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**John Richard Marek v. State of Florida**

**SC65,821 | SC09-765**

>> PLEASE RISE.

>> LADIES AND GENTLEMEN, THE  
FLORIDA SUPREME COURT.

PLEASE BE SEATED.

>> THE NEXT CASE ON THE COURT'S  
AGENDA IS MAREK VERSUS FLORIDA.  
THE PARTIES READY?

MR.^McCLAIN.

>> MARTIN McCLAIN.

I'M HERE TODAY REPRESENTING

MR.^JOHN MARE REC.

THANK YOU, SIR.

I APOLOGIZE BEING LATE.

I WAS ON A PLANE AT 6:15 THIS  
MORNING.

TOLD THERE WAS WEATHER IN  
TALLAHASSEE AND WE COULDN'T  
TAKE OFF FOR COUPLE HOURS.

MUST HAVE BEEN FOG.

I DON'T KNOW WHAT IT WAS.

IN ANY EVENT, APRIL HERE TODAY  
REPRESENTING MR.^MAREK AND --

>> DID YOU WANT TO RESERVE ANY  
TIME FOR REBUTTAL?

>> FIVE MINUTES, YOUR HONOR.

THIS CASE ARISES FROM THE  
APPEAL OF SUMMARY DENIAL OF  
3850 RELIEF.

A 3850 HAD BEEN FILED IN MAY OF  
2007.

THE LAST HEARING ON IT WAS IN  
FEBRUARY OF 2009.

MEMORANDUM WAS SUBMITTED WITH  
THE JUDGE'S PERMISSION IN

FEBRUARY 23rd.

WHEN THE GOVERNOR SIGNED ARE A  
WARRANT ON APRIL 20th HE ISSUED

AN ORDER DENYING 3850 ON APRIL  
23rd.

RULE 3.852, EACH REQUEST FOR  
PUBLIC RECORDS WENT OUT ON  
FRIDAY THE 24th.

THE JUDGE SCHEDULED A  
HEARING ON 27th.

AT THAT TIME RECORDS WERE  
TURNED OVER.

I ALSO FILED A MOTION FOR REHEARING AND MOTION TO AMEND. THE JUDGE ALLOWED THE STATE TO FILE A WRITTEN RESPONSE. WE HAD ARGUMENT THAT AFTERNOON AND THE JUDGE ENTERED AN ORDER DENYING. HE ALSO, MY REQUEST WAS IN LIGHT OF THE FACT THAT THOUSANDS OF PAGES OF RECORDS HAVE BEEN TURNED OVER THE INVESTIGATION WAS ONGOING IF I WOULD BE ABLE TO FILE WHENEVER I HAD SOMETHING TO FILE. MEANWHILE I HAD TO FILE THE INITIAL BRIEF WITH THIS COURT. AND THE STATE FILED THEIR ANSWER BRIEF. I FILED THE REPLY BRIEF ON FRIDAY. LATE ON FRIDAY I ALSO FILED ANOTHER 3850. SO WE'RE IN THE UNUSUAL POSTURE OF HAVING PROCEEDINGS IN BOTH PLACES I KNOW THIS COURT TREATED THE INITIAL BRIEF AS A NOTICE OF APPEAL. BUT, THE NEW 3850 IS PREMISED IN PART AN AFFIDAVIT OBTAINED SOMEONE WHO KNEW MR. ^WIGLY IN PRISON AND WHO MR. ^WIGLY CONFESSED. >> THAT IS IN TRIAL COURT RIGHT NOW. >> CORRECT. >> WE HAVE SEVERAL ISSUES BASED ON YOUR PRIOR SUCCESSES. >> YES, SIR. >> 3.851 MOTION. >> THAT MOTION WAS PROMISED UPON FURMAN v. GEORGIA. THE ISSUES THAT I ARGUED IN THE BRIEF WERE LARGELY PREMISED ON FURMAN v. GEORGIA. FUHRMAN ESTABLISHES THAT A DEATH SENTENCE, THE PROCEDURE, STATE FOLLOWS CAN NOT LEAD TO ARBITRARY AND CAPRICIOUS RESULTS. IN THAT CASE, FURMAN IS A MACRO LOOKING AT THE PROCESS, NOT, THE SPECIFICALLY LOOKING AT AN INDIVIDUAL CASE. THIS COURT INDICATED IN

RUTHERFORD, IN ORDER TO HAVE A CLAIM BASED ON THAT YOU DO ALSO HAVE TO TIE IT IN AND SHOW PREJUDICE TO INITIAL POINT.

>> YOU'VE BEEN THREE MINUTES TALKING AROUND THINGS.

YOU'RE VERY EXPERIENCED DEFENSE ATTORNEY REPRESENTING CAPITAL DEFENDANTS.

WE HAVE, AS YOU KNOW, THIS IS A 1984 MURDER.

>> YES.

>> IT HAS BEEN UP HERE ON POST-CONVICTION RELIEF.

IT HAS BEEN THROUGH THE 11th CIRCUIT.

WHAT SEEMS TO ME THAT YOUR ISSUE IS THE CODEFENDANT.

>> YES.

>> HAS ALREADY BEEN DETERMINED ADVERSELY TO YOU.

THAT IS THAT MR. ^WIGLY RECEIVED A LIFE SENTENCE IS THAT THE PART ON THE FURMAN?

>> THE FACT THAT INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS DECISIONS FROM THE U.S. SUPREME COURT WHICH HAVE COME OUT SINCE THAT SHOW THAT THE ORIGINAL RESOLUTION WAS INCORRECT. IN MY OPINION.

BUT TURNING FIRST TO THE --

>> YOU KNOW, WE ARE GIVING ORAL ARGUMENT.

>> YES.

>> FROM KNOWING WHAT WE HAVE DONE WITH TOMKINS AND ALL THESE OTHER CASES AT THIS POINT, UNDER AN ACTIVE WARRANT.

>> YES.

>> EXECUTION DATE IS WITHIN THE NEXT TWO WEEKS.

>> YES.

>> WHAT IS IT THAT, WHAT IS YOUR BEST ARGUMENT HERE THAT THESE ISSUES THAT YOU'RE RAISING HAVEN'T BEEN PROCEDURALLY, AREN'T PROCEDURALLY BARRED? WE'RE NOT GOING TO DECIDE THAT EVERY DEATH PENALTY DEFENDANT GETS TO RELITIGATE THEIR INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM.

THERE HASN'T BEEN CHANGE IN

LAW.

WE ALREADY DECIDED THAT.  
WHERE IS YOUR BEST SHOT FOR  
MR. MAREK THAT THERE IS  
SOMETHING NEW THAT WE OUGHT TO  
BE CONSIDERING THAT WOULD  
ENTITLE HIM TO RELIEVE?

>> WELL, OF COURSE THERE HAS  
BEEN A CHANGE IN LAW AS TO  
INEFFECTIVE ASSISTANCE OF  
COUNSEL.

U.S. SUPREME COURT DECIDED  
THREE CASES --

>> BUT WE REJECTED THAT.  
I DON'T KNOW THE CASE AFTER  
CASE AND WIGGINS AND THOSE DID  
NOT REPRESENT A CHANGE IN THE  
LAW THAT WOULD BE ENTITLED TO  
RETROACTIVE APPLICATION.  
WERE MERELY RESTATEMENTS OF  
THE STRICKLAND.

SO BACK TO WHERE'S THE BEEF  
HERE?

WHAT IS YOUR --

>> AS MY BRIEF SET FORTH THAT'S  
THE BEEF.

THAT'S THE BEEF.

ALSO THE FACT THAT THE  
CODEFENDANT, HIS TREATMENT,  
THAT HAS NEVER REALLY BEEN  
BEFORE THE COURT.

THIS COURT NEVER HAD THE RECORD  
ON APPEAL FROM MR. WIGLEY'S  
CASE TO SEE THE ARGUMENT MADE  
IN THE WIGLEY CASE WHERE HE WAS  
SPECIFICALLY ARGUED TO BE THE  
KILLER AND MAIN ACTOR BEHIND  
THAT.

>> WITH RESPECT TO THAT, WHY  
WASN'T THAT BROUGHT UP MUCH,  
MUCH EARLIER?

WHY ISN'T THAT BARRED?

HOW COULD YOU POSSIBLY SHOW  
THERE HAD BEEN REASONABLE  
DILIGENCE IN PRESENTING THAT  
ISSUE WHEN, YOU KNOW, THAT IS  
MATTER OF PUBLIC RECORD?

>> WELL, AGAIN, --

>> WHETHER WAS BROUGHT BEFORE  
THE COURT OR NOT, IT WAS A  
MATTER OF PUBLIC RECORD THAT  
YOU COULD HAVE, YOU COULD HAVE  
BROUGHT BEFORE THE COURT.

>> AND AGAIN, MY ARGUMENT IS

PREMISED UPON FURMAN AND THE FACT THAT THE FLORIDA PROCESS, AS FUNCTIONING NOW, IS RESULTING IN ARBITRARY AND CAPRICIOUS DEATH SENTENCES AND TYING ON THE BASIS OF RUTHERFORD THIS COURT INDICATED THAT I HAD TO TIE SPECIFIC PREJUDICE TO MR. ^MAREK.

SO THE EXAMPLES OF THE SPECIFIC PREJUDICE UNDER FURMAN THAT I'M TYING TO MR. ^MAREK ARE THE, DISPARATE TREATMENT.

THE FACT THAT WIGLEY TRIAL THE PROSECUTOR ALLEGED HE WAS THE MAIN PERPETRATOR, HE WAS THE MAIN ACTOR.

TYING IT TO INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM. THE FACT THAT THE U.S. SUPREME COURT REPRESENTED DERED THREE DECISIONS.

>> WITH RESPECT TO THAT ISN'T THAT AN ISSUE YOU HAVE ARGUED PREVIOUSLY, UNSUCCESSFULLY, IN THE PRIOR SUCCESSIVE MOTIONS, OR THE APPEAL OF PRIOR MOTION FOR, DENIAL OF THE PRIOR MOTION FOR POST-CONVICTION RELIEF?

>> CERTAINLY I DID ARGUE THAT AND CERTAINLY THIS COURT DID ISSUE A THREE LINE ORDER WHICH IT FOUND THAT ISSUE NOT TO HAVE MERIT.

BUT THAT WAS NOT PART OF THE FURMAN CLAIM WHICH IS PRESENTED HERE.

AND IN ADDITION TO THAT, ALSO ON THE CLEMENCY ASPECT OF THE CASE.

AND THE FACT THAT WHAT WE HAVE GOING ON IN FLORIDA WITH REGARD TO CLEMENCY WITH THE GOVERNOR'S POWER TO SIGN WARRANTS THERE ARE OVER 50 PEOPLE HE COULD SIGN ON.

THERE IS ABSOLUTELY NO PROCEDURE IN PLACE FOR DETERMINING WHICH ONE OF THE 50 GETS THE WARRANT.

THERE ARE PEOPLE WHO HAD NOTHING PENDING IN COURT.

MR. ^MAREK HAD A 350 PENDING IN

COURT.

AND, FOR REASONS --

>> WHAT ARE YOU ASKING US TO DO? TELL THE GOVERNOR WHO HE CAN SIGN A WARRANT ON?

>> I'M SAYING THAT UNDER FURMAN IT CAN NOT SMACK OF A LOTTERY SYSTEM.

>> ISN'T IT A WARRANT APPROPRIATE FOR ANY CASE THAT IS FINAL CASE?

>> IN NO OTHER CASE IN THIS COUNTRY IS THIS PROCESS FOLLOWED.

IN EVERY OTHER CASE, EVERY OTHER STATE IN THIS COUNTRY, IT IS THE COURTS THAT SET EXECUTION DATE.

AFTER AN EXECUTION DATE IS SET, THERE IS A CLEMENCY PROCESS THAT CAN TAKE PLACE.

>> BUT THERE ARE NO CLEMENCY PROCESS IN THIS CASE.

>> THE CLEMENCY PROCESS OCCURRED IN 1988.

U.S. SUPREME COURT JUST RENDERED DECISION IN HARBISON MADE ITS DECISION CLEAR THAT CLEMENCY IS THE FAIL-SAFE.

CLEMENCY YOU GET TO PRESENT, WHATEVER REASON, PROCEDURAL BAR, WHATEVER, COULDN'T DO ANYTHING ABOUT.

TO OPERATE AS A FAIL-SAFE.

YOU CAN'T HAVE THE CLEMENCY OCCUR BEFORE YOU HAVE THE JUDICIAL PROCESS.

AND SO, --.

>> SO, IN YOUR SCENARIO, YOU CAN NEVER HAVE CLEMENCY, CLEMENCY PROCEEDING UNTIL THE DEFENDANT HAS GONE THROUGH ALL HIS SUCCESSIVE 3.851 MOTIONS?

>> CERTAINLY THAT IS WHAT THE SUPREME COURT IN HARBINSON INDICATED.

AND IN HERRERA

THEY SAID THAT THE CLEMENCY PROCESS IS THE FAIL-SAFE.

THE BACKSTOP, THE WAY TO WAY TO FIX PROBLEMS WHEN COURTS CAN'T.

IF YOU DO IT BEFORE THE COURT HAVES ADDRESSED IT -- IN THE THIS CASE, THE COURT, IN THE

CLEMENCY PROCESS THERE WAS NO INFORMATION ABOUT THE MENTAL OR MENTAL BACKGROUND OR LIFE HISTORY OF MR. MAREK.

THERE WAS NO INFORMATION ABOUT MR. WIGLEY IN HIS CASE BEING ALLEGED TO BE THE MAIN ACTOR. THERE WAS NO INFORMATION PRESENTED --

>> LET'S GET BACK.

ONE OF THE THINGS THAT I THINK THIS CASE IS WORTH DISCUSSING, ONE ASPECT IS, THE CODEFENDANT WIGLEY, WHO IS NOW DECEASED, MURDERED BY ANOTHER DEFENDANT ON DEATH ROW.

>> BLACKWELDER HAS BEEN EXECUTED.

>> BLACKWELDER EXECUTED, KILLED WIGLEY.

>> THAT IS MY UNDERSTANDING.

>> HE IS NOT ON DEATH ROW?

>> BLACKWELDER HAS BEEN EXECUTED.

>> IN ANY EVENT --

>> MAYBE I'M CONFUSED.

>> HE WAS SENTENCED TO LIFE AFTER A JURY'S LIFE RECOMMENDATION.

>> YES.

>> THE ISSUE OF RELATIVE CULPABILITY WHICH ALWAYS CONCERNS ME, WAS RAISED ON DIRECT APPEAL AND IT WAS REJECTED BY THIS COURT, FINDING THAT MR. MAREK WAS MORE CULPABLE THAN MR. WIGLEY. CORRECT.

NOW, YOU ARE, YOU RAISED ISSUES THAT THE PROSECUTOR SAID THAT MR. WIGLEY WAS THE MAIN FORCE.

>> YES.

>> BUT WE HAVE THAT ISSUE OF WHETHER THE PROSECUTOR TRIES TO SAY SOMEONE IS MORE CULPABLE IN ONE CASE THAN THE OTHER.

ISN'T IT GOING TO BE CONSTITUTIONALLY WHAT DETERMINES WHETHER ONE PERSON SHOULD RECEIVE THE DEATH SENTENCE AND THE OTHER RECEIVE LIFE, WOULD YOU AGREE WITH WE HAVE NOT --

>> CERTAINLY THAT IS NOT WHAT

COURT INDICATED IN RALEIGH v. STATE WHEN THEY ADDRESSED RAM NEYCATIONS BRADSHAW v. STUMP EVEN THOUGH RELIEF WAS NOT GRANTED TO MR.^RALEIGH THIS COURT WENT OUT OF ITS WAY ON SPECIFIC FACTS OF RALEIGH THIS COURT DID NOT FIND THERE WAS A PROBLEM IN THAT REGARD OR THERE WAS A VIOLATION AND DID NOT GRANT RELIEF.

RALEIGH WAS POST-CONVICTION CASE. IT WAS RAISED BEFORE THIS COURT IN A ORAL ARGUMENT. THIS COURT WENT AHEAD AND ADDRESSED MERITS OF IT AND TREATED IT AS SOMETHING THAT COULD BE PRESENTED ANEW AT POINT IN TIME.

AND I CERTAINLY FILED MY MOTION WITHIN A YEAR OF THIS COURT'S DECISION IN RALEIGH.

>> WE ALSO, WE SEEMED TO HAVE SOMEWHAT CROSSED THIS BRIDGE AS FAR AS THE STATE BEHAVING INAPPROPRIATELY BY TAKING INCONSISTENT POSITIONS IN THE FOTOPOULOS CASE.

IN THE COURT THAT ISSUE WAS DIRECTLY PRESENTED TO US IN 3850.

THE MAJORITY OF THIS COURT HELD IT WAS NOT A BASIS, ADMITTEDLY UNDER A DUE PROCESS ARGUMENT. MAYBE NOT ONE YOU'RE MAKING TODAY.

BUT THEN IN THE, AS I RECALL THE HISTORY OF THAT CASE, YOU CORRECT ME IF I'M WRONG BUT MR.^FOTOPOULOS DID GET RELIEF IN THE FEDERAL COURT BUT THE 11th CIRCUIT, INTERVENED AND SAID NO.

THERE IS NO RELIEF AVAILABLE FOR THIS.

>> THAT'S CORRECT.

>> WHY WOULD THAT NOT BE CONTROLLING? ARE MAKING A DIFFERENT, DIFFERENT, ADDRESSING THIS PROBLEM FROM A DIFFERENT PERSPECTIVE, A DIFFERENT VIOLATION?

WHY HASN'T THAT REALLY SORT OF BEEN BROUGHT TO REST IN OUR

JURISDICTION?

>> TAKING IT FROM DIFFERENT PERSPECTIVE BUT I ALSO HAVE DIFFERENT FACTS.

IN THIS CASE, IT'S QUITE CLEAR, WHEN YOU LOOK AT THE TRANSCRIPT FROM THE WIGLEY PROCEEDING, THAT, WIGLEY WAS ALLEGED TO BE THE LEADER.

>> SO WAS FOTOPOULOS.

FOTOPOULOS WAS URGED IN THE, CORRESPONDING TRIAL THAT HIS GIRLFRIEND OR BARMAID WAS ACTUALLY ONE PULLING TRIGGER AND QUESTION AROSE, WHO IS MORE RESPONSIBLE.

I'M MISSING THE FACTUAL DISTINCTION.

>> MY UNDERSTANDING OF FOTOPOULOS WHICH OF COURSE WAS NOT MY CASE AND I'M NOT AS FAMILIAR WITH IT WAS THERE HAD BEEN A FINDING THAT FOTOPOULOS WAS THE LEADER.

ACROSS THE BOARD.

IF I'M WRONG ON THAT --

>> BUT ISN'T THAT, ISN'T THAT WHAT DECISION HAS BEEN MADE HERE BASED UPON THE EVIDENCE THAT IS IN THE LIFEGUARD'S STAND OR, WHAT THE EVIDENCE FOUND THERE?

WASN'T IT JUST THE SAME TO ME THAT WAS INHERENT IN THIS CASE?

>> WELL, IN THIS CASE, AT THE WIGLEY, AT THE WIGLEY TRIAL IT WAS ALLEGED, THERE IS NO REASON TO CONCLUDE IT WAS NOT FOUND THAT HE WAS LEADER.

>> NO, IN THIS CASE.

IN THIS, YOUR DEFENDANT CASE, HAVEN'T WE CROSSED THAT AS TO WHO IS RESPONSIBLE FOR THESE THINGS?

NO EVIDENCE WAS PRESENTED REGARDING MR. WIGLEY.

THE JURY NEVER NEW MR. WIGLEY GOT A LIFE SENTENCE.

THE JURY DIDN'T HAVE ANY OF THAT INFORMATION.

IN FACT, AS FROM THE TRANSCRIPT OF THE WIGLEY PROCEEDING THE PROSECUTOR NOTED DURING THE SENTENCING HE WAS GOING TO HAVE

REALLY DIFFICULT TIME WITH THE MAREK CASE BECAUSE HE DIDN'T HAVE ANY OTHER EVIDENCE EXCEPT CIRCUMSTANTIAL EVIDENCE.

>> THAT IS WHERE YOU'RE TALKING INEFFECTIVE ASSISTANCE OF COUNSEL YOU'RE SAYING THEY SHOULD HAVE PRESENTED EVIDENCE OF MAREK'S LIFE SENTENCE BUT, MR.^MOLDOV, I THINK, THAT WAS HIS NAME, DEFENSE ATTORNEY, MADE A STRATEGIC, BECAUSE WHAT THE JUDGE SAID, THAT COMES IN, THEN MR.^WIGLEY'S CONFESSION IS GOING TO COME IN, THAT, POINTED TO THE FINGER TO YOUR CLIENT. AND HE MADE A DECISION NOT TO PRESENT THAT.

WHAT I'M HAVING TROUBLE WITH HERE, WHATEVER THE STATE SAID OR DIDN'T SAY, EVIDENCEWISE, WE SAID ON DIRECT APPEAL BASED ON THE TRIAL JUDGE'S FINDINGS THAT WIGLEY, THAT APPELLANT, NOT WIGLEY WAS DOMINANT ACTOR. BOTH AL APPELLANT AND VICTIM TRAVELING COMPANION THEY TALKED TO THE TWO WOMEN FOR APPROXIMATELY 45 MINUTES. WIGLEY REMAINED IN THE TRUCK. WHEN WIGLEY GOT OUT OF THE TRUCK TO JOIN APPELLANT HE REMAINED SILENT.

THEN THERE WAS ISSUE JUSTICE LEWIS MENTIONED ONLY APPELLANT'S FINGERPRINT WAS FOUND IN THE OBSERVATION DECK WHERE THE BODY WAS DISCOVERED. HAVE YOU, WITH ALL OF THIS, 25 YEARS, 20 YEARS LATER IS THERE ANY DIFFERENT EVIDENCE BEFORE US OR BEFORE THE TRIAL COURT THAT, TAKES ISSUE WITH THAT? THAT IT REALLY WAS WIGLEY THAT WAS THE DOMINANT FORCE, OTHER THAN THE STATE ARGUING IT?

>> WELL, AND THE EVIDENCE PRESENTED AT WIGLEY TRIAL WHICH WAS NOT BEFORE THIS COURT.

>> WHAT EVIDENCE IS THAT? THAT'S NOT IN OUR RECORD EVEN TODAY?

>> WELL, THE ROA FROM THAT CASE WAS LIFE SENTENCE WOULD NOT

HAVE COME TO THIS COURT.  
SO THIS COURT DOES NOT HAVE IT.  
THIS COURT WOULD HAVE TO TAKE  
JUDICIAL UNLESS OF IT.  
CERTAINLY I AM RELYING ON IT  
AND --

>> BUT YOU HAD TWO YEARS,  
SOMEBODY HAD TWO YEARS TO SAY  
THE NEWLY DISCOVERED EVIDENCE  
IS THE WHAT?

WHAT IS THE EVIDENCE THAT  
SOMEWHERE IN THE RECORD  
SOMEWHERE?  
WHAT REFUTES WHAT WE SAID BACK  
AT THAT TIME?

I'M SORT OF, IMPORTANT TO ME.  
MAYBE IT IS IMPORTANT TO THE  
GOVERNOR, THAT SHOWS WIGLEY WAS  
REALLY WAS THE ONE THAT, YOU  
KNOW, RAPED AND MURDERED THIS  
DEFENDANT, NOT, MR.^MAREK.

>> WELL THE EVIDENCE WAS  
PRESENTED AT WIGLEY CASE THAT  
HE WAS THE ONE THAT WAS  
CONTROLLING MR.^MAREK.  
THAT MR.^MAREK SPOKE, PURSUANT  
TO AN AGREEMENT WITH  
MR.^WIGLEY.

THAT MR.^WIGLEY WAS THE ONE  
WITH THE GUN.  
THAT MR.^WIGLEY WAS THE ONE WHO  
WAS UP IN THE GUARD SHACK.  
THAT MR.^WIGLEY WAS THE ONE  
WITH THE TRUCK WHEN HE WAS  
STOPPED.

MR.^MAREK WAS ON THE ROAD,  
WALKING.

SO THAT, EVERY BIT OF EVIDENCE  
LINKED, THESE INDIVIDUALS TO  
THIS MURDER WAS IN THE  
POSSESSION OF MR.^WIGLEY.

THERE IS EVERY INDICATION THAT  
MR.^WIGLEY WAS THE ONE WHO WAS  
IN CONTROL.

THAT WAS PRESENTED AT  
MR.^WIGLEY'S CASE.

AND IN FACT THAT'S WHY THE  
PROSECUTOR WAS SO CONCERNED AT  
THE SENTENCING THAT HE DIDN'T  
HAVE, DIDN'T HAVE A CASE  
AGAINST MR.^MAREK WAS BECAUSE ALL  
OF THE EVIDENCE POINTED TO  
MR.^WIGLEY, AS WAS PRESENTED IN  
MR.^WIGLEY'S TRIAL.

>> IN THE SENTENCING ORDER ITSELF, IT SAYS THERE ON PAGE 6, THAT ALL OF THE EVIDENCE IN THE CASE IS JUST THAT THE DEFENDANT AND HIS ACCOMPLICE WIGLEY, ACTED IN CONCERT.

>> I UNDERSTAND THAT.

BUT THAT OF COURSE IS NOT ON THE BASIS OF THE RECORD IN MR. WIGLEY'S CASE.

AND, WHAT I WAS TRYING TO DO IN THE 3850 TO RELY UPON WHAT THIS COURT SAID IN RUTHERFORD AS TO FURMAN CLAIM AND ALSO WHAT THIS COURT SAID IN RALEIGH AND ARGUE THIS HAD TO BE REVISITED.

AND, THAT'S WHAT I TRIED TO DO.

I SEE THAT I AM INTO MY REBUTTAL TIME AND WOULD LIKE TO RESERVE THE REST OF IT.

>> THANK YOU.

>> THANK YOU.

>> MISS SMURKOWSKI.

>> MAY IT PLEASE THE COURT.

MY NAME IS CAROLYN SMURKOWSKI I'M WITH THE ATTORNEY GENERAL'S HERE IN TALLAHASSEE, FLORIDA.

FIRST OF ALL, I THINK WE NEED TO PAY ATTENTION TO A DECISION THAT CAME OUT OF THIS COURT RECENTLY IN SMITH VERSUS STATE IN SEPTEMBER OF 2008 WHICH TALKS ABOUT INCONSISTENT STATEMENTS THE CITE ON THAT IS 998-2-516.

I ADDED NOTICE OF ADDITIONAL AUTHORITY, LAST WEEK WITH WHEN I FILED MY BRIEF I THINK THE NEXT DAY.

ANYWAY IT TALKS ABOUT WHAT HAPPENS WHEN YOU HAVE INCONSISTENT POSITIONS AND, WHAT NEEDS TO BE DONE.

ONE OF THOSE THINGS THAT NEEDS TO BE DONE IS HAVE A RECORD OF THE CODEFENDANT OR WHOMEVER, YOU'RE COMPLAINING ABOUT AND HAVE THAT PRESENTED BEFORE THE COURT SO YOU HAVE A FAIR COMPARISON.

>> AGAIN, I UNDERSTAND THAT I UNDERSTAND THAT.

I AM CONCERNED THAT, AT LEAST THIS COURT NEVER HAD THE

BENEFIT OF LOOKING AT WHETHER THE TWO WERE EQUALLY CULPABLE. IF THE OUR LAW IS THAT IF THEY WERE EQUALLY CULPABLE AND ONE RECEIVES LIFE AND ONE RECEIVES DEATH, THAT PRESENTS A LEGAL CONCERN, IS THAT CORRECT?

>> YES IT IS.

>> EQUAL CULPABILITY.

>> FIRST OF ALL, I THINK THE ISSUE WAS BEFORE THE FLORIDA SUPREME COURT WITH REGARD TO DISPARATE TREATMENT.

WE'RE TALKING ABOUT BACK SIDE OF THE SAME ARGUMENT.

THE ARGUMENT --

>> BUT AT THE TIME WE SAID THAT WE DIDN'T HAVE WHAT HAD HAPPENED IN WIGLEY'S TRIAL.

>> TO THE CONTRARY. YOU DID. BECAUSE IN YOU HAVE TESTIMONY THAT COMES IN LATER ON AND YOU ACTUALLY HAVE TESTIMONY AT THE ORIGINAL TRIAL WHERE MR.^MOLDOV, EXCUSE ME, DOESN'T HAVE AN R IN HIS NAME.

MR.^MOLDOV TESTIFIED BEFORE PENALTY PHASE OF HIS PROCEEDING WHAT HE WAS DOING AND WHY IN FACT HE WAS NOT GOING TO MAKE ANY ARGUMENTS WITH REGARD TO THE FACT THAT WRIGLEY HAD ALREADY GOTTEN A LIFE SENTENCE. IN FACT HE HAD SAT THROUGH THE TRIAL AND HE KNEW WHAT WAS GOING TO BE SAID.

IN FACT IN THIS PARTICULAR RECORD, THERE IS A, THERE WAS A JOINT MOTION TO SUPPRESS WHEREIN MR.^WIGLEY'S CONFESSION CAME IN.

NOW THIS WAS A MOTION TO SUPPRESS BUT IN THAT PARTICULAR DOCUMENTATION AND WHEN QUESTIONED BY DR.^CASH, WHO WAS THERE TO SHOW THAT MR.^WIGLEY COULD NOTLY UNDERSTAND THE MIRANDA WARNINGS HE WAS GIVEN, THEREFORE HE DIDN'T VOLUNTARILY GIVE HIS STATEMENT, IN THAT STATEMENT, DR.^CASH SAID THAT MR.^WIGLEY WAS A FOLLOWER.

HE WAS NOT A LEADER.

AND THAT THAT WAS THE PREMISE

UPON WHICH ALL THIS EVIDENCE,  
WHY HIS STATEMENT SHOULD NOT  
COME IN.

THAT WAS HIS THEME.

THAT WAS WHAT THEY WENT FORWARD  
WITH.

>> BUT YOU AGREE THAT THE STATE  
IN THE MR.^WIGLEY'S TRIAL, SAID  
THAT HE WAS NOT A FOLLOWER.  
THAT HE WAS, DID THEY SAY HE  
WAS IN FACT THE DOMINATING  
FORCE?

>> THERE ARE STATEMENTS TAKEN  
OUT OF CONTEXT, AT THE POINT  
THEY COULD HAVE BEEN FOR  
REBUTTAL PURPOSES.

I NEVER SEEN THAT RECORD.

THAT IS WHAT I'M TRYING TO  
SUGGEST TO YOU.

IN SMITH VERSUS STATE THE COURT  
HELD UP THE PROCEDURE IF YOU'RE  
GOING TO MAKE THIS KIND OF  
INCONSISTENT ARGUMENT AND  
ACCUSE THE PROCUTION OF  
WRONGDOING IS YOUR

RESPONSIBILITY IF YOU'RE THE  
APPELLANT TO BRING THAT RECORD.  
THAT HAS NOT BEEN DONE.

WE DON'T KNOW WHAT THAT RECORD  
SAYS.

ALL WE HAVE ARE SNIPPETS FROM  
THE RECORD WAS CHERRY-PICKED  
SAY WHAT THE ALLEGATIONS ARE  
HERE TODAY TO BE.

IF YOU IN FACT IF YOU LOOK AT  
MAREK YOU WILL SEE IN THE  
OPENING REMARKS, IN THE CLOSING  
REMARKS AND HANDLING OF THE  
WITNESSES, THAT IT WAS NOT THE  
STATE, DID NOT GO FORWARD WITH  
THAT MR.^MAREK WAS THE KILLER.  
BECAUSE THAT'S THE KEY ISSUE  
HERE,

WHETHER HE WAS THE KILLER.

WHAT THEY ASKED WERE THE  
QUESTIONS, THE RESULT WAS AS A  
RESULT OF TRIAL.

AT OPENING STATEMENT, THE  
PROSECUTOR SAID THIS IS WHAT  
WE'RE GOING TO TALK ABOUT WE'LL  
HEAR THE FACTS AND FOR YOU TO  
MAKE THOSE DECISIONS.

IN CLOSE HEING HE MADE ARGUMENT  
THERE ARE MULTIPLE WAYS YOU CAN

DETERMINE MR. MAREK IS GUILTY  
OF AGREE MURDER.

ONE OF THEM IS THAT HE IS THE  
MURDERER.

ANOTHER ONE HE IT IS FELONY  
MURDERER.

ANOTHER THAT IS HE PRINCIPLE IN  
THIS OR NOT A FOLLOWER.

OR NOT A MINE MINOR  
PARTICIPANT.

LET ME REPHRASE THAT.

THIS IS NOT A CASE WHERE WE  
TOOK A POSITION IN ONE CASE AND  
ALL OF A SUDDEN IN THE NEXT  
CASE WE'RE CHANGING IT THIS IS  
NOT VIOLATION OF BRADSHAW.

AS A MATTER OF FACT, BRADSHAW,  
BRINGING UP OF BRADSHAW I WOULD  
SUS TO MAKE AN ARGUMENT IS THAT  
EVEN THAT IS PROCEDURALLY  
BARRED.

WHILE THE, MR. McLAIN COMES IN  
HERE, AS HEARS ABOUT RALEIGH  
THAT GAVE HIM HIS ONE-YEAR  
WINDOW.

INCONSISTENT PRESENTATION AS TO  
CODEFENDANTS IS NOTHING NEW.  
IT DIDN'T HAPPEN BECAUSE RALEIGH  
CAME ALONG.

AND BRADSHAW WAS, I BELIEVE.  
YEARS EARLIER.

SO THERE'S BASIS UPON WHICH  
EVEN TO MAKE THIS ARGUMENT.  
ARGUMENT COULD HAVE ALWAYS BEEN  
MADE.

IN FACT AS I STARTED OUT  
EARLIER THIS ARGUMENT WAS MADE.  
IT WAS OTHER SIDE OF THIS  
ARGUMENT.

THAT THERE WAS DISPARATE  
TREATMENT BETWEEN MR. MAREK AND  
MR. WIGLEY WITH REGARD TO THE  
SENTENCE THAT WAS IMPOSED.

THERE HAS BEEN ARGUMENT THIS  
MORNING, TO POINT TO THE  
RECORD, I WANT FOR THE  
RECORD --

>> LET ME ASK YOU THIS.

>> YEAH.

>> IF MR. WIGLEY'S CASE, DID IT  
GO THROUGH THE PENALTY PHASE?

>> YES.

HE HAD LIFE RECOMMENDATION.

>> IT WAS A LIFE

RECOMMENDATION?

>> YES, MA'AM.

>> SO WE WOULD WOULD ASSUME, IT WAS BASED ON MITIGATING CIRCUMSTANCES.

>> RIGHT.

>> THAT WERE PRESENTED IN HIS CASE?

>> THERE IS SUGGESTION IN THIS RECORD BASED ON WHAT DR. ^CASH WAS TALKING ABOUT THIS INDIVIDUAL WAS, HAD SOME ISSUES AND SO I SUSPECT THERE WAS MITIGATION.

BUT I DON'T KNOW THAT.

I COULD NOT REPRESENT TO THIS COURT BECAUSE I DIDN'T DO THE DIRECT APPEAL IN THE DISTRICT COURT.

AND I HAVE NOT EVER SEEN THAT RECORD.

NOW, HAVING SAID THAT, THOUGH, I WOULD LIKE, I WOULD POINT THE COURT TO THE VOLUMES 8 AND 9 WHERE WE HAVE THE OPENING AND CLOSING ARGUMENTS AT THE ORIGINAL RECORD SO YOU CAN REVIEW IF YOU SO CHOOSE THE REMARKS THAT WERE MADE BY THE PROSECUTOR WITH REGARD TO WHAT THE THEME OF THE CASE WAS.

IN THIS SAME, FIRST POINT, IT WAS KIND OF A COLLECTION OF, ISSUES, THERE WAS INEFFECTIVENESS OF COUNSEL CLAIM.

I THINK IT IS IMPORTANT THAT WE LOOK AT THIS ISSUE HAS BEEN RESOLVED.

I THINK THE COURT RECOGNIZED IN A PLETHORA OF CASES STRICKLAND HAS NOT CHANGED.

THERE HAS BEEN SOME EFFORTS TO LOOK AT IT AND SEE, LOOK AT IT IN DIFFERENT KIND OF LENS BUT BOTTOM LINE IN EVERY CASE WHETHER IT IS WIGGINS OR ROM PELLA, THE BOTTOM LINE IS END RESULT IT STILL LAND VERSUS WASHINGTON.

THAT IS THE STILL THE STANDARD. IT HASN'T BEEN CHANGED.

MAY LOOK AT FACTS, WE MAY HAVE MORE PENETRATING ANALYSIS BUT

IT IS STILL THE SAME.  
IN THIS PARTICULAR CASE THE  
11th CIRCUIT LOOKED AT THIS  
ISSUE AFTER THIS COURT LOOKED  
AT ISSUE AND I PREPARED IN MY  
PLEADINGS AN ACCOUNTING OF WHAT  
THEY FOUND.  
BUT IN FACT THE RECORD REFLECTS  
THAT THIS WAS TRIAL STRATEGY,  
BASED ON MR. ^MOLE DOVE DECIDING  
THAT WOULD BE HARMFUL AND TOO  
MUCH EVIDENCE OUT THERE AND  
THAT HE WOULD PIN HIS CLIENT.  
MR. ^MAREK, I DIDN'T FULLY  
PORTRAY THAT, I THINK IT IS  
IMPORTANT TO KNOW MR. ^MAREK  
SAID HE DIDN'T DO IT.  
HE FELL ASLEEP IN THE CAR OR  
TRUCK, EXCUSE, AFTER MISS  
SIMMONS GOT INTO THE CAR.  
HE WOKE UP AND ASKED WIGLEY  
WHERE MISS SIMMONS WAS.  
HE SAYS, I DON'T KNOW.  
I LET HER OFF AT THE STATION.  
AND THEN HE GOES BACK TO SLEEP.  
HE WAKES UP AGAIN THEY'RE AT  
BEACH AND HE IS LOOKING FOR  
WIGLEY.  
HE CLAIMS THAT SEES WIGLEY  
COMING BACK TOWARDS THE BEACH  
AND HE IS COMING TOWARDS AWAY  
FROM THIS LIFEGUARD STAND.  
THAT'S HIS TESTIMONY.  
EVERY WITNESS WHO TESTIFIED IN  
THIS CASE WHO WENT UNIMPEACHED  
UNSULLIED TESTIFIED THAT THE  
MAREK WAS THE MOVER AND SHAKER  
IN THIS CASE.  
>> THAT WAS BASED, AGAIN, I  
UNDERSTAND THAT YOU'RE, READ  
THE DIRECT APPEAL IN THE 11th  
CIRCUIT OPINION AND THERE ARE  
NORMALLY, NOT NORMALLY BUT IN A  
LOT OF CASES WHERE WE'RE TRYING  
TO DECIDE IF THERE IS EQUAL  
CULPABILITY THERE IS SOMETHING  
THAT REALLY POINTS TO ONE  
PERSON BEING, YOU KNOW THE  
KILLER, THE OTHER PERSON BEING  
MORE OF THE ASSISTER OR EQUAL  
OR THEY BOTH DO IT.  
HERE, INFERENTIAL BASED ON  
MAREK DOES MORE OF THE TALKING.  
WHEN THEY'RE PULLED OVER HE

DOES MORE OF THE TALKING.

WHAT ABOUT -- THIS IS A

HORRIBLE CRIME.

WHAT ABOUT THE ACTUAL CRIME  
ITSELF?

WERE THEY BOTH, IS IT THE POSITION

OF THE STATE AND WAS IT

CONSISTENT THAT THEY BOTH TOOK

PLACE IN THE RAPE BUT THEN IT

WAS MAREK THAT ACTUALLY

STRANGLER HER TO DEATH?

IS THAT --

>> MAREK WAS NOT CONVICTED OF  
THE RAPE.

IT WAS LESSER, I THINK

AGGRAVATED BATTERY THAT

THE RECORD REFLECTS AND HE CAN'T  
EXPLAIN.

IT WAS ONLY MAREK'S

FINGERPRINTS INSIDE THE SHACK,

WHERE THE BODY IS FOUND.

>> THERE WAS ONE FINGERPRINT.

>> A FINGERPRINT.

>> ONE FINGERPRINT BUT IT WAS  
MAREK.

>> IT WAS MAREK'S.

REALLY WAS NOT IN THERE

ALTHOUGH A NUMBER OF WIGLEY'S

FINGERPRINTS OUTSIDE THE SHED.

>> WELL THAT --

>> THAT'S PART OF IT.

>> TO ME THAT IS PRETTY STRONG.

>> THAT'S PART OF IT.

THE OTHER THING IS INCREDIBLE  
TESTIMONY HE GIVES BEFORE THE  
JURY THAT HE GOES INTO THE  
SHACK.

SO HE HAS TO EXPLAIN WHY HIS

FINGERPRINTS ARE IN THE SHACK.

SO HE GOES INTO THE SHACK AND

IS WALKING AROUND.

AND STAYS THERE BETWEEN 13 OR  
15 AND 18 MINUTES.

IT IS DARK AND HE NEVER

STUMBLES ON THE BODY.

HE WALKS AROUND THE SHACK BUT

NEVER STUMBLES ON THE BODY.

THAT IS HIS TESTIMONY THAT HE

COMES BACK OUT.

THEY ARE SEEN RELATIVELY

QUICKLY AFTER THE MURDER IS

COMPLETED THEY'RE WALKING AWAY

FROM THE SHACK.

AND THEY'RE STOPPED BY A

PATROL OFFICER WHO IS LOOKING, WATCHING PEOPLE ALONG THE BEACH AND LOOKING, THEY GIVE, WIGLEY AND MAREK GIVE THEIR NAMES. AFTER THAT, ENCOUNTER THEY LEAVE AND THEY WERE RECALLED THEY LEFT THEIR SHIRT AND RETURNED AT THE SCENE AGAIN. THEY TELL THE POLICE THEY ARE JUST GETTING THEIR SHIRT.

WHEN, --

>> THAT DOESN'T.

>> I'M JUST TRYING TO GIVE YOU THE SCENARIO WHAT IS HAPPENING.

>> I LIKE TO KNOW THE STRONGEST EVIDENCE. HE WAS THE KILLER HIS FINGERPRINT IS FOUND IN THE SHACK WHERE THE BODY IS FOUND.

>> RIGHT.

HE MAKES A STATEMENT, THAT'S WHY I WAS GETTING TO THAT. HE MAKES A STATEMENT WHEN THEY'RE ARRESTED A THERE IS SUGGEST THAT WIGLEY COUGHED UP EVERYTHING.

HE MAKES A EXPLETIVE THAT HE MUST HAVE TOLD ALL.

THERE IS STATEMENT AT THE END AFTER WIGLEY'S COMMENTS ARE MADE.

THEY HAVE PROCEEDS THAT ARE IN THE TRUCK THAT BELONG TO THE VICTIM.

THAT IS JUST, THOSE ARE FACTS.

>> THAT WOULD JUST POINT TO EQUAL CULPABILITY.

>> I'M JUST SAYING GIVE YOU ALL THE FACTS I RECALL WHAT HAS HAPPENED.

BUT THE MOST IMPORTANT WAS THE FINGERPRINT AS I INDICATED BUT ALSO THE FACT THAT EVERYBODY WHO TESTIFIED AT THIS TRIAL, THE JURY HEARD, THE JURY HEARD TESTIMONY WITH REGARD THAT MAREK WAS THE ONE DID ALL THE TALKING.

HE ACTUALLY CONTROLLED TALKING.

POLICE ENCOUNTER OCCURRED ON THE BEACH.

NONE OF THAT WAS EVER CHALLENGED.

REASON HOW ALL THIS IS

CHALLENGED, TRYING TO, PASTE IT  
THE OTHER WAY, WAIT A MINUTE  
HERE HE WAS NOT THE LEADER.  
IT WAS WIGLEY, WHO WAS LEADER.  
>> AND MAREK WAS THE ONE WHO  
HAD THE CONVERSATION WITH THE  
VICTIM THAT MANY LED TO HER  
GIVE GETTING IN THE TRUCK.  
>> THAT WAS JEAN TREK.  
SHE SURVIVED.  
STAYED WITH THE BROKEN DOWN  
CAR.  
HER ACCOUNT WAS ALWAYS THAT.  
MAREK GOT OUT OF CAR.  
SHE RECOGNIZED MAREK.  
IT WAS 15 MINUTES OR 20 MINUTES  
INTO THE TIME THEY WERE THERE  
AND TRYING TO HELP THE CAR  
BEFORE WIGLEY EVER GETS OUT OF  
THE CAR.  
HE STAYS.  
HE INDICATES SHE INDICATES HE  
DOESN'T SAY NOTHING, HARDLY  
ANYTHING AT ALL.  
HE IS NEVER MAKING ANY KIND OF  
COMMENT.  
I THINK IT IS UNCLEAR, THIS  
MORNING, I WAS LOOKING OVER  
THIS. I REGRET I WASN'T ABLE TO  
FULLY GO BACK BECAUSE I DIDN'T  
BRING ALL THE RECORD WITH ME.  
I THINK THERE IS ALSO, SOME  
DISCREPANCY WITH REGARD TO WHAT  
WIGLEY WOULD HAVE SAID WITH  
REGARD TO WHETHER HE WAS  
DRIVING OR WHETHER IT WAS IN  
FACT MAREK THAT WAS DRIVING THE  
TRUCK AWAY.  
I THINK THERE WAS SOME  
CONFUSION AS TO THAT.  
THAT WOULD BE OBVIOUSLY  
CONFUSED AND INCORRECT IF IN  
FACT WHAT MAREK SAID WAS HE WAS  
A PASSENGER AND HE FELL ASLEEP  
AS SOON AS HE GOT INTO THE CAR.  
I THINK, I DON'T HAVE THE  
CORRECT TESTIMONY ON THAT.  
I DON'T REMEMBER EXACTLY WHAT  
THAT SAYS.  
THAT MIGHT BE OF ASSISTANCE TO  
THE COURT TOO.  
AGAIN, WITHOUT HAVING, I COULD  
READ IT TO YOU BECAUSE I THINK IT  
WAS ADMITTED.

I DON'T KNOW WHERE IT WAS IN THE RECORD OR ACTUALLY MADE RECORD OR JUST AS AN EXAMPLE. BUT IN THE MOTION TO SUPPRESS THERE WAS WIGLEY'S STATEMENT DID COME IN. SO GETTING BACK TO WHAT I WAS TRYING TO SUGGEST, MR. ^MOLDOF HAD KNOWLEDGE OF WHAT WAS GOING ON. HE HAD MONITORED THE TRIAL. HE HAD SPOKEN SO MR. ^WIGLEY'S DEFENSE COUNSEL BECAUSE THE TRIAL OCCURRED BEFORE MAREK HAD TAKEN PLACE. HE MADE THOSE STRATEGIC DETERMINATIONS HOW BEST TO PRESENT HIS CASE. I THINK WHILE, I THINK, THE FOTOPOULOS CASE GIVES INSIGHT TO THIS BECAUSE THERE WERE ALLEGATIONS IN THAT PARTICULAR CASE IN REGARD TO INCONSISTENT STATEMENTS. IN THAT CASE YOU ALL KIND OF REVIEWED WHAT THE TRIAL LAWYER HAD DONE IN THIS CASE AND REALIZED THERE ARE TIMES WHEN LAWYERS WILL MAKE THESE KIND OF DETERMINATIONS THAT AT FIRST BLUSH YOU SAY, WONDER WHY HE DID THAT. IT EXPLAINS AS YOU GET MORE INTO THE ARGUE IT EXPLAINS WHAT HIS THOUGHT PROCESSES WERE AND WHY IN FACT HE WAS PROBABLY CORRECT WITH REGARD TO NOT BRINGING IN MUCH OF THE INFORMATION THAT, WITH REGARD TO WIGLEY AND LIFE SENTENCE, FOR THAT MATTER HE MADE STATEMENTS AT THE BEGINNING OF THE PENALTY AS TO WHY HE WAS NOT GOING TO CHALLENGE WHETHER THERE WAS A PRIOR VIOLENT FELONY. HE DID NOT WANT THE JURY TO HAVE ANYTHING BEFORE IT THAT WOULD BRING IN THE FACT THAT HE WAS IN TROUBLE IN TEXAS. IT MIGHT HAVE BEEN MINOR TROUBLE IN TEXAS BUT HE DIDN'T WANT THAT KIND OF EVIDENCE IN. HE DECIDED HE WASN'T GOING TO

DO INTOXICATION OR DRUG DEFENSE  
OF THE FACT INCREDIBLE  
STATEMENT, I SAY INCREDIBLE.  
IT MAY NOT HAVE BEEN  
INCREDIBLE.

BUT TO ME READING IT WAS  
INCREDIBLE THAT MR. MAREK TOLD  
THE JURY, THEY HAD THE 60 BEERS  
THE DAY OF THE MURDER.

SO, BASED ON THAT, IF YOU DON'T  
HAVE ANY QUESTIONS I'LL REST  
AND ASK THAT YOU AFFIRM THE  
TRIAL COURT'S DETERMINATION.  
THERE IS AS MR. MAREK, MR.  
McCLAIN HASN'T INDICATED THERE  
IS NEW 3850 PENDING BEFORE THE  
TRIAL COURT.

IT WAS FILED LATE FRIDAY.

>> OKAY.

COULD I ASK YOU ABOUT THE  
CLEMENCY ISSUE?

>> SURE.

>> DOES THE SUPREME COURT  
DECISION OF HARBINSON HAVE  
ANYTHING TO DO WITH THIS CASE?

>> NO IT DOES NOT.

HARBINSON IS DETERMINATION  
WHETHER IN FACT FEDERAL FUNDING  
WILL BE PROVIDED TO INDIVIDUALS  
WHO QUALIFY UNDER A CERTAIN  
TYPE OF SCALE, FOR PAYMENT IN  
THE FEDERAL SYSTEM.

AND THE ISSUE THAT WAS BEFORE  
THE COURT HAD TO DO IN MAIN THE  
IDEA WHETHER YOU'RE EXPANDING  
IT TO ALLOW THESE INDIVIDUALS  
BECAUSE THE WORD CLEMENCY WAS  
IN THE DOCUMENT, IN THE  
STATUTORY PROVISION OR THE  
FEDERAL PROVISION.

AND THE COURT DETERMINED THAT  
THAT CLEMENCY ALSO MEANT CLEM  
MEN SIP IN THE STATE COURT  
SYSTEM.

AND SO WHILE THERE IS LANGUAGE  
THAT SEEMS TO SUGGEST THAT, YOU  
KNOW, CLEMENCY IS THE END  
PRODUCT AND IT IS A NECESSARY  
PART OF THE PROCESS AND IT IS A  
NECESSARY PART OF THE PROCESS.  
IN FLORIDA, AS A MATTER OF FACT  
IT IS AN ABSOLUTE NECESSARY  
PART OF THE PROCESS BECAUSE IT  
MOVES THE CASE FORWARD WITH

REGARD TO THE JUDGE, WITH REGARD SETTING THE DATE OF THE EXECUTION.

BUT, IN THAT CASE, I THINK THERE THEY WERE TALKING ABOUT WHY IT IS IMPORTANT AND WHY THERE IS NO LIMITATION WITH REGARD TO FEDERAL FUNDING DOLLARS BEING GIVEN TO AN INDIVIDUAL TO GO INTO BACK INTO THE STATE AND DO THAT. IN THAT PARTICULAR CASE THERE WAS NO MECHANISM IN THE STATE THAT ALLOWED FOR STATE APPOINTMENT.

IN FLORIDA WE DO HAVE THAT. WE DO HAVE PROVISIONS IN OUR STATE STATUTE UNDER THE PUBLIC DEFENDER'S ACT ALLOWS FOR APPOINTMENT OF COUNSEL FOR CLEMENCY.

>> I THINK WE'VE PROBABLY BEEN ALL OVER IT. CLEMENCY PROCEEDINGS OCCURRED IN 1988.

>> 88.

>> 20 YEARS AGO, BEFORE, AND BECAUSE AT THE ORIGINAL TRIAL THERE WAS NO PRESENTATION MENTAL MITIGATION. THE MENTAL MITIGATION, THAT WAS PRESENTED WASN'T PRESENTED UNTIL POST-CONVICTION PROCEEDINGS, TO SHOW THAT HE HAD HAD AN ABUSED CHILDHOOD. EXTREMELY --

>> SOME OF THAT INFORMATION WAS AVAILABLE.

DR.^KRUGER KNEW ABOUT THAT INFORMATION. HE HAD A BACKGROUND AND MOLDOF, HAD A BACKGROUND ON WHAT, HAD TRANSPIRED.

MR.^MAREK --

>> I GUESS WHAT I'M JUST, ISN'T IT A BETTER PROCEDURE THOUGH TO HAVE CLEMENCY OCCUR AT LEAST AFTER THE POST-CONVICTION PROCEED SOMETHING CONCLUDED?

>> AT THE TIME, CLEMENCY AT THE TIME THEN, THAT IS HOW THE STRUCTURE WAS.

IT HAS SINCE BEEN MODIFIED TO COME AT A LATER POINT BUT IT

COULD COME AT ANY POINT IN TIME.

IN FACT, I THINK IT GOES WITHOUT SAYING YOU HAVE AN INDIVIDUAL WHO IS VOLUNTEER, HE DOESN'T DO ANY LITIGATION HE IS NEVER GOING TO HAVE ANY KIND OF PROCESS.

AND THEREFORE THAT WOULD SEEM TO ME, THAT WOULD BE A PROBLEM. SO AT THE TIME, IT WAS THAT, AT THE, AT THE END OF THE DIRECT APPEAL AND THE POST CONVICT, CONVICTION AT THAT POINT IN TIME.

THE FACT THAT HE HAD A CLEMENCY PROCEEDING AND IS, IS WHAT WAS UNDER OUR STATUTE UNDER OUR RULE 15 OF RULES OF EXECUTIVE CLEMENCY ALLOWS FOR CLEMENCY CONSIDERATION, MR. ^MAREK HAS NEVER BEEN GRANTED CLEMENCY, BUT HE HAS BEEN DENIED THREE TIMES.

AND, IN FACT, IF YOU LOOK AT, LOOK AT RULES WITH REGARD TO CLEMENCY, GOVERNOR IS NECESSARY VOTE FOR CLEMENCY.

THEN HE HAS TO HAVE TWO MEMBERS OF THE CLEMENCY BOARD, BEING GRANT OF CLEMENCY.

IF HE SAYS NO IT DOESN'T GO FURTHER THAN THAT HE HAD PRESENTATION.

MR. ^MAREK HAD COUNSEL.

MR. ^LITTLE REPRESENTED HIM AT THE CLEMENCY PROCEEDINGS.

HE HAD A HEARING.

HE HAD INTERVIEW AT FLORIDA STATE PRISON WITH REGARD AND HE WAS ABLE TO PRESENT WHATEVER HE WANTED TO.

WAS NO LIMITATION AT THAT POINT.

TO SUGGEST THAT ALL THIS.

MR. ^LITTLE HAD OPPORTUNITY AND GET THAT INFORMATION AND VERY WELL MAY HAVE I DID NOT GO BACK TO LOOK AT THE CLEMENCY PROCESS TO SEE IN FACT WHAT WAS TRANSPIRED.

THE ISSUE IS NOT WHAT WAS, WHETHER MR. ^LITTLE WAS COMPETENT WITH REGARD TO WHAT

HE PRESENTED TO EXECUTIVE CLEMENCY BOARD BUT WHETHER HE HAD THE PROCESS.

IF WE EVEN EXTEND HARBINSON TO SOME SORT OF RIGHT TO THE HAVE A CERTAIN PROCESS, HE STILL HAD A PROCESS THAT IS SET OUT IN FLORIDA.

THE FEDERAL COURT CAN'T MANDATE WHAT KIND OF A PROCESS YOU HAVE.

AND I DON'T THINK THAT THIS COURT OR ANYBODY IS IN REALLY SUGGESTING THAT THE SUDDENLY NOW WE OUGHT TO MAKE SOME KIND OF MODIFICATIONS WITH REGARD TO THAT.

BECAUSE IN FACT, MORE TIMES THAN THAT NOT INDIVIDUALS GET RELIEF NOT BECAUSE OF CLEMENCY BUT BECAUSE OF LITIGATION ENGAGED IN THE SEVERAL COURTS THEY GO THROUGH DURING THESE TREKS.

UNLESS THERE IS ANY FURTHER QUESTIONS, THE STATE WOULD ASK THAT YOU AFFIRM.

THANK YOU.

>> THANK YOU.

>> MR.^McCLAIN.

>> FIRST, WITH REFERENCE TO MOLDOF'S EXPLANATION WHY HE WASN'T PRESENTING LIFE SENTENCE FOR MR.^WIGLEY IT WAS BECAUSE THE JUDGE SAID IF YOU DO I WILL LET MR.^WIGLEY'S CONFESSION COME IN.

SOMETHING THAT IS NOT ADMISSIBLE, THAT WOULD BE A VIOLATION OF THE CONFRONTATION CLAUSE.

SO THE JUDGE THREATENED HIM WITH VIOLATION OF CONFRONTATION CLAUSE TO CAUSE HIM NOT TO PRESENT THAT INFORMATION.

AS TO, WIGLEY'S MOTION TO SUPPRESS, THE, THAT DOESN'T, THAT DOESN'T MAKE THE STATEMENTS HE MADE INTRODUCED INTO EVIDENCE.

HE HAD A MOTION TO SUPPRESS. AND HE WAS SEEKING TO SUPPRESS HIS STATEMENT.

IT ALSO DOESN'T MAKE HIS

STATEMENT RELIABLE OR CORRECT  
AS TO THE RESPECTIVE ROLES OF  
THE INDIVIDUALS.

DISPARATE TREATMENT AND DUE  
PROCESS CLAIM I'M MAKING ARE NOT  
SAME THING.

FAIR TREATMENT IS MITIGATING  
CIRCUMSTANCE.

DUE PROCESS CLAIM I'M MAKING IS A  
CONSTITUTIONAL CLAIM.

TO MAKE THEM THE SAME IS,  
THAT'S NOT MY ARGUMENT.

STRICKLAND IS THE LOAD STAR  
WHEN IT COMES TO INEFFECTIVE  
ASSISTANCE OF COUNSEL.

IN WIGGINS V. TAYLOR AND  
WIGGINS v. SMITH, STATE AND  
FEDERAL CASE COURTS IN EACH OF  
THOSE CASES MISCONSTRUED  
STRICKLAND.

U.S. SUPREME COURT IN EACH ONE  
OF THOSE CASES SAID THEY WERE  
WRONG.

LOGIC OF EACH ONE OF THOSE  
CASES APPLIES TO MR. MAREK'S  
CASE.

IT INDICATES THAT YOU CAN'T  
MAKE A VALID DECISION IF YOU  
HAVEN'T BEEN INVESTIGATED.

MR. MOLDOF NEVER INVESTIGATED  
BACKGROUND.

NEVER GOT ANY INFORMATION FROM  
TEXAS AND DIDN'T KNOW ANYTHING  
ABOUT IT.

AS TO DR. KRUGER'S REPORT,  
DR. KRUGER'S REPORT WAS NOT  
ADMITTED INTO EVIDENCE THE  
STATE'S ARGUMENT KRUGER'S  
REPORT WAS INTRODUCED AT  
CLEMENCY ISN'T TRUE.

IT WASN'T INTRODUCED.

MR. MOLDOF SOUGHT TO INTRODUCE  
THE REPORT.

JUDGE SAID NO.

IT IS HEARSAY.

YOU CAN NOT INTRODUCE THE  
REPORT.

WE SINCE HAVE LEARNED THAT  
HEARSAY IS ADMISSIBLE AT  
PENALTY PHASE.

THE JUDGE'S RULING WAS WRONG.  
JUDGE EXCLUDED KRUGER'S  
REPORTS.

THE MENTAL HEALTH INFORMATION

NOT COME IN.

FINALLY AS TO CLEMENCY PROCESS  
AS TO WHETHER THE FEDERAL  
COURTS MANDATE HOW THE  
CLEMENCY PROCESS IS DONE,  
FURMAN v. GEORGIA, ESTABLISHED  
A LONG TIME AGO THE FEDERAL  
CONSTITUTION THAT TELL THE  
STATES TO FUNCTION.

WHEN YOU HAVE A CLEMENCY  
PROCESS NOT FUNCTIONED AS  
REQUIRED IN EXPLAINED IN  
HERRERA AND MOST RECENTLY  
EXPLAINED IN HARBINSON IT DOES  
VIOLATE THE CONSTITUTION.  
MISS SMURKOWSKI ARGUED THREE  
TIMES CLEMENCY WAS DENIED IN  
THIS CASE.

I KNOW OF ONLY ONE THERE WAS  
ONLY ONE CLEMENCY PROCEEDING.  
TO THE EXTENT SHE IS ENDED EACH  
TIME A WARRANT IS SIGNED  
CLEMENCY.

MR.^MAREK HAD NO KNOWLEDGE, NO  
INFORMATION, NO COUNSEL.  
IF THERE WAS A CLEMENCY  
PROCEEDING GOING ON LAST  
SEPTEMBER WHEN THE GOVERNOR WAS  
COLLECTING RECORDS FROM THE  
STATE ATTORNEY'S OFFICE AND  
FROM THE ATTORNEY GENERAL'S  
OFFICE, CERTAINLY I DIDN'T KNOW  
THAT.

MR.^MAREK DIDN'T KNOW THAT.  
AND A ONE-SIDED EX PARTE  
PROCEEDING SURELY IS NOT A  
PROPER CLEMENCY PROCEEDING  
WHERE ALL OF THE INFORMATION  
CAN BE PRESENTED.

FOR THESE REASONS I ASK THE  
COURT TO VACATE AND REMAND.

>> THANK YOU BOTH FOR YOUR  
ARGUMENTS.

THE COURT WILL NOW BE IN  
RERECES UNTIL TOMORROW  
MORNING.

>> PLEASE RISE.

THE SUPREME COURT IS NOW  
ADJOURNED.