IN THE SUPREME COURT OF FLORIDA

CASE NO. SC09-1454

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

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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

The Circuit Court of the Seventeenth Judicial Circuit, Broward County, entered the judgments of conviction and sentence under consideration.

On July 6, 1983, Mr. Marek and his co-defendant, Raymond Wigley, were charged by indictment in the Circuit Court of the Seventeenth Judicial Circuit, Broward County, Florida, with first degree murder, kidnapping, burglary, and two counts of sexual battery. Wigley was tried first, was found guilty as charged on all counts, and was sentenced to life imprisonment in May of 1984.

Mr. Marek's trial began on May 22, 1984, before Judge Stanton Kaplan. On June 1, 1984, the jury found Mr. Marek guilty of first degree murder (on a felony murder theory), kidnapping, attempted burglary with an assault (a lesser included offense), and two counts of battery (lesser included offenses of sexual battery).

The penalty phase was conducted on June 5, 1984. By a 10-2 vote, the jury recommended death. On July 3, 1984, Judge Kaplan imposed death, finding no mitigating circumstances and four aggravating circumstances: (1) prior violent felony based upon Mr. Marek's contemporaneous conviction of kidnapping; (2) murder committed while engaged in burglary; (3) murder

committed for pecuniary gain; (4) heinous, atrocious or cruel (R.1472). Judge Kaplan also found that Mr. Marek and Wigley "acted in concert from beginning to end"(R. 1471).

Mr. Marek appealed.[1] This Court affirmed the convictions and death sentence. Marek v. State, 492 So. 2d 1055 (Fla. 1986).

On October 10, 1988, Mr. Marek filed a motion under Rule 3.850, Fla. R. Crim. P. The motion presented twenty-two claims, including, *inter alia*, trial counsel failed to investigate and present mitigating evidence (Claims V, VI), the defense mental health expert provided inadequate assistance (Claim II), the jury's death recommendation was tainted by invalid aggravators (Claims XI, XII, XIII, XIV), the death sentence rests upon an unconstitutional automatic aggravating circumstance (Claim XX), the jury's sense of responsibility for sentencing was diluted (Claim XVII), and the jury was prevented from considering the co-defendant's life sentence and a mental health evaluation of Mr. Marek as mitigation (Claim IX)(1PC-R.1-118).

An evidentiary hearing was conducted on November 3 and 4,

[1]The direct appeal raised the following issues: 1) denial of motion for mistrial when policeman who arrested Wigley testified he found a gun in the truck; 2) denial of the motion for judgment of acquittal; 3) jury panel's viewing of film called "You, the Juror"; 4) disparate sentencing; 5) challenges to all four aggravating factors; 6) denial of jury instruction on Wigley's life sentence; 7) electrocution is cruel and unusual punishment.

1988 under the pendency of a death warrant. This Court denied Mr. Marek's claims of penalty phase ineffective assistance of counsel and inadequate mental health evaluation (1PC-R. 262-64, 487-88), found that the prior violent felony aggravator must be struck, but denied relief (1PC-R. 266).

Mr. Marek appealed. This Court affirmed the circuit court's order denying relief. Marek v. Dugger, 547 So. 2d 109 (Fla. 1989). Mr. Marek also filed a habeas corpus petition in this Court. This Court denied that petition as well. Marek v. Dugger, 547 So. 2d 109 (Fla. 1989).

In 1989, Mr. Marek filed a federal petition for a writ of habeas corpus. The district court denied relief, and Mr. Marek appealed. On August 14, 1995, the Eleventh Circuit affirmed. Marek v. Singletary, 62 F.3d 1295 (11th Cir. 1995).[2]

In 1992, Mr. Marek filed a second habeas corpus petition in this Court, alleging violations of Espinosa v. Florida, 112 S. Ct. 2926 (1992), and Sochor v. Florida, 112 S. Ct. 2114 (1992). The Court denied relief. Marek v. Dugger, 626 So. 2d 160 (Fla. 1993).

[2]The issues raised in these proceedings included: 1) ineffective assistance of counsel at the penalty phase; 2) trial court precluded presentation of mitigating evidence; 3) erroneous jury instructions on aggravating and mitigating factors; 4) ineffective assistance of counsel on direct appeal; 5) trial counsel failed to provide background information to mental health expert.

While his Eleventh Circuit appeal was pending, Mr. Marek discovered new information and filed a second Rule 3.850 motion on July 22, 1993 (Supp. 2PC-R. 1-98).[3] The 1993 Rule 3.850 motion presented claims from the first Rule 3.850 motion because the prior "proceedings were tainted by the conflict" of interest regarding funding (Supp. 2PC-R. 1). The motion pointed out that in the prior proceedings, "Mr. Marek challenged the adequacy of the [trial] mental health evaluation and the adequacy of his [trial] representation. Evidence was presented that investigation and mental health testing were not conducted in order to save taxpayers money and insure future court appointments" (Supp. 2PC-R. 4).

On June 3, 1996, the circuit court ordered the State to respond to Mr. Marek's Rule 3.850 motion by September 6, 1996 (2PC-R. 290). On August 29, 1996, the State requested a 90-day extension of time for filing its response, and the motion was granted (2PC-R. 291-93, 438). On December 2, 1996, Mr. Marek filed a Supplemental Motion to Vacate raising a public records claim (Supp. 2PC-R. 139-46).

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[3] This motion raised the following claims: 1) Broward County's system for funding special assistant public defenders created a conflict of interest; 2) ineffective assistance of counsel at the penalty phase; 3) invalid aggravating factors; 4) automatic aggravating factor; 5) diminishment of jury's sense of responsibility for sentencing; 6) exclusion of mitigating evidence. In January of 1994, Mr. Marek supplemented this motion with a Claim 7 alleging he was denied due process in post-conviction when he was required to litigate his initial post-conviction motion under the time exigencies created by a death warrant.

On January 15, 1997, Judge Kaplan issued an order of disqualification. (Order filed January 15, 1997).

On March 7, 1997, Mr. Marek filed a Motion to Compel public records compliance (Supp. 2PC-R. 162-64). On March 5, 1997, the State requested that the order requiring it to respond to the Rule 3.850 motion be held in abeyance because Mr. Marek would be permitted to amend the motion once the public records litigation was completed (Supp. 2PC-R. 158-61). The circuit court granted the State's motion (Supp. 2PC-R. 169-70).[4]

Mr. Marek's amended Rule 3.850 motion was filed on September 27, 2001 (2PC-R. 702-841). The motion raised twelve claims: 1) access to public records; (2) the conflict of interest created by Broward County's system for funding special assistant public defenders and expert witnesses; (3) ineffective assistance provided by trial counsel and the trial mental health expert at the penalty phase; (4) jury recommendation was tainted by invalid aggravators; (5)unconstitutional automatic aggravator; (6) dilution of jury's sense of responsibility for penalty; (7) exclusion of

[4]Mr. Marek filed additional motions to compel(Supp. 2PC-R. 176-262 [filed 2/17/98]; Supp. 2PC-R. 333-419 [filed 7/21/99]; 2PC-R. 633-38 [filed 10/12/00]; 2PC-R. 692-95 [filed 4/9/01]). From 1996 into 2001, Mr. Marek litigated public records issues (See 2PC-R. 533-670, 671-95, 700-01; Supp. 2PC-R. 162-64, 171-73, 176-302, 327-464, 465-67, 553-63, 569-78; 2PC-T. Vols. 1, 2). After this litigation concluded, the court ordered Mr. Marek to amend his Rule 3.850 motion by September 28, 2001(2PC-T. 66).

mitigating evidence; (8) due process violated by litigating prior Rule 3.850 motion under death warrant; (9) newly discovered evidence regarding Wigley; (10) Judge Kaplan's bias tainted the trial, penalty phase and prior post-conviction proceedings; (11) capital sentencing statute violates Sixth Amendment; (12) lethal injection violates Eighth Amendment.

The State filed a supplemental response on April 2, 2002 (2PC-R. 940-1045). This response deleted the allegations from the first response that the entirety of Claim X was procedurally barred. Mr. Marek filed a reply to the State's supplemental response (2PC-R. 1046-60).

On September 30, 2003, the circuit court denied Rule 3.850 relief (Supp. 2PC-R. 650-64). In sum, the court ruled, "this Court finds that the Defendant's claims fail to state facts which must be resolved in an evidentiary hearing, fail to state grounds for relief that are cognizable in this proceeding, and that his motion may be resolved as a matter of law" (Supp. 2PC-R. 651).

Mr. Marek appealed (2PC-R. 1264-65). This Court issued a summary order affirming the denial of relief. Marek v. State, 2006 Fla. LEXIS 1425 (Fla. June 16, 2006).

In May of 2005, Mr. Marek filed a third petition for a writ of habeas corpus in the Florida Supreme Court. This

petition raised claims under Roper v. Simmons, 125 S.Ct. 1183 (2005), Wiggins v. Smith, 123 S. Ct. 2527 (2003), and Crawford v. Washington, 124 S. Ct. 1354 (2004). The Florida Supreme Court also denied that petition. Marek v. State, 2006 Fla. LEXIS 1425 (Fla. June 16, 2006).

On May 10, 2007, Mr. Marek filed his third motion to vacate his conviction and sentence of death. In this motion, he challenged Florida's lethal injection protocol in light of the execution of Angel Diaz and he argued that his sentence of death was arbitrary and capricious within the meaning of Furman v. Georgia, 408 U.S. 238 (1972). On June 14, 2007, the circuit Court ordered the State to file a response to the motion to vacate.

On July 2, 2007, the State served its response to the motion. A case management was held on June 18, 2008, after the various decisions regarding lethal injection had issued from this Court and the United States Supreme Court. Accordingly, the circuit court granted Mr. Marek leave to an amendment within 30 days.

On July 18, 2008, Mr. Marek filed his amended motion to vacate. On August 18, 2008, the State filed its response to the amended motion.

On February 6, 2009, the circuit court held a status

hearing at which the State submitted supplemental authority. Mr. Marek asked for the opportunity to submit a written memorandum in response. The circuit court granted the request, and a memorandum of law was filed on February 23, 2009.

On April 20, 2009, the Governor signed a warrant setting Mr. Marek's execution for May 13, 2009. The circuit court entered an order denying the pending motion to vacate on April 23, 2009. On April 27, 2009, Mr. Marek requested leave to amend his May, 2007, motion to vacate with a claim that the length of time Mr. Marek had spent on death row constituted cruel and unusual punishment and that the United States Supreme Court's consideration of the issue concerning Judge Kaplan's presiding over his postconviction proceedings establishes a violation of due process. See Caperton v. A.T. Massey Coal Co., No. 33350 (W. Va. Apr. 3, 2008), cert. granted, 129 S. Ct. 593 (U.S. Nov. 14, 2008) (No. 08-22).

Mr. Marek appealed.[5] On May 8, 2009, this Court affirmed the denial of relief. Marek v. State, 8 So. 3d 1123 (Fla.

[5]On appeal, Mr. Marek challenged the circuit court's determinations regarding 1) whether lethal injection violates Mr. Marek's eighth and fourteenth amendment rights to the United States Constitution; 2) whether his sentence of death was arbitrary and capricious within the meaning of Furman v. Georgia, 408 U.S. 238 (1972); 3) whether the time spent on death row constitutes cruel and unusual punishment; and 4) whether the United States Supreme Court's consideration of the issues in Caperton v. A.T. Massey Coal Co., No. 33350 (W. Va. Apr. 3, 2008), cert. granted, 129 S. Ct. 593 (U.S. Nov. 14, 2008) (No. 08-22) warrant relief.

2009).

Meanwhile, Mr. Marek had filed another motion to vacate before the circuit court on May 1, 2009. The motion included the following claims: newly discovered evidence demonstrates that Mr. Marek's capital conviction and death sentence are constitutionally unreliable; the clemency process and the manner in which it was determined that Mr. Marek should receive a death warrant was arbitrary and capricious; Mr. Marek's right to due process was violated when the State drafted the order denying rule 3.850 relief *ex parte*, in 1988. Mr. Marek amended his motion on May 4, 2009. The circuit court denied Mr. Marek's claims on May 8, 2009.

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.

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.[6]

Mr. Marek appealed to this Court. On July 16, 2009, this Court issued its opinion affirming the denial of Rule 3.851 relief. Marek v. State, - So. 3d - , 2009 WL 2045416 (Fla. July 16, 2009).

On July 17, 2009, the Governor rescheduled Mr. Marek's execution for August 19, 2009.

On August 3, 2009, Mr. Marek filed a new Rule 3.851 motion premised upon the recently obtained affidavit from Lee Johnson regarding his conversations with Raymond Wigley while they were incarcerated together.

On August 17, 2009, the circuit court conducted a case management hearing during which the presiding judge expressed great concern regarding his ability to order evidentiary hearing in the short period of time remaining before the scheduled execution. Following the conclusion of the hearing, the circuit court decided not to order an evidentiary hearing and issued an order summarily denying the Rule 3.851 motion.

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[6] 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.

Thereafter, Mr. Marek filed a notice of appeal.

ARGUMENT AS TO THE ISSUES HEARD AT THE EVIDENTIARY HEARING

I. IT WAS ERROR FOR THE CIRCUIT COURT TO DENY AN EVIDENTIARY HEARING ON MR. MAREK'S NEWLY DISCOVERED EVIDENCE CLAIM WHICH PROVIDED NEW EVIDENCE SUPPORTING HIS PREVIOUSLY PRESENTED NEWLY DISCOVERED EVIDENCE CLAIM THAT HIS CAPITAL CONVICTION AND DEATH SENTENCE ARE CONSTITUTIONALLY UNRELIABLE IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

A. Introduction

Here, Mr. Marek at the June, 2009, evidentiary hearing presented six witnesses who testified to conversations that they had with Raymond Wigley regarding the fact that he murdered Adella Simmons and that his co-defendant, John Marek, did not. The circuit court heard those witnesses and concluded that he had not been convinced by what he heard that Mr. Wigley's statements were sufficiently credible to establish that in fact Mr. Wigley was the one who committed the murder. On appeal, this Court affirmed finding that unless the new evidence demonstrated that Mr. Wigley could be believed when he claimed that he and not Mr. Marek had committed the murder, Mr. Marek was not entitled to relief. Marek v. State, 2009 WL 2045416.

After this Court's decision, Mr. Marek's counsel discovered an additional witness who also signed an affidavit regarding his conversations with Mr. Wigley. This new witness

was Lee Johnson who had been a lawyer in Dade County prior to his conviction of second degree murder in the early 1980's. Mr. Johnson indicated that Mr. Wigley had confided in him that he had committed the murder and not Mr. Marek. According to Mr. Johnson, Mr. Wigley was upset about this and wishing to do something to assuage his guilt over the fact that Mr. Marek received a death sentence. At the same time however, Mr. Wigley was concerned about what additional jeopardy coming forward with the truth would create for himself. Mr. Wigley was obviously trying to pick Mr. Johnson's brain for legal advice, given Mr. Johnson's background as a lawyer.

After obtaining this affidavit from Mr. Johnson, Mr. Marek filed a new Rule 3.851 motion on August 3, 2009, in which he asserted that the new evidence that Mr. Johnson could provide when considered cumulatively with the previously presented evidence tipped the scales in Mr. Marek's favor and would establish that he should receive penalty phase relief. Accordingly, Mr. Marek asked for an evidentiary hearing at which he could present Mr. Johnson's testimony regarding his conversations with Mr. Wigley.

B. Legal Standard

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.[7] Here, the new evidence of innocence 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

[7] 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.

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).

C. The New Evidence

In his new Rule 3.851 motion, Mr. Marek relied upon an

affidavit from a newly discovered witness, Lee Johnson. Mr. Johnson has been incarcerated since 1982. Prior to his criminal conviction and incarceration he had been a practicing criminal defense attorney. During his incarceration, Mr. Johnson met Raymond Wigley and discussed Wigley's criminal case with him. Mr. Johnson has explained this in an affidavit:

> 1. My name is Lee Johnson, DC #836857. I am currently incarcerated at Sumter Correctional Institution.
>
> 2. I have been incarcerated since 1982.
>
> 3. While incarcerated I met an individual named Raymond Wigley. I recall being incarcerated at the same institutiona with Wigley more than once. Each time I was incarcerated with Wigley he spoke about his case. I am fully capable of making this affidavit, as I hold a juris doctorate degree and understand the working of the criminal justice system.
>
> 4. Wigley told me that his "fall partner" had a death sentence for a crime he did not commit. Every time I spoke to Wigley he maintained that he was the person who killed the victim in his case. In fact, Wigley seemed motivated to want to help his co-defendant and asked if I had any advice on what he could do.
>
> 5. Wigley was very concerned about receiving the death penalty and about whether he could be prosecuted for perjury because he had made a sworn statement to the police. I tried to explain that these issues should not concern him, but Wigley confided that he was worried that he did not want to hurt his chance for parole.
>
> 6. Wigley repeatedly told me that it was he who had committed the murder and not his co-defendant.

Mr. Marek also proffered his diligence as to his discovery of Mr. Johnson as a witness. After Mr. Marek's warrant was signed and execution date scheduled, postconviction counsel sought to determine what, if anything, Wigley revealed to his fellow inmates while he was incarcerated. Investigator Daniel Ashton interviewed a number of individuals who had known Wigley prior to the June 1-2, 2009, evidentiary hearing. At that hearing the testimony of six individuals was presented. After the hearing concluded, Mr. Ashton continued to investigate in order to locate any other individuals in whom Wigley may have confided. As Mr. Ashton explained in an affidavit that was attached to the motion, on June 15, 2009, he spoke Anthony Lamarca. The purpose of the interview was discuss with Mr. Lamarca his own case. In the course of the meeting, Mr. Ashton happened to ask Mr. Lamarca if he knew either Marek or Wigley. Surprisingly, Mr. Lamarca reported that he did and explained that at one point he had been incarcerated with Wigley. Though Lamarca recalled that he had heard Wigley confess to a murder, he did not recall Wigley providing him any specific details. However, Mr. Lamarca did provide a list of names of other individuals that he thought knew Wigley. Mr. Ashton followed up on this list list of names and conducted

interviews of these individual. One of the individuals was Kenneth Cofield, DC #726869. Mr. Cofield did not recall anything that he had heard Wigley say, but he did recall that Wigley spoke to an individual named, Lee Johnson. As a result, Mr. Ashton spoke to Mr. Johnson and obtained an affidavit from him (attached as Attachment A).

Prior to Mr. Ashton's conversation with Mr. Cofield, Mr. Ashton was unaware of the name of Lee Johnson, or that such an individual had ever spoke to Wigley about his case. Prior to Mr. Ashton's conversation with Mr. Lamarca, Mr. Ashton was unaware of the the name of Kenneth Cofield or that such an individual may have had any knowledge that Wigley had spoken to Lee Johnson. Prior to his conversation with Mr. Lamarca, Mr. Ashton had no information that Mr. Lamarca knew Wigley or had any information regarding others who knew and spoke to Wigley.

Mr. Marek alleged in his motion that he had exercised due diligence. Mr. Marek only learned of Lee Johnson through conversations with other inmates. None of the names of the inmates that Mr. Ashton spoke with that led him to Mr. Johnson, had appeared on any DOC record linking them to Wigley, nor had the names of these individuals come up in previous conversations as individuals who knew Wigley or who

knew others who knew Wigley. Likewise until July 20, 2009, when Mr. Ashton first spoke to Mr. Johnson, Mr. Marek had no idea that Mr. Johnson possessed any information concerning Wigley.

Mr. Marek also observed in his motion that the statements that mr. Wigley made to Lee Johnson is further corroborated by the report made by Dr. Cash concerning his mental evaluaton of Mr. Wigley prior to his trial. After interviewing Mr. Wigley, Dr. Cash concluded that Mr. Wigley was insane within the meaning of the law at the time that he committed the murder. In reaching this conclusion, Dr. Cash noted:

> [Wigley] reports very strongly ambivalent feelings about his mother, on the one hand loving her deeply enough to carry the Bible she had given him wherever he went, and on the other hand so bitterly resenting her attempts to control him as to have fanatsies of harming her. With female authority figures, on the other hand, the conflict between hostility and strong affiliative and affectional needs, resulting in significant errors in judgment and reality testing , especially when relating to older women. Further, it appears that on the evening of June 16 . . . and to Adella Simmons, who also represented a domineering authority figure to him because of her age and humiliation of him in front of Marek. This confluense of circumstances produced a psychotic reaction in which all of Mr. Wigley's enraged and terrified feelings about authority figures began to boil up inside him so that he did not know that his actions were wrong . . . .

Mr. Marek further noted that a cumulative analysis of the new evidence of innocence, along with all prior claims and the complete record is required. See Strickler v. Greene, 527

U.S. 263, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999); Lightbourne v. State, 742 So. 2d 238 (Fla. 1999); Young v. State, 739 So. 2d 553 (Fla. 1999). Accordingly, Mr. Johnson's affidavit was not to be evaluated in isolation in determining whether an evidentiary hearing was warrant. It had to be considered with Dr. Cash's report and with the testimony that was present at the June, 2009, evidentiary hearing. If Mr. Johnson's affidavit could tip the scales and lead reasonably to the conclusion that in fact Mr. Wigley told the truth to Dr. Cash, to Mr. Johnson and to the six witnesses who testified in June, then an evidentiary hearing was required so that the circuit court could hear from Mr. Johnson directly in order to evaluate not just his credibility, but the circumstances surrounding his conversations with Mr. Wigley in order to gauge the likelihood a jury would be convinced that in fact Mr. Wigley was telling the truth would he admitted responsibility for the murder.

D. An Evidentiary Hearing is Warranted

The record and files in Mr. Marek's case do not conclusively rebut the instant claim. In this circumstances, the files and records cannot conclusively establish that the jury would not have been convinced by the Mr. Johnson's testimony that Mr. Wigley told the truth when he claimed he

committed the murder. Lee Johnson's affidavit represents newly discovered evidence. An evidentiary hearing is required to determine whether this evidence when considered cumulatively with the other previously presented evidence and with Dr. Cash's report would probably have resulted in a sentence of less than death.

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, the issue as to the death sentence is whether the new evidence would probably result in a sentence of life rather than death. Had the jury known of Mr. Wigley's confession that he did the rape and committed the murder, it would have probably returned a life recommendation. Had the jury know that Wigley's own mental health expert concluded that he committed the murder during a psychotic episode, it would have probably returned a life sentence. Unless the files and records conclusively establish that the jury would not have been convinced by Mr. Johnson, cumulatively with Dr. Cash and the six witnesses presented in June of 2009, an evidentiary hearing is required. State v. Mills, 788 So. 2d 249 (Fla. 2001).

In this regard consideration must also be given to the impact Mr. Wigley's confession would have had on the findings

regarding aggravation and mitigation and proportionality concerns in light of Enmund v. Florida, 458 U.S. 782 (1982) and Tison v. Arizona, 481 U.S. 137 (1987). The trial court's findings, reflected in the sentencing order, make clear that the court believed that at a minimum there was "joint participation" in strangling the victim and that "both men acted in concert from beginning to end."[8] However, Mr. Wigley's confession makes clear that this is not the case and the court's findings are erroneous, unreliable, and cannot constitutionally support a sentence of death.

When all of Mr. Wigley's statements are consider, to Dr. Cash, to Mr. Johnson and to the six witnesses from the June hearing, tipping the scales with the additional witnesses to favor Mr. Wigley's credibility would show that Mr. Marek cannot be sentenced to death under Enmund. He did not kill and there is no evidence that he knew that Wigley would kill while in the throes of a psychotic episode.

If Mr. Johnson's testimony tips the scales and show that Mr. Wigley's was probably speaking the truth, then it would defeat the court's rejection of the mitigating factor that Mr. Marek was merely an accomplice in the capital felony committed

[8]Yet, Mr. Wigley was sentenced to life and Mr. Marek was sentenced to death. If there was truly equal culpability, then the trial court erred in sentencing Mr. Marek to death.

by another person and his participation was relatively minor. Mr. Wigley's statements to Lee Johnson when coupled with the mental health evaluation by his own confidential expert, demonstrate that Wigley committed the murder while in the throes of a psychotic episode.

If Mr. Johnson's testimony would tip the scales to show that Mr. Wigley's statements were probably true it would defeat or dilute the court's finding that Mr. Marek was not under extreme duress or the substantial domination of another person because "Marek was the dominant party and controlled the actions of the two."[9]

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[9]The trial court's finding is completely inconsistent with the theory the State presented in Wigley's trial as to who was the dominant party. At Wigley's penalty phase, the trial prosecutor argued:

> Who, ladies and gentlemen, was the first person to display a gun to her? **It was Raymond Dewayne Wigley**.
>
> Who was the first person to rape her? **It was Raymond Dewayne Wigley**.
>
> Who was the first person to beat her? **It was Raymond Dewayne Wigley. Not John Marek**.
>
> Who was involved up to the hair on his chinnie-chin-chin with dragging her up into that lifeguard shack? **It was Raymond Dewayne Wigley and John Marek equally**.
>
> Who was involved in the burglary? **Equally, it was Raymond Dewayne Wigley and John Marek**.
>
> Who was involved in the kidnapping? **It was both**.

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.
>
> ***
>
> 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.

***

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.

***

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?

***

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).[10]

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?

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

A. Yes, I did.

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

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).[11]

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:[12]

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

[12] 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. 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.

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?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.[13]

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.

[13]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 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).

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 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).[14] 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

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

his file which revealed Mr. Marek's Texas 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.[15] 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

[15] 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).

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 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,[16] 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. 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,

[16] 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.

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.

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 August 18, 2009.

CERTIFICATE OF FONT

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

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