for Leave to Amend. Claim I of this motion was premised upon the United States Supreme Court decision on June 8, 2009, in Caperton v. Massey Coal Co. Claim II was premised upon new testimony from

Hilliard Moldof, Mr. Marek's trial counsel, that was elicited by the State during his June 2, 2009, testimony.

Without conducting a case management hearing in order to permit Mr. Marek's counsel an opportunity to orally argue the legal bases for his motion and its timeliness, the circuit court entered an order on June 19, 2009, summarily denying the June 12th motion to vacate. In so doing, the circuit court deprived Mr. Marek of his due process rights as recognized in Huff v. State, 622 So. 2d 982 (Fla. 1993), and codified in Rule 3.851.

In clear violation of Rule 3.851 the circuit court did not conduct a case management conference on Mr. Marek's Rule 3.851 motion that he filed on June 12, 2009. Rule 3.851(f)(5)(B) provides in pertinent part: "Within 30 days after the state files its answer to a successive motion for postconviction relief, the trial court **shall hold** a case management conference." (Emphasis added). The case management conference is required by due process as explained in Huff v. State, 622 So. 2d 982 (Fla. 1993), in order to allow the movant an opportunity to orally argue the basis of the motion to vacate and/or the need for evidentiary development. The circuit court ignored the requirement in Rule 3.851(f)(5)(B). This violated due process.

Mr. Marek was entitled to an opportunity to address the circuit court and explained why the decision on June 8, 2009, in Caperton rendered Claim I of the motion timely and a meritorious

claim. He was also entitled to an opportunity to explain to the circuit court that Mr. Moldof's testimony on June 2, 2009, was new evidence elicited by the State that warranted revisiting Mr. Marek's previously presented claim of ineffective assistance of counsel.

A case management hearing was required on Mr. Marek's motion. This Court's refusal to grant a case management hearing overlooked the clear language in Rule 3.851. The denial of the motion to vacate must be reversed and remanded for further proceedings.

II.

MR. MAREK WAS DEPRIVED OF DUE PROCESS AND THE EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION WAS VIOLATED WHEN JUDGE KAPLAN SENTENCED MR. MAREK TO DEATH AND PRESIDED OVER THE EVIDENTIARY HEARING IN 1988 AT WHICH MR. MAREK'S CLAIM THAT HIS TRIAL ATTORNEY HILLIARD MOLDOF PROVIDED INEFFECTIVE ASSISTANCE OF COUNSEL WAS HEARD.

After a warrant was signed setting Mr. Marek's execution in the fall of 1988, he filed a Rule 3.850 motion challenging his conviction and sentence of death. An evidentiary hearing was conducted on this motion on November 3 and 4, 1988, days before Mr. Marek's scheduled execution. The hearing was before Judge Kaplan. Mr. Marek presented numerous witnesses and documents regarding his claim that trial counsel, Hilliard Moldof, provided ineffective assistance in failing to investigate and present evidence of mitigation and regarding his claim that the trial mental health expert curtailed his evaluation of Mr. Marek

and thus the cost of that evaluation in order to assure future court appointments. Mr. Marek also contended that allowing the jury to consider the prior violent felony aggravator and Judge Kaplan's finding of that aggravator were legally erroneous because the aggravator relied upon Mr. Marek's contemporaneous conviction for kidnapping. Subsequently, Judge Kaplan ruled that Mr. Moldof had not provided ineffective assistance of counsel, and his ruling was upheld on appeal.

On July 22, 1993, Mr. Marek filed his second Rule 3.850 motion. Accompanying this motion was a Motion to Disqualify Judge Kaplan. The disqualification motion relied upon new information "which, in conjunction with the materials included in the original Motion to Disqualify [filed in 1988], further establishes that Mr. Marek cannot receive a fair and impartial hearing before Judge Kaplan" (Supp. 2PC-R. 100-01). The information came from a March 31, 1993, segment of the CBS television show "48 Hours" which included an interview with Judge Kaplan in which he explained that his job in dealing with criminal defendants was "to get rid of these people . . . and keep them off the streets as long as possible so that you and I can be rid of them" (Supp. 2PC-R. 101-02). His policy was "you've got to fight fire with fire" (Supp. 2PC-R. 102). Prosecutors who were interviewed said they were "excited" when they were assigned cases in front of Judge Kaplan because, as

Judge Kaplan explained, "Sometimes you give them a little stiffer sentence so they'll spend some more real time in jail" (Supp. 2PC-R. 102). When a criminal defendant appeared before him, Judge Kaplan said, "I'm always looking at a negative approach, somebody's trying to con me" (Supp. 2PC-R. 122). The Motion to Disqualify also argued that Judge Kaplan was required to recuse himself because he would be a witness regarding a funding/conflict of interest issue (Supp. 2PC-R. 103-05).

On August 30, 1996, Mr. Marek filed an Amended Motion to Vacate containing nine claims (2PC-R. 313-437). In addition to the six claims pled in the Rule 3.850 motion filed in July of 1993 and the one claim pled in a supplement filed in January of 1994 (2PC-R. 19), the amended motion alleged that Judge Kaplan's bias had tainted the trial and collateral proceedings (Claim IX, 2PC-R. 423-35),[12] and newly discovered evidence regarding Wigley (Claim VIII, 2PC-R. 417-23).

Also on August 30, 1996, Mr. Marek filed a motion to depose Judge Kaplan (2PC-R. 294-306). The motion relied upon the recently-conducted deposition in Lewis and upon State v. Lewis, 656 So. 2d 1248 (Fla. 1995)(2PC-R. 294). The motion stated, "Mr. Marek's counsel is seeking to depose Judge Kaplan regarding Judge

[12]In August of 1996, Judge Kaplan was deposed in another capital collateral case involving a defendant named Lawrence Lewis. This claim relied in part upon Judge Kaplan's Lewis deposition, which had not yet been transcribed (2PC-R. 426). The transcript was filed on October 3, 1996 (2PC-R. 440-532).

Kaplan's animosity towards Mr. Marek, inappropriate remarks made while being interviewed on a television news program, and the conflict of interest issue based on the funding methods of the Seventeenth Judicial Circuit" and noted that these were precisely the reasons the deposition was allowed in Lewis (2PC-R. 294-95). The motion pointed out that Mr. Marek had moved to disqualify Judge Kaplan because of these matters and argued that Judge Kaplan "likely possesses additional information that may provide a basis for claims for relief" (2PC-R. 295-96).[13]

On August 30, 1996, Mr. Marek also filed another motion to disqualify Judge Kaplan (2PC-R. 307-12). In addition to the allegations presented in his previous motion to disqualify and its supplements, Mr. Marek relied upon Judge Kaplan's deposition testimony in which Judge Kaplan revealed his biases in sentencing convicted defendants and his skepticism about pleas for mercy (2PC-R. 308). Based upon Judge Kaplan's sworn testimony, "Mr.

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[13]The motion stated that Claim I of Mr. Marek's pending Rule 3.850 motion raised the conflict of interest issue arising from the funding methods (2PC-R. 296-301). Claim I noted that new information regarding the court funding matter was particularly pertinent to testimony presented in Mr. Marek's initial post-conviction proceedings: trial counsel had testified that he limited his investigation of mitigation in part due to concerns about obtaining the necessary funding, and the trial mental health expert testified that he received court-appointed work because he was known as someone who "wasn't going to run up a bill" (2PC-R. 298-99). Mr. Marek argued that the new information necessitated deposing Judge Kaplan because he "possesses critical facts" and "[n]o one but Judge Kaplan possesses these facts" (2PC-R. 302).

Marek faced a judge who was biased against him through out the penalty phase of his trial and during the pendency of his collateral proceedings" (2PC-R. 308).

The State did not respond to the amended Rule 3.850 motion or to the motion to depose Judge Kaplan or to the motion to disqualify Judge Kaplan. On September 20, 1996, Judge Kaplan denied the motion to disqualify as "legally insufficient" (Supp. 2PC-R. 133). On December 2, 1996, the State requested and received another 90-day extension of time to file a response to Mr. Marek's Rule 3.850 motion (2PC-R. 147-49, 150).

On January 15, 1997, Judge Kaplan issued an order finding the motion "legally insufficient" but recusing himself based on his friendship with Mr. Marek's trial counsel (Supp. 2PC-R. 156-57). Specifically, Judge Kaplan stated:

> 1. This Court finds that all of the grounds of the Defendant's several Motions to Disqualify are legally insufficient to disqualify the trial judge.
>
> 2. **Over many years this Judge's personal relationship with Attorney Hilliard Moldof has developed into a close friendship with Attorney Moldof, his wife, Mrs. Zena Moldof, as well as the Moldof's children.**
>
> 3. The court still feels it could be fair and impartial in this matter.
>
> 4. However, the court believes that the manifest appearance of impartiality is just as important as actual impartiality.
>
> 5. Accordingly, based upon the possible appearance of the court not being impartial, based upon the above stated reasons (and for these reasons only),

It is hereby,

> ORDERED AND ADJUDGED that the undersigned Judge hereby recuses himself from further proceedings in this matter.

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

Thereafter, Mr. Marek sought to depose Judge Kaplan, noting that in prior collateral proceedings, Judge Kaplan accepted the testimony of his "good friend," trial counsel Hilliard Moldof, in denying numerous ineffective assistance of counsel claims (Supp. 2PC-R. 494-95). Thus, "Judge Kaplan determined his close personal friend's credibility and made fact findings in that regard. **The judge should be questioned regarding his actual relationship with trial counsel**, as his order disqualifying himself is vague in this regard" (Supp. 2PC-R. 495) (emphasis added). The State continued to oppose Mr. Marek's request to depose Judge Kaplan, calling the request "a fishing expedition" (Supp. 2PC-R. 504-09).

In support of the allegations in his motion to vacate, Mr. Marek had included an affidavit from Hilliard Moldof:

> 3. In early 1993, I learned that legal fees paid to special public defenders in capital cases and to confidential mental health experts is taken from the funds allocated to Broward County circuit court judges for administrative costs.* * *
>
> 4. Until Judge Tyson revealed this conflict, I was totally unaware of this budgeting provision. I was astounded when Judge Tyson revealed this conflict. Had I known in 1984 when I represented Mr. Marek, I would have objected and placed the matter on the record.* * *

5. Moreover, this conflict certainly impacted on Mr. Marek's defense. Judge Kaplan imposed caps on fees payable to confidential mental health experts and to court appointed counsel. I was aware of the cap. I was also aware of Judge Kaplan's hesitancy to authorize expenditures of money to assist a capital defendant. As I explained in 1988, I did not request the appointment of an investigator to assist me because "I would have had to request the Court to appoint an investigator for a very oblique reason." I did not request the appointment of a co-counsel because "it [was] not something that the Court [was] going to readily agree to when I [could]n't give a very detailed reason." It was clear to me that Judge Kaplan would not appoint either an investigator or a co-counsel simply because I felt it was necessary to adequately investigate and prepare.

6. **I knew Judge Kaplan very well. When I was a public defender, I was assigned to Judge Kaplan's docket. He knew my caseload when he appointed me to represent Mr. Marek. He knew that at the time "I had other files and I usually carr[ied] one or two murder ones." I knew that he expected me to remain within the cap, juggle my schedule, and not request other assistance. I did my best to honor his expectations.** I did not know of the conflict described by Judge Tyson.

7. Dr. Seth Krieger was appointed by Judge Kaplan to conduct a confidential mental health evaluation of Mr. Marek. Dr. Krieger was obligated to act within a cap on his fees. The cap provided a maximum of one hundred fifty dollars as compensation for his evaluation of Mr. Marek. Mental health experts who did not abide by the cap would not get appointed to do evaluations.

(2PC-R. 711-13) (emphasis added).

The circuit court denied the motion to depose Judge Kaplan (2PC-R. 696-98). As to Mr. Marek's request to depose Judge Kaplan regarding the funding/conflict of interest issue, the circuit court specifically said that the claim was meritless

based upon Rivera, 717 So. 2d at 480 n.2 (2PC-R. 697). The circuit court also said that Mr. Marek could not depose Judge Kaplan regarding his comments in "Rough Justice" because "[t]he deposition of Judge Kaplan in the Lewis case has been available to Marek in the Lewis court file, and Marek has not presented this Court with the deposition although referring to same in his allegations, and has not presented good cause to this Court to order Judge Kaplan's deposition" (2PC-R. 698).

On February 19, 2002, the circuit court heard argument on the Rule 3.850 motion (2PC-T. Vol. 4). Mr. Marek's counsel explained that the State's response was erroneous regarding the procedural history of Mr. Marek's claims, particularly as to Claim X (2PC-T. 73-78). Counsel explained that Claim X was the essence of the motion and that because of Judge Kaplan's bias, "the sentencing should be revisited [and] everything that was decided in the [prior] 3.850 should be revisited" (2PC-T. 78-80). Relying upon Thompson v. State, 731 So. 2d 1235 (Fla. 1998), and State v. Lewis, 17th Judicial Circuit, No. 89-9095CF, both cases in which the State had conceded the need for an evidentiary hearing on Judge Kaplan's bias, counsel argued that Claim X required an evidentiary hearing (2PC-T. 83-87, 89). Counsel also argued that Claims IX and II required an evidentiary hearing (2PC-T. 87-88).

The State conceded its response was erroneous regarding the

procedural history of Claim X and agreed to file a supplemental response (2PC-T. 92, 99, 100). The State opposed an evidentiary hearing on Claim X because "there's been nothing presented that evidences Judge Kaplan had any kind of bias in Mr. Marek's case" and because Judge Kaplan's prior rulings had been reviewed by this Court (2PC-T. 98-112). The State argued Lewis and Thompson did not mean Mr. Marek's claim required an evidentiary hearing because in those cases "there was some nexus" (2PC-T. 100).

Mr. Marek's counsel argued that the State's argument that Mr. Marek had "not pled specific as to John Marek what Judge Kaplan has said" missed the point because "the reason [Mr. Marek has] not pled specific is because the deposition has not occurred. And the state's the party that's blocked the deposition" (2PC-T. 114-15). Counsel also argued that in all the prior proceedings in Mr. Marek's case, Judge Kaplan's rulings were "reviewed with a presumption that the presiding judge was not biased," but that "the question is here whether that presumption is valid" (2PC-T. 119).

The circuit court denied an evidentiary hearing on Claim X because "If, in fact, there is sufficient bias [on the part of Judge Kaplan] to warrant any relief, the matter may be decided on the basis of the documents included in this record" (Supp. 2PC-R. 660). The circuit court then discussed only Judge Kaplan's deposition in Lewis and Judge Kaplan's explanations in that

deposition for the comments he made to CBS (Supp. 2PC-R. 660-61). This Court stated he had reviewed Mr. Marek's submissions and found "nothing to indicate he did not receive a fair trial" (Supp. 2PC-R. 661). Therefore, the circuit court stated, "the issues before this Court are whether [Judge Kaplan's] statements indicate bias at sentencing, and whether or not the Defendant received a full and fair review of his post-conviction motions" (Supp. 2PC-R. 661). The circuit court found Lewis v. State, 838 So. 2d 1102 (Fla. 2002), Thompson v. State, 731 So. 2d 1235 (Fla. 1998), and Porter v. State, 723 So. 2d 191 (Fla. 1998), "distinguishable from Marek's case"(Supp. 2PC-R. 662). The circuit court concluded that no bias infected Mr. Marek's sentencing because it found "no case law where impermissible bias was found on the basis that the trial judge is known to be 'tough' in sentencing" (Supp. 2PC-R. 662). The circuit court also concluded that no bias infected Mr. Marek's sentencing or prior post-conviction proceedings because "the trial judge's sentence in the case at bar, as well as his rulings on previous motions for post-conviction relief, have been examined and upheld by the Florida Supreme Court" (Supp. 2PC-R. 662).

But as Judge Kaplan belatedly admitted in 1997, he had a close friendship with Mr. Marek's trial counsel, which Mr. Moldof acknowledged in affidavit had begun in 1984 at the time that he was appointed to represent Mr. Marek. Thus, in addition to his

bias against mitigation presented by one convicted in his courtroom by a jury, Judge Kaplan had in 1988 a personal reason to find that his friend, Mr. Moldof, provided Mr. Marek with effective assistance. However, Judge Kaplan heard and decided Mr. Marek's ineffective assistance of counsel claims without revealing his close friendship with trial counsel. Judge Kaplan's partiality is clear. His personal sentencing philosophy and his friendship with Mr. Marek's trial counsel operated to prejudice Mr. Marek and his post-conviction lawyers in seeking collateral relief. Due process was violated as has now been explained in Caperton v. Massey Coal Co., — U.S. — (decided June 8, 2009). Mr. Marek is entitled to new proceedings on his initial Rule 3.850 motion. At the very least, Mr. Marek is entitled to discovery and an evidentiary hearing under Caperton.

In its recent decision in Caperton v. Massey Coal Co., the United States Supreme Court ruled due process is violated when a serious, objective risk of actual judicial bias is present. Under Caperton, the basis that this Court decided Mr. Marek's claim that Judge Kaplan was biased at the time of the 1988 evidentiary hearing was erroneous. It is not Mr. Marek's burden to prove actual bias. In Caperton v. Massy Coal Co., the United States Supreme Court explained: "In lieu of exclusive reliance on that personal inquiry, or an appellate review of the judge's determination of actual bias, the Due Process Clause has been

implemented by objective standards that do not require proof of actual bias." Slip Op. at 13. Accordingly, the question under the Due Process Clause is "whether, 'under a realistic appraisal of psychological tendencies and human weakness,' the interest 'poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented.' Withrow [v. Larkin, 421 U.S. 35,] at 47." As a result, the United States Supreme Court held that: "The failure to consider objective standards requiring recusal is not consistent with the imperatives of due process." Caperton v. Massey Coal Co., Slip Op. at 16. That is precisely what occurred in Mr. Marek's case when the circuit court denied Mr. Marek an opportunity to depose Judge Kaplan, denied an evidentiary hearing, and denied Mr. Marek's claim that the evidentiary hearing in 1988 was conducted in violation of due process when Judge Kaplan presided when one of the issues presented was whether his good friend, Hilliard Moldof, provided Mr. Marek with constitutionally effective representation at his 1984 capital trial. The circuit court and this Court on appeal did not consider the objective standards, but merely found that actual bias had not been shown. This was error under Caperton.

The dissenting justices in Massey made it clear that the construction of the Due Process Clause applied in the majority's analysis was not limited to only those cases involving campaign

contributions: "In any given case, there are a number of factors that could give rise to a 'probability' or 'appearance' of bias: friendship with a party or lawyer, prior employment experience, membership in clubs or associations, prior speeches and writings, religious affiliation, and countless other considerations." Caperton v. Massey Coal Co., Slip Op. of Roberts, C.J., dissenting at 3.[14]

Earlier this year, Mr. Marek sought to amend his Rule 3.851 motion in light of the grant of certiorari review in Caperton v. Massey. Mr. Marek specifically advised this Court and this Court that:

> At issue in this case which was argued on March 3, 2009, is whether the due process clause requires judicial disqualification where a judge has a close relationship with a litigant. Though a ruling has not yet issued, if the U.S. Supreme Court finds that the due process clause is applicable in such instances and warrants disqualification, then Mr. Marek was deprived of due process in 1988 when Judge Kaplan presided over the evidentiary hearing in Mr. Marek's case to determine whether his good friend Hilliard Moldof had rendered ineffective assistance of counsel at Mr. Marek's trial. Given the pendency of Caperton and the scheduled execution date, Mr. Marek has sought to amend his Rule 3.851 motion to plead that he was deprived of his due process rights in the collateral proceedings conducted in 1988. His execution when such an important issue is pending in the United States Supreme Court would be arbitrary and capricious and violative of the Eighth Amendment.

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[14]Chief Justice Roberts specifically stated that the majority's ruling raised the question of whether "close personal friendship between and a party or lawyer now give[s] rise to a probability of bias?" Caperton v. Massey Coal Co., Slip Op. of Roberts, C.J., dissenting at 7.

(Initial Brief filed in this Court on April 29, 2009 at 72-73.

Mr. Marek was deprived of due process in 1984 when Judge Kaplan presided over Mr. Marek's penalty phase proceeding and imposed a sentence of death given his stated explanation that he viewed a convicted defendant with a jaundiced eye at his sentencing. Mr. Marek was deprived of due process in 1988 when Judge Kaplan presided over the evidentiary hearing in Mr. Marek's case to determine whether his good friend Hilliard Moldof had rendered ineffective assistance of counsel at Mr. Marek's trial. Discovery and an evidentiary hearing are warranted, and thereafter Rule 3.851 should issue in light of the due process violation and in light of the recent decision in Caperton.

II.

NEW EVIDENCE PRESENTED BY THE STATE ON JUNE 2, 2009, DEMONSTRATES THAT MR. MAREK RECEIVED CONSTITUTIONALLY INEFFECTIVE ASSISTANCE OF COUNSEL AT HIS CAPITAL PENALTY PHASE PROCEEDING AND THAT HIS SENTENCE OF DEATH STANDS IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

At the June 1-2, 2009, evidentiary hearing, Mr. Marek's trial attorney, Hilliard Moldof was called to testify. During the State's examination of Mr. Moldof, the following testimony was elicited:

> Q. Well, this has nothing to do with being psychotic, Mr. Moldof, it's the presentation of defense witnesses at the penalty phase regarding the disparity of treatment.

A. But I'm saying if that buttressed another witness' statement that didn't have that ingredient in it, and by that result I get proportionality, and I've told you before I think proportionality -- I think a jury's conscience weighs heavily on them, and if they realize another jury recommended life, I find that to be very important testimony. At a recent trial I had it was probably the most important testimony.

Q. Assuming -- well, we don't have to assume. The fact in evidence is that this witness is a nine-time convicted felon who has testified that twice Wigley told him that Wigley was in fact the one who strangled Adel Simmons, the first time they were intoxicated on moonshine, the second time they were intoxicated on reefer. Now, you're going to explain to Judge Levenson that you in fact would have presented a nine-time convicted felon to testify to the court that twice, under the influence of moonshine, whatever that may be, and pot, Wigley made these statements?

A. Yeah. Because in Penalver, the Supreme Court found the most damning evidence or the only direct evidence against Mr. Penalver was a jailhouse confession to like an eight-time convicted felon who was in jail with my client. So, yes, I definitely would have done that. Mr. Morton did it to me in Penalver. You know, anytime there is a jailhouse snitch they come into evidence. So, yeah, the State finds it useful. I would find it useful in that respect because of the proportionality argument.

Q. Now, wouldn't you presenting that open up the door to the State presenting Wigley's confession?

A. Yeah, it might, but I'm saying at that point I get proportionality in and it leaves the jury with two opposite statements by Wigley. The problem for me was I didn't have that back at the time, so I would be injecting Wigley's statement without something to counteract it, I found that to be damning. But I'll tell you right now, I don't know I would have made the same decision today, maybe I would have put it in, 'cause it was already coming in through other avenues it seems like.

Q. And wouldn't that --

THE COURT: Excuse me. What do you mean by "it was coming in through other avenues"?

> THE WITNESS: 'Cause the State, it seems like in that transcript, the State was arguing that my client was the main actor. There was probably some other evidence of him being the main actor, from what I read, vis-a-vis, the lady that was with Adel Simmons apparently testified that Wigley got out later and was very passive.
>
> So assuming, I mean, as I look back now, assuming they had that argument that my client was the main actor, I might have put that confession in anyway. I just had a case Anthony Bryant, my client and the codefendant had been convicted of attempted murder in New York, he came and testified in my case, I went first, ultimately got a life recommendation even in spite of the prior violent shooting, and Sam Halpern had the codefendant, went after me, said the most important thing was the proportionality argument, and I really agree with him. I mean, those juries, they take -- you know -- they take it very seriously.
>
> THE COURT: Did the other guy get life?
>
> THE WITNESS: Yeah, and that's why. I mean, my guy was the main actor in that shooting in New York, Anthony Bryant was. So, you know, knowing what I know now, I probably would have put that confession in, I think, because the case had already gone sour in the guilt side. **I would have done a lot of things different. I would have gotten some psychiatric testimony; I would have gone to Texas. You know, quite frankly, I'll be honest with you, I'm embarrassed by my work in this case back in '83.**

(Transcript of June 2nd at 330-33) (emphasis added).

The new testimony elicited by the State constitutes new evidence demonstrating that Mr. Marek received ineffective assistance of counsel at his penalty phase proceeding. Had this testimony been given before, Mr. Marek would have prevailed on his ineffective assistance of counsel claim. In light of the new testimony, the matter must be revisited under Jones v. State, 591 So. 2d 911 (Fla. 1991), and Rule 3.851 relief must issue.

Defense counsel had an "obligation to conduct a thorough

investigation of the defendant's background." Williams v. Taylor, 529 U.S. 362, 396 (2000); Rompilla v. Beard, 2005 U.S. LEXIS 4846 (June 20, 2005). Further, "Strickland [v. Washington, 466 U.S. 668 (1984),] does not establish that a cursory investigation automatically justifies a tactical decision with respect to sentencing strategy. Rather, a reviewing court must consider the reasonableness of the investigation said to support that strategy." Wiggins v. Smith, 539 U.S. 510, 527 (2003). Here, as in Wiggins and Williams, trial counsel had leads to information but did not follow those leads. Rather, "counsel abandoned [his] investigation of [Mr. Marek's] background after having acquired only rudimentary knowledge of his history from a narrow set of sources." Wiggins, 539 U.S. at 524.[15] As in Wiggins, "any reasonably competent attorney would have realized that pursuing these leads was necessary to making an informed choice among possible defenses, particularly given the apparent absence of any aggravating factors in petitioner's background."

[15]The ABA standards establish that Mr. Marek's counsel's performance did not measure up to prevailing professional norms. In Wiggins, the Court found that counsel's performance "fell short of the standards for capital defense work articulated by the American Bar Association (ABA)--standards to which we long have referred as 'guides to determining what is reasonable.'" 123 S. Ct. at 2536-37, quoting, Strickland, 466 U.S. at 688, and Williams v. Taylor, 529 U.S. 362, 396 (2000). Thus, "the ABA standards for counsel in death penalty cases provide the guiding rules and standards to be used in defining the 'prevailing professional norms' in ineffective assistance cases." Hamblin v. Mitchell, 354 F.3d 482, 486 (6th Cir. 2003).

Id. at 525.[16]

Trial counsel did not make a strategic decision not to present the records which would illustrate a tortured childhood characterized by neglect, abandonment and severe psychological and emotional problems because, as in Wiggins and Williams, counsel failed to obtain the crucial records. Thus, Judge Kaplan's finding that the records describing Mr. Marek's childhood would have provided "negative aspects" was in error, and counsel's failure to discover these records constituted deficient performance.[17] Clearly, as Mr. Moldof has

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[16]The duty to investigate is heightened, not limited, when a defendant is emotionally unable to assist trial counsel or when counsel has the "impression" that the defendant did not want counsel to pursue certain matters. "ABA and judicial standards do not permit the courts to excuse counsel's failure to investigate or prepare because the defendant so requested." Hamblin, 354 F.3d at 492. "The investigation for preparation of the sentencing phase should be conducted regardless of any initial assertion by the client that mitigation is not to be offered." ABA Guidelines for the Appointment and Performance of Counsel In Death Penalty Cases 11.4.1© (1989). The commentary to Guideline 11.4.1 explains: "Counsel's duty to investigate is not negated by the expressed desires of a client. . . . The attorney must first evaluate the potential avenues of action and then advise the client on the merits of each. Without investigation, counsel's evaluation and advice amount to little more than a guess" (footnotes omitted). Further, "[c]ounsel and support staff should use all available avenues including signed releases, subpoenas, and Freedom of Information Acts, to obtain all necessary information." ABA Guidelines 11.4.1(D)(7). In discussing client contact, the Guidelines explain, "Any reluctance on the part of the client to disclose needed information must be overcome, not a quick or easy task." ABA Guidelines 11.4.2 (commentary) (footnote omitted).

[17]In Williams, the Court found counsel ineffective for failing to present records even though they contained some

acknowledged in his testimony, he should have conducted an investigation into Mr. Marek's background in Texas and obtained the available records and located the witnesses who could have testified to the wealth of mitigation in Mr. Marek's life history.

This Court should issue Rule 3.851 relief and vacate Mr. Marek's sentence of death. At the very least, a new evidentiary hearing on the ineffective assistance of counsel claim is required in light of the new evidence uncovered in the course of the State's questioning of Mr. Moldof.

ARGUMENT AS TO THE DENIAL OF THE MOTION TO CORRECT THE TRANSCRIPT

On June 12, 2009, Mr. Marek filed his motion for the correction of transcript. This motion concerned the testimony of Leon Douglass. In the motion, Mr. Marek averred:

> Mr. Marek's counsel is in receipt of the transcript that has been prepared reflecting the testimony at last week's evidentiary hearing. However, counsel believes that the transcript contains an error in the transcription of the testimony of Leon Douglass. On page 145 of the transcript, the cross-examination of Mr. Douglass is in progress. The transcript shows the following:
>
> Q. What does he look like?
>
> A. He was a black male, kind of skinny, brownish/blackish hair, dark-colored hair, if you will, five-foot-seven, eight. Any other description you'd

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negative information about Mr. William's past. In Mr. Marek's case, the records arguably contained no "negative aspects."

like for me to give?

Q. Weight?

A. Probably 150 pounds, 160 pounds.

(June 1st transcript at 145).

2. Counsel is absolutely certain that he did not hear any statement by Mr. Douglass describing Mr. Wigley as a black male. Certainly, had such a statement been made, Ms. Bailey would have immediately asked in her condescending tone, "Are you telling us that Mr. Wigley was a black male?" Since Ms. Bailey did not make any reference to such a glaring error, it is clear that she did not hear Mr. Douglass describe Mr. Wigley as a black male.

3. Moreover, it would make no sense for Mr. Douglass to describe Mr. Wigley as a black male and then proceed to describe his hair color as "brownish/blackish hair, dark-colored hair, if you will" (June 1st transcript at 145), since a black male is presumably going to have dark-colored hair. A black male's hair color is only addressed if it is not dark-colored.

4. Further, had counsel heard Mr. Douglass describe Mr. Wigley as a black male, he would have addressed such a description in redirect. Counsel knew that Mr. Douglass described Mr. Wigley as a white male to Mr. Ashton. Counsel knew that Mr. Douglass had correctly identified a picture of Mr. Wigley as the man that he knew when shown the picture by Mr. Ashton. Counsel knew that Mr. Douglass had correctly described Mr. Wigley as a white male to Ms. McDermott when she spoke to him. Had he heard Mr. Douglass describe Mr. Wigley as a black male, not only would he have pursued the matter in redirect, he would have questioned Mr. Ashton and Ms. McDermott regarding Mr. Douglass' description of Mr. Wigley to them, and his ability to correctly identify a photograph of Mr. Wigley.

Motion at 1-2.

Without conducting an evidentiary hearing, the circuit court rejected Mr. Marek's allegations simply based upon Judge

Leverson's representation of his memory. Full factual development was denied in violation of due process.

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

Further, Mr. Marek proffered in circuit court the affidavit of Dan Ashton who Mr. Marek would have called as a witness. In

his affidavit, Mr. Ashton stated:

> 1. I am a private investigator and was hired by attorneys Martin McClain and Linda McDermott to conduct investigation on behalf of John Marek.
>
> 2. My duties in this matter included interviewing witnesses who were believed to have known deceased inmate Raymond Wigley, DC# 094065. I started each interview in the same manner. I explained to the witness who I was and the reason for me contacting them. I then showed each witness a picture of Raymond Wigley that I obtained from the Florida Department of Corrections website. I then asked each witness if they could identify the individual depicted in the picture.
>
> 3. On May 18, 2009, I interviewed inmate Leon Douglas, DC# 541168 at Madison Correctional Institution. Mr. Douglas was shown the DOC photograph of Mr. Wigley at the beginning of the interview. Mr. Douglas immediately, without hesitation recognized and identified Raymond Wigley as an individual that he knew and was incarcerated with.

Attachment.

Mr. Marek also proffered in circuit court that Ms. McDermott spoke to Mr. Douglass on May 31, 2009, before the evidentiary hearing began. He advised her that Mr. Wigley was white and he identified the DOC photograph of Mr. Wigley that she had with her.

Mr. Marek's counsel was very aware that Mr. Douglass had indicated that Mr. Wigley was white and had identified a DOC photograph of Mr. Wigley. Had Mr. Douglass said that Mr. Wigley was a black male, counsel could have easily have established that it was a misstatement and that Mr. Douglass had consistently said before the hearing that Mr. Wigley was white and had correctly

identified a photograph of Mr. Wigley.

Moreover, had the State heard Mr. Douglass make a statement incorrectly describing Mr. Wigley as a black male, the State would have called Mr. Douglass on this, and the State did not address after the transcript shows that Mr. Douglass made such a statement.

As the court reporter acknowledged to undersigned counsel, he did not recall Mr. Douglass make such a statement, a statement that the court reporter readily acknowledged would have been a glaring error in the description of Mr. Wigley. It was only because the back up tape sounded like Mr. Douglass made the statement, that the transcript now shows that statement as made.

An evidentiary hearing was required on Mr. Marek's motion. An opportunity for the parties to listen to the back up tape should have been permitted. The circuit court's denial of the motion overlooked the need to afford Mr. Marek an opportunity to present the evidence supporting his motion. The matter must be reversed and remanded for correction of the transcript.

ARGUMENT AS TO THE NEED FOR ORDER DIRECTING THAT THE MOTION TO GET THE FACTS MUST BE GRANTED

Following the order from this Court remanding Mr. Marek's case on May 21, 2009, undersigned counsel heard from Judge Levenson's office that a case management hearing would be held on May 27, 2009. A second hearing was held on May 29, 2009. Prior

to the commencement of the June 1-2, 2009, evidentiary hearing, undersigned counsel received two conflicting order from Chief Judge Tobin. The first order appointed a judge other than Judge Levenson. It was dated May 26, 2009. A second order also dated May 26, 2009, rescinded the appointment because the clerk of court had already appointed Judge Levenson.

Because undersigned counsel found these orders unusual and confusing, he brought them up in open court on June 1, 2009, before the evidentiary hearing commenced. When the matter was brought up, the State stood silent and did not make any statements or indicate that the prosecutors possessed any knowledge of what had happened. Instead, Judge Levenson explained that since the clerk of court had already appointed him before May 26th, it was decided that Chief Judge Tobin's subsequent appointment of a different judge should be rescinded without notice to the parties. After Judge Levenson provided this explanation and assured Mr. Marek's counsel that the clerk's office had properly made the appointment of him to preside over the case, the matter was dropped.

After the conclusion of the evidentiary hearing, the State on June 4th placed a service copy of a "Notice" in the mail to undersigned counsel. The "Notice" indicated that undersigned counsel was served on May 21st, not on June 4th. The "Notice" was in fact a request that Chief Judge Tobin appoint a new judge to

preside over Mr. Marek's case. The "Notice" makes clear that it was written and signed the same day that the Florida Supreme Court issued its order remanding the case, May 21st.[18] This was the day before the Broward County clerk of court appointed Judge Levenson to preside over Mr. Marek's case.

At no time on June 1st when the issue was being discussed did the State put on the record the fact that it had requested Chief Judge Tobin to make the appointment before the clerk of court acted. Since the State was less than forthcoming and since the facts of what occurred when Judge Levenson was appointed to the case keeps shifting and changing, an evidentiary hearing must be held to ascertain what happened when. Certainly, if the State

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[18]The State has indignantly filed a pleading alleging that undersigned counsel must apologize because the State emailed him a copy of the pleading on May 21, 2009. However, the State is in error. I did not receive such an email from the State on May 21st or any other date. I have repeatedly gone through my email in order to ascertain what I did and did not receive. I did not receive the pleading that the State filed on May 21st until after it was put in an envelop that carried a postmark of June 4th.

Moreover, undersigned counsel stood up in court on June 1st and expressed bafflement over the orders he received from Chief Judge Tobin on May 30th. Had he know of the pleading that the State filed on May 21st, he would not have been so confused as to how it came to be that the clerk of court appointed Judge Leverson to preside over Mr. Marek's case, while Chief Judge Tobin appointed a different judge to preside over the case.

The State can make all the excuses it wants for its actions, but the bottom line is that between May 21st and June 4th, Mr. Marek's counsel knew nothing about the May 21st pleading that the State filed. And based upon the undeniable fact, undersigned counsel may certainly be concerned and raise his concerns over the propriety of what occurred and/or the appearance of impropriety.

had made the request on May 21st that Chief Judge Tobin appointed a judge to hear the case, it raises questions of whether the clerk of court was free to ignore the pleading filed by the State and to make the appointment of a judge to preside over the case. This Court should relinquish jurisdiction to the circuit court so that an evidentiary hearing can be conducted as to the what occurred as to how Judge Levenson ultimately sat on Mr. Marek's case.

CONCLUSION

Based upon the record and his arguments, Mr. Marek respectfully urges the Court to reverse the lower court, order a new trial and/or resentencing, order new proceedings on Mr. Marek's 1988 Rule 3.850 motion, or remand for an evidentiary hearing, and/or relinquish jurisdiction for correction of the transcript and in order to get the facts regarding the judicial appointment process employed in Mr. Marek's case.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by US Mail delivery to Carolyn Snurkowski, Assistant Deputy Attorney General, Department of Legal Affairs, The Capitol PL01, Tallahassee, Florida 32399-1050 on June 25, 2009.

CERTIFICATE OF FONT

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

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