IN THE SUPREME COURT OF FLORIDA

NO. 77872

ROY CLIFTON SWAFFORD,

Petitioner,

v.

HARRY K. SINGLETARY, JR., Secretary,
Florida Department of Corrections

Respondent.

PETITION FOR EXTRAORDINARY RELIEF AND FOR A WRIT OF HABEAS CORPUS

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INTRODUCTION

This petition for habeas corpus relief is being filed in order to address a substantial claim of error under the fifth, sixth, eighth and fourteenth amendments. This claim demonstrates that Mr. Swafford was wrongly deprived of his rights to a post-conviction evidentiary hearing on the issues of a conflict of interest involving his trial co-counsel, Howard Pearl. Recent changes in the law on this issue require that an evidentiary hearing now be held in the trial court. The petition therefore presents a question that was ruled upon on appeal from the trial court's denial of post-conviction relief, but that should now be revisited in order to correct error in the appeal process that denied fundamental constitutional rights. See Kennedy v. Wainwright, 483 So. 2d 424, 426 (Fla. 1986); Meeks v. Dugger, 16 F.L.W. 5261 (decided April 11, 1991).

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

1. On February 14, 1982, at approximately 6:15 a.m., Brenda Meadows Rucker was abducted from a Fina Station in Ormond Beach, Florida. Her body was found the following day. She had been shot to death and the State alleged that she had been sexually assaulted. There was one eyewitness to the abduction.

2. Roy Clifton Swafford did not know Brenda Rucker. He did not abduct her or kill her. Evidence produced at trial

revealed that for three (3) hours immediately prior to Ms. Rucker's abduction, Mr. Swafford had been with a prostitute in Daytona Beach, Florida. He had taken this lady back to her place of employment, the Shingle Shack Bar, leaving her there at 6:00 a.m. He then returned to his friends at a nearby campground. Although the testimony was conflicting, it was generally acknowledged that Mr. Swafford arrived at the campground between 6:30 a.m. and 7:00 a.m. that same morning.

3. Mr. Swafford was charged by grand jury indictment with first-degree murder, sexual battery and robbery to which he pled not guilty. Due to indigency status, Messrs. Ray Cass and Howard Pearl, attorneys, were appointed to represent Mr. Swafford.

4. On October 28, 1985, the jury trial began in the Circuit Court for Volusia County, Judge Kim Hammond presiding. The jury returned guilty verdicts of first-degree murder and sexual battery. Mr. Swafford was acquitted of robbery.

5. The penalty phase was conducted on November 7, 1985. No live testimony was Presented on Mr. Swafford's behalf. Ninety five minutes later the jury returned from deliberations and recommended death by a vote of ten (10) to two (2).

6. Judge Hammond sentenced Mr. Swafford to death on November 12, 1985.

7. The Florida Supreme Court affirmed the conviction and sentence on direct appeal. Swafford v. State, 533 So. 2d 270

(1988). The United States Supreme Court denied certiorari review. Swafford v. State, 109 S. Ct. 1578 (1989).

8. Clemency proceedings were held before the Honorable Bob Martinez, Governor of the State of Florida. Clemency was denied on March 27, 1989.

9. On September 7, 1990, Governor Martinez signed Mr. Swafford's first and only death warrant. The execution was scheduled for November 13, 1990.

10. On October 15, 1990, Mr. Swafford filed a Motion to Vacate Judgment of Conviction and Sentence with Request for Leave to Amend. On October 22, 1990, the State filed its response. Two (2) days later the trial court heard brief argument on the motion and then, on October 30, 1990, summarily denied all fifteen (15) claims raised by Mr. Swafford -- even though an evidentiary hearing was requested by Mr. Swafford and even though the State, in its Response, conceded the appropriateness of an evidentiary hearing on Mr. Swafford's claims of ineffectiveness of counsel during the penalty phase (State's Response p. 3). The State, during the above-referenced hearing before the trial court, broadened its concession to the need for an evidentiary hearing. At that time the State conceded that a hearing was also appropriate on Mr. Swafford's claimed violation of Brady v. Maryland, 373 U.S. 83 (1967). The State also conceded the legitimacy of an evidentiary hearing on the public records

claims, as well as on the issue of ineffectiveness of counsel at penalty phase (H. 7). No evidentiary hearing was held.

11. Mr. Swafford then filed an Appeal and Application for Stay of Execution with the Florida Supreme Court on November 8, 1990. The State filed its Response the same day. Oral argument was held before the Florida Supreme Court on November 9, 1990 after which said court issued a temporary stay until 1:00 p.m. on November 15, 1990. Mr. Swafford's execution was thereupon rescheduled for 1:01 p.m. on November 15, 1990.

12. On November 14, 1990, the Florida Supreme Court issued its opinion denying all relief. Swafford v. State, 569 So. 2d 1264.

13. Mr. Swafford next filed a Petition for Writ of Habeas Corpus By Person In State Custody. The petition was filed on November 14, 1990, in the United States District Court for the Middle District of Florida, Orlando Division. The State filed a response to the petition.

14. Oral argument was heard before United States District Court Judge G. Kendall Sharp at 10:00 p.m. in Orlando, Florida. Said hearing was limited to argument only and ended at 11:30 p.m., an hour and a half later. At 1:06 a.m. on November 15, 1990, Judge Sharp issued a thirty-one (31) page Order. All claims were denied as was Mr. Swafford's continued request for an evidentiary hearing. The court likewise declined to issue a

certificate of probable cause. Mr. Swafford's Motion for Stay of Execution was also denied.

15. An Emergency Motion for Stay of Execution to Preserve Jurisdiction Pursuant to 28 U.S.C. Sec. 2251 or, in the alternative, 28 U.S.C. Sec. 1651 and a Motion for Certificate of Probable Cause was then filed on November 15, 1990, in the Eleventh Circuit Court of Appeals. The Court of Appeals thereupon granted Mr. Swafford's Motion for Stay of Execution and Motion for Certificate of Probable Cause.

JURISDICTION TO ENTERTAIN PETITION, AND GRANT HABEAS CORPUS RELIEF

This is an original action under Fla. R. App. P. 9.100(a). This Court has jurisdiction pursuant to Fla. R. App. P. 9.030(a)(3) and art. V, Sec. 3(b)(9), Fla. Const. The petition presents constitutional issues which directly concern the judgment of this Court during the appellate process, and the legality of Mr. Swafford's capital conviction and sentence of death. Jurisdiction in this action lies in this Court, **see**, e.g., Smith v. State, 400 So. 2d 956, 960 (Fla. 1981), for the fundamental constitutional errors challenged herein involved the appellate review process. **See** Wilson v. Wainwrisht, 474 So. 2d 1163 (Fla. 1985); Bassett v. Wainwrisht, 229 So. 2d 239, 243 (Fla. 1969); see also Johnson (Paul) v. Wainwrisht, 498 So. 2d

938 (Fla. 1987). Cf. Brown v. Wainwright, 392 So. 2d 1327 (Fla. 1981).

This Court has long held that "habeas corpus is a high prerogative writ," which "is as old as the common law itself and is an integral part of our own democratic process." Anglin v. Mayo, 88 So. 2d 918, 919 (Fla. 1955). Because it enjoys such great historical stature, the writ of habeas corpus encompasses a broad range of claims for relief:

> The procedure for the granting of this particular writ is not to be circumscribed by hard and fast rules or technicalities which often accompany our consideration of other processes. If it appears to a court of competent jurisdiction that a man is being illegally restrained of his liberty, it is the responsibility of the court to brush aside formal technicalities and issue such appropriate orders as will do justice. In habeas corpus the niceties of the procedure are not anywhere near as important as the determination of the ultimate question as to the legality of the restraint.

Anglin, 88 So. 2d at 919-20. See also Seccia v. Wainwright, 487 So. 2d 1156 (Fla. 1st DCA 1986), relying on Anglin. Thus, this Court has held, "Florida law is well settled that habeas will lie for any unlawful deprivation of a person's liberty." Thomas v. Dugger, 548 So. 2d 230 (Fla. 1989). When a habeas petitioner alleges such a deprivation, the petition "has a right to seek habeas relief," and the Court will "reach the merits of the case." Id. See also State v. Bolyea, 520 So. 2d 562, 564 (Fla. 1988) ("habeas relief shall be freely grantable of right to those

unlawfully deprived of their liberty in any degree").

This Court has also consistently exercised its authority to correct errors which occurred in the direct appeal process. When this Court is presented with an issue on direct appeal, and its disposition of the issue is shown to be fundamentally erroneous, the Court will not hesitate to correct such errors in habeas corpus proceedings. See Jackson v. Dugger, 547 So. 2d 1197 (Fla. 1989). As this Court has explained, the Court will "revisit a matter previously settled by the affirmance," if what is involved is a claim of "error that prejudicially denies fundamental constitutional rights . . . ." Kennedy v. Wainwright, 483 So. 2d 424, 426 (Fla. 1986).

Mr. Swafford's current petition presents a substantial claim demonstrating that he was unlawfully convicted and unlawfully sentenced to death, in violation of fundamental constitutional precepts. The claim was presented to this Honorable Court previously in Mr. Swafford's appeal from the summary denial of his Rule 3.850 motion by the trial court. Specifically, the instant petition addresses the issue of Howard Pearl, attorney's conflict of interest in this case and the trial court's denial of an evidentiary hearing on the issue in October, 1990, when Mr. Swafford was under a death warrant. This Honorable Court affirmed the trial court's denial. However, on May 2, 1991, this Honorable Court decided Herring v. State, No. 75,209, which is

identical to the case at bar and which now supports Mr. Swafford's contention that he is entitled to an evidentiary hearing on the issue. In light of this substantial claim, Mr. Swafford respectfully urges the Court to "issue such appropriate orders as will do justice." Anglin.

GR(FOR S CORPUS RELIEF

By his petition for a writ of habeas corpus, Mr. Swafford asserts that his capital conviction and sentence of death were obtained and then affirmed during the Court's appellate review process in violation of his rights as guaranteed by the fifth, sixth, eighth and fourteenth amendments to the United States Consitution, and the corresponding provisions of the Florida Constitution, and for each of the reasons set forth herein.

ARGUMENT I

TRIAL COUNSEL'S UNDISCLOSED CONFLICT OF INTEREST IN VIOLATION OF THE LAWS AND CONSTITUTION OF THE STATE OF FLORIDA DENIED MR. SWAFFORD THE EFFECTIVE ASSISTANCE OF COUNSEL GUARANTEED UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Five (5) days ago, on May 2, 1991, this Honorable Court decided Herring v. State, No. 75,209 (copy of Herring attached hereto as Exhibit A). Herring dealt, in part, with the issue of an alleged conflict of interest involving defense attorney-deputy sheriff Howard Pearl. Specifically, Herring, a death-sentenced

inmate alleged in his motion for post-conviction relief (Fla. R. Crim. P. 3.850) that Mr. Pearl's representation of him while simultaneously serving as a deputy sheriff created an actual conflict of interest which required reversal of his sentence. The trial court denied Herring's claim without an evidentiary hearing. Id. at 4-5. The rationale used was that the same trial court had denied relief on this same issue after first holding an evidentiary hearing in State v. Harich, 542 So. 2d 980 (Fla. 1989), Herring, No. 75,209 at 4. This Court reversed the trial court on this issue, stating:

> Although we recognize that the evidence presented may be duplicative, due process requires that Herring be afforded an opportunity for a hearing on this matter. If other defendants raise the same claim, however, we find that it would be proper for the chief judge to consolidate the cases for one hearing on this single issue.

Herring, No. 75,209 at 8.

Roy Swafford, like Ted Herring, was represented by Mr. Pearl while Mr. Pearl held the office of special deputy sheriff. This fact was unknown to to Mr. Swafford until after his trial was over and he had been sentenced to death. Mr. Swafford, like Mr. Herring, raised the issue of Pearl's in Claim 5 of his Motion to Vacate Judgment of Conviction and Sentence with Request for Leave to Amend ("Motion") (Claim 5 is attached hereto as Exhibit B, for the Court's convenience). This motion was filed under warrant on October 15, 1990, and it was anticipated that leave to amend

would be granted, thus affording Mr. Swafford the time and resources necessary to fairly and fully develop this and other claims which had been raised.

In Claim 5 of the Motion, Mr. Swafford pled (1) that Mr. Pearl, while representing him was simultaneously holding the office of special deputy sheriff (Motion at 79-90); (2) that Mr. Swafford did not know this at the time (Motion at 79), and (3) that Mr. Swafford was entitled to a full and fair hearing on the merits in order to demonstrate the validity of this claim (Motion at 105). On October 30, 1990, the trial court denied this claim without a hearing, finding the claim to have been procedurally barred (trial court order at 11) (Exhibit C).

On Appeal to this Court, Mr. Swafford again raised the issue of Mr. Pearl's conflict of interest. See Appellant's Brief, Claim 4 at 105-09 (Exhibit D). To avoid repitition the facts relating to Mr. Swafford's employment as a special deputy sheriff will not be repeated herein. Rather, Mr. Swafford, incorporates by reference Exhibit C in its entirety as if fully set forth herein. Mr. Swafford pointed out to this Court that the finding of a procedural bar was in direct contravention of the holding in Harich v. State, 542 So. 2d 980, 981 (Fla. 1980) (Appellant's brief at 109). Furthermore, Mr. Swafford again requested an evidentiary hearing to present detailed facts which demonstrate prejudice suffered by Mr. Swafford as a result of the conflict

(Appellant's brief at **108**).

On November 14, **1990**, this Court denied all relief and refused to grant a further stay of execution. Swafford v. State, 569 So. 2d 1264 **(1990)**. As to Mr. Swafford's claim that Mr. Pearl was conflicted in his representation, this Court stated:

> As to claim 5 (sic), co-counsel's involvement in the case was minimal and Swafford could not have been prejudiced.

Swafford, 569 So. 2d at **1267**. This was the entire ruling on this issue. The lower court's erroneous finding of procedural bar was not addressed.

These findings are wholly contradicted by the fact that Mr. Pearl was involved in the filing and/or argument of five **(5)** pretrial motions (R. **1688-1737**). Furthermore, as was pointed out in the Appellant's brief to this Court:

> At a (sic) evidentiary hearing Mr. Swafford can also demonstrate specific acts that were a function of this conflict which actually prejudiced Mr. Swafford. For example conflicted counsel sousht and obtained a (sic) independent and favorable ballistics opinion which was mysteriously never communicated to trial counsel.

Appellant's Brief at **108**.

This Court's findings of fact (which were made without benefit of an evidentiary hearing or even oral argument) also failed to address Mr. Pearl's involvement in the taking of the following pretrial depositions:

	Deponent		Deposition Date
(1)	Roger Dean Harper	--	5/21/89
(2)	Arthur J. Botting, M.D.	--	3/19/85
*(3)	Gary Rathman	--	4/2/85
(4)	Mariann M. Hildreth	--	4/2/85
*(5)	Charles R. Meyers	--	4/2/85
(6)	George Allen Brown, Jr.	--	5/3/85
*(7)	Ronald H. Burk	--	5/3/85
*(8)	James Dennis Bushdid	--	5/3/85
*(9)	Michael R. Longfellow	--	5/3/85
*(10)	Dennis O'Donnell	--	5/3/85
*(11)	Ruth Ellen Zeller	--	5/3/85
(12)	Patricia Atwell	--	6/18/85
*(13)	Jacob F. Ehrhart	--	10/14/85
**(14)	Marjorie C. Smith	--	10/14/85
**(15)	Mary Elizabeth Henderson	--	10/14/85
(16)	Robert Nolin	--	10/14/85
***(17)	Bobby James Lambert	--	10/14/85
*(18)	Marvin Melton	--	10/16/85
*(19)	George Edward Dunn, Sr.	--	10/16/85
(20)	Marione Rasnick	--	10/16/85
*(21)	John Joseph Provenzano	--	10/16/85
*(22)	Alan James Elliot	--	10/16/85
*(23)	Bobby Mack Richardson	--	10/16/85

As can be seen from the above, Mr. Pearl's involvement in this case was extensive, not minimal. He deposed (1) the primary witness, Roger Harper; (2) the two (2) ballistics experts,

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*Denotes Deponent who is employed by law enforcement agency.

**Deponents at whose depositions Mr. Pearl asked no question.

***Deponent who was employed by law enforcement and not questioned by Mr. Pearl at deposition.

All of these depositions are part of the original record on appeal.

Messrs. Rathman and Meyers; (3) the medical examiner, Joseph Botting, M.D.; and (4) eleven (11) law enforcement personnel. Furthermore, as can be seen from the dates of the depositions, Mr. Pearl's involvement in this case lasted, at a minimum, seventeen (17) months with the last deposition being taken by him just twelve (12) days before the trial began.

Mr. Pearl's conflict is the same as that found in Herring. His involvement in Mr. Swafford's case was extensive, just as it was in Herring. Indeed, Mr. Pearl was responsible for the majority of the pretrial discovery conducted on Mr. Swafford's behalf. Accordingly, Mr. Swafford, like Ted Herring, is entitled to have this issue decided at a full and fair evidentiary hearing.

Mr. Swafford contends that the state courts should be given the opportunity to resolve this issue prior to the federal courts ruling thereon. The recently released decision in Herring clearly signals a change in this Court's handling of this matter. Under Herring, Mr. Swafford is indisputably entitled to an evidentiary hearing in the state courts, just as is Mr. Herring. He respectfully urges this Honorable Court to therefore reconsider this issue at this time and to provide him the same opportunity as afforded Mr. Herring to present his case fully in an evidentiary hearing.

CONCLUSION

WHEREFORE, good cause therefore having been shown, Petitioner respectfully prays that this Honorable Court GRANT his Petition for Extraordinary Relief and for a Writ of Habeas Corpus and REMAND this case to the trial court directing the trial court to hold an evidentiary hearing on the issue raised herein, in accordance with Herring v. State. Petitioner also prays that this Honorable Court will grant him such other and further relief as this Court deems just and proper.

Respectfully submitted,

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By: 
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY a true copy of the foregoing has been furnished by first class, U.S. Mail, first class, postage prepaid, to Barbara Davis, Assistant Attorney General, Office of the Attorney General, 210 North Palmetto Avenue, Suite 447, Daytona Beach, Florida 32114, on this 6th day of May, 1991.

Attorney