IN THE SUPREME COURT OF FLORIDA

ROY CLIFTON SWAFFORD,

Appellant,

v. CASE NO. 80,192

STATE OF FLORIDA,

Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE SEVENTH JUDICIAL CIRCUIT
IN AND FOR VOLUSIA COUNTY, FLORIDA

SUPPLEMENTAL ANSWER BRIEF OF APPELLEE

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SUPPLEMENT TO STATEMENT OF THE CASE

On September 7, 1990, the Governor signed Swafford's death warrant. On October 15, 1990, a Florida Rule of Criminal Procedure 3.850 motion was filed by Swafford. A motion to compel production of Chapter 119 materials was also filed (PCR 1566). Judge Hammond dropped everything and went through the record and exhibits. It took some time to review them (PCR 1490).

Assistant Attorney General Barbara Davis was the primary on the warrant for the Attorney General's Office. Assistant State Attorney Sean Daly, who normally handles 3.850 responses, was involved in the Fotopolos trial (PCR 1566). Ms. Davis prepared a response in conjunction with Mr. Daly (PCR 1567). On October 22, 1990, the state submitted the response, indicating that an evidentiary hearing should be limited to two possible claims: (1) the *Brady v. Maryland,* 373 U.S. 83 (1963) claim and (2) the ineffective assistance of counsel claim. The state filed the response before the judge could ask for it (PCR 1567). The state had also prepared a proposed order (PCR 1462; D.Ex.C).

The state also prepared an order entitled "Order Setting Evidentiary Hearing," which was presented to the judge, which suggested that an evidentiary hearing should be held on the two limited claims, and the public records issue. (PCR 1574;1582;1588;1600); D.Ex.A). It was faxed to CCR on October 22nd (PCR 1569). Ms. Davis testified that there were over twenty issues, most of which were procedurally barred. Her position was that if there was going to be an evidentiary hearing, it should be on those two issues only. She had an inclination to clear up

certain matters that she felt were untruthful (PCR 1588). She spoke with Mr. Nickerson on October 19th (PCR 1569). She indicated they had an agreement that the hearing would occur on October 24th, although Mr. Nickerson did not agree to a hearing on the limited claims, but wanted a stay of execution and a full hearing on everything. Judge Hammond testified that the procedure was for the state and the defense to get hearing time from his judicial assistant, who would know what times were available (PCR 1456). Mr. Nickerson had already noticed the hearing on the 24th and when he got to the hearing, argued about the scope of it (PCR 1457).

A second "Notice of Hearing" was signed by Ms. Davis and faxed to Mr. Nickerson on October 23rd (D.Ex.B). This second order deleted reference to an evidentiary hearing being conducted on October 24th and there was also no mention of the motion to compel records (PCR 1602). Ms. Davis testified that she did not remember why this order was different. She did not know if there was going to be a hearing on public records, ineffectiveness or whatever, and she felt there should be a notice of hearing (PCR 1572).

Mr. Nickerson testified that he was confused because he had received two notices of hearing one day after the other (PCR 1601). Mr. Nickerson testified in contradiction to Ms. Davis that there was no conversation with Ms. Davis concerning the notices or when an evidentiary hearing should be held. He tried to take steps to be prepared for the possibility that the judge would instruct them to go forward (PCR 1600; 1602). He testified

that it would have been extremely difficult, if not impossible, to participate in an evidentiary hearing on the 24th because he was working as lead counsel on the Jerry Lane Rogers case for which an evidentiary hearing in St. Augustine had been set for the following day, October 25th (PCR 1600-01). Mr. Nickerson, however, had also prepared a notice of hearing setting the case for hearing on October 24th, as previously mentioned (PCR 1614 S.Ex.C.). He termed this "an effort to expedite" as he was attempting to have public records turned over so he would be able to sooner amend his 3.850 motion (PCR 1599). The notice, however, called up all other pending motions including the 3.850. Mr. Nickerson admitted on cross-examination that the court could have had an evidentiary hearing on the 24th (PCR 1613). Judge Hammond testified that his office encourages both parties to come to some date that is convenient with his schedule. It would appear that the party who prepared the notice had notice of a hearing (PCR 1491).

Mr. Nickerson also had prepared an order reflecting his position in the case, granting a stay of execution (PCR 1583). Thus, Judge Hammond, at that point in time had unsolicited orders from both parties. Because of the exigencies of time in death warrant litigation it was normal for the State Attorney or the Attorney General's Office to prepare responses and orders without solicitation (PCR 1583).

A status hearing was held on October 24, 1990, at which time Chapter 119 material was turned over to Swafford. Mr. Nickerson objected to the state submitting an order. (The

disagreement as to what should be in the draft orders was raised on appeal) (PCR 1593). It was CCR's position that the proposed order was full of erroneous legal positions, factual determinations and issues which the state said were procedurally barred and the judge should not sign the order (PCR 1495). At the end of the hearing the judge took matters under advisement (PCR 1604).

Approximately a week later, Judge Hammond's law clerk, Randy Rowe, called Ms. Davis and told her the judge was summarily denying the 3.850 motion and there would be no evidentiary hearing (PCR 1575). Judge Hammond had asked him to contact Ms. Davis and request a proposed order and to notify CCR that he had requested the order from her (PCR 1649). The judge decided what position to take before he instructed his clerk to obtain an order (PCR 1479). He was not soliciting further argument from the parties (PCR 1498). Mr. Rowe inquired if Ms. Davis still had the proposed order on her word processor, which she did, and then asked if she would prepare an order. She indicated that she would and he read her changes which she typed as they were read (PCR 1575). Ms. Davis testified that she did not discuss the merits of the case with Mr. Rowe at all (PCR 1583-4). Mr. Rowe also testified that he didn't believe he had discussed any of the merits of the case. It was an administrative type thing (PCR 1650). He just read the changes and she typed them in. He told her exactly what to type. He asked her to cite *Strickland v. Washington,* 466 U.S. 668 (1984), in each instance of ineffectiveness (PCR 1583-84). She did not make any changes that

the clerk was unaware of on her own initiative (PCR 1584). She gave it to one of the state attorney's investigators who took the original to Bunnell (PCR 1575).

In keeping with the judge's instructions, Mr. Rowe called CCR that evening and asked for Mr. Nickerson. A man answered the phone, said he had gone out for food, didn't know when he would return, and suggested that he take a message. Mr. Rowe told him it was about the Swafford case and that they had requested a proposed order from the Attorney General's Office. He told him the same thing he had told Ms. Davis. The man indicated that he would pass it on to Mr. Nickerson. Mr. Rowe was under the impression that the man was writing it down because he had asked him to repeat a couple of things. He assumed that he relayed the message (PCR 1651-53). The person who answered the phone seemed knowledgeable about the case. He assumed he was an attorney or involved with cases (PCR 1661). He had expected Mr. Nickerson to be there after 5 o'clock. He had told someone he would probably be there as he often stayed at the office and actually slept on the couch at night (PCR 1661). Mr. Nickerson never returned his call (PCR 1651-1653). Mr. Rowe assumed Ms. Davis would provide a copy to the other side (PCR 1655).

Mr. Nickerson testified that he would have objected if he had known the judge's office had contacted the state and asked for a draft order summarily denying the 3.850 motion (PCR 1606). He claimed that he never received the message from Mr. Rowe (PCR 1614). Assistant State Attorney Sean Daly testified that "it was very seldom that you could call CCR and get somebody the first

time and if they don't feel like calling you back, they don't call you back." (PCR 1641). Ms. Davis does not recall advising Mr. Nickerson that Judge Hammond's law clerk had called and asked her to draft the order (PCR 1578). She indicated that at oral argument before this court Mr. Nickerson knew that she had typed the order (PCR 1585). Mr. Nickerson testified that he had no information, whatsoever, that Davis had typed the order that the judge signed and there was no discussion during oral argument indicating he knew she had typed the order. If he had known that she had typed the order, he indicated that he would have listed that first as grounds for rehearing and would have appealed to this court (PCR 1608-09).

Judge Hammond signed the revised order on October 30, 1990. (PCR 1576; D.Ex.D). It was filed in the Clerk's Office on October 31st (PCR 1465). The proposed order of the state and the order ultimately signed by Judge Hammond were significantly different. The proposed order indicated that an evidentiary hearing should be held. The final order ultimately signed indicated that there would be no evidentiary hearing and summarily denied relief (PCR 1582). Judge Hammond testified that he did not rubber-stamp the state's proposed order (PCR 1492). There was some period of time between the hearing and his signing of the order. He testified that it was not his practice to refuse to consider objections to any proposed order. Counsel frequently file things of their own volition that they feel are appropriate and he has to take them into consideration (PCR 1499-1500).

The signed order was faxed from the Attorney General's Office to CCR the same day (PCR 1576). Ms. Davis testified that she did not call Jay Nickerson to let him know the order was coming. A footnote on the front page of Swafford's motion for rehearing indicates Mr. Nickerson received the faxed order at 6:38 p.m. on Tuesday, October 30 (PCR 1576) Ms. Davis testified that she thought the machine was off an hour because of the time change and it was more like 5:37 p.m. when it was faxed (PCR 1576). She thought the judge's office had called Mr. Nickerson and then he called her and asked for a copy of the order (PCR 1577). On cross examination Ms. Davis indicated that she recalled Mr. Nickerson calling her and asking if she would fax the order. She indicated that she may have called him and left a message (PCR 1590). Mr. Nickerson has no recollection of calling Ms. Davis and requesting a copy of the fax (PCR 1608). On redirect she indicated that she had no way of knowing how Mr. Nickerson found out. She didn't know if he had heard through the Supreme Court of Florida. She had faxed the order to this court, and the United States District Court (PCR 1591-92). Mr. Nickerson remembers the fax coming across in the evening. He testified that he may have gotten a call from the Florida Supreme Court that tipped him off that something was moving (PCR 1608).

Swafford subsequently filed a motion for rehearing on November 1, 1990 (PCR 1576; S.Ex.A).[1] The motion contained

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[1] Swafford argued that counsel's failure to present or investigate mitigation resulted from neglect; the court improperly found the discovery violation would not have affected the outcome; the provisions of *Kokal v. State,* 562 So. 2d 324 (Fla. 1990), and *Provenzano v. State,* 561 So. 2d 541 (Fla. 1990), were not

arguments similar to those made in objections to orders Judge Hammond has prepared or proposed orders the other side has prepared (PCR 1482). Judge Hammond has regularly seen that type of argument in objections to orders (PCR 1484). Had Swafford chosen to file objections instead of a motion for rehearing he would have entertained them (PCR 1485). He would have expected corrections, disagreement and dissatisfaction from anybody in such a case (PCR 1484). The state filed a response (PCR 1608; D.Ex.N). An order denying rehearing was entered November 2, 1990 (PCR 1580). Judge Hammond stated that he gives serious consideration to arguments made in motions for rehearing (PCR 1484). After reviewing the motion for rehearing his position didn't change. He thought the state was correct in their position (PCR 1485). The orders were done with some consideration and study (PCR 1483). When he makes a decision after looking at several hundred or a few thousand pages of transcript he has pretty well made up his mind (PCR 1483). He is satisfied that he ruled according to the law (PCR 1483). Ms. Davis testified that she did not recall doing the order denying rehearing but she was typing the style of the case backwards and this one was typed in that fashion (PCR 1580).

At the conclusion of the evidentiary hearing on March 29, 1993, Judge Hutcheson found that: (1) Judge Hammond had directed Mr. Rowe to call the Attorney General's Office and request that a

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complied with; Swafford has learned of new evidence concerning claims I and II and the court erred in ruling Swafford had failed to establish mitigating evidence to be adduced by a mental health professional.

proposed order be prepared. (2) Mr. Rowe did not use written communications or attempt to set up a conference call. He did attempt to call CCR, after hours, but spoke only to a male voice, did not ascertain the man's name or position, whether he was a lawyer, investigator, paralegal, secretary or maybe the janitor, (although it was someone who seemed to know what was going on) which was ineffectual as far as putting CCR on notice that a proposed order had been requested. (3) There was no attempt to get a copy of the proposed order to CCR before it was signed by Judge Hammond so CCR had an opportunity to review it and file objections as pointed out in *Rose v. State,* 601 So. 2d 1181 (Fla. 1992) (PCR 1777-79).

This court had affirmed the denial of the 3.850 motion. *Swafford v. Dugger,* 569 So.2d 1264 (Fla. 1990). A petition for writ of habeas corpus had been subsequently filed in the United States District Court, Middle District of Florida. Relief was denied on November 15, 1990. The United States Court of Appeals for the Eleventh Circuit ultimately stayed Swafford's execution and set a briefing schedule. Swafford subsequently filed a second 3.850 motion. The Eleventh Circuit held the case in abeyance pending resolution of the motion.

The second 3.850 motion was filed on November 21, 1991. The state filed its response on February 10, 1992. There was a six week gap in which Sean Daly was ostensibly preparing an order (PCR 1586). Ms. Davis then received a phone message in April from Mr. Rowe which indicated that she should submit a draft order (PCR 1595). She did not personally speak to him on the

telephone, received no directions, was not told what to put in the order, and did not discuss the merits (PCR 1585; 1594). She did not inform Swafford's counsel that the judge's office had called her about a draft order. She called Mr. Daly and said "The judge has contacted this office, you take care of it." (PCR 1580). Mr. Rowe remembered calling CCR. The policy was always to speak to both sides when requesting an order. He could not remember who he spoke to or what attorney was involved in the case at that time (PCR 1653-54). Ms. Davis typed the order and gave it to Sean Daly. She received back a courtesy copy (PCR 1586). Mr. Daly sent the order to the judge and mailed a copy with a cover letter to CCR on May 20, 1992 (PCR 1476 D.Ex.G & H).

Judge Hammond signed the order on May 22, 1992 (PCR 1474-76; D.Ex.G, H). The order was not filed in the Clerk's office, however, until June 9, 1992 (PCR 1474). Judge Hammond testified that counsel frequently request a matter to be heard again or clarified and that CCR would have had an opportunity to object and could have requested a hearing or a number of different things but requested nothing (PCR 1476). Judge Hammond had previously noted that members of CCR's staff have contacted his office several times (PCR 1448). Mr. Rowe testified that the other side can always object to a proposed order. They hold up sending an order out if there is an objection to it (PCR 1672).

Judge Hammond further testified that after the 3.850 motion was filed he took no action to prevent Swafford's counsel from submitting a proposed order. He would not have discouraged or in any way interfered with that. Up until the time of his order of

May 22, 1992, any party could have submitted proposed orders (PCR 1486).

Swafford subsequently filed a motion for rehearing and to disqualify the judge (PCR 1487; D.Ex.B). Judge Hammond testified that he gives careful consideration to motions for rehearing, would have given careful consideration to the arguments of Swafford's counsel, and would have reconsidered what was previously argued. He probably would have had the clerk do some research and would have discussed the matter in detail (PCR 1487-88). The motion was denied on June 29, 1992 (PCR 1512; D.Ex.J). Judge Hammond testified that his position wouldn't have changed a bit if the motion was styled "Objection to Proposed Order" instead of "Motion for Rehearing." (PCR 1488).

Briefs were subsequently filed in this court on appeal from the second denial of post conviction relief. Jurisdiction was relinquished for a hearing on the issue of *ex parte* contact as well as on the issue of Assistant Public Defender Ray Cass' alleged law enforcement status.

Judge Hutcheson took judicial notice of the testimony of now deceased Sheriff Duff in the case of *Harich v. State,* 573 So. 2d 303 (Fla. 1990). He also allowed transcripts of the testimony of Sheriffs Moreland and Knupp in the omnibus hearing ordered by this court on the "Howard Pearl/Deputy Sheriff" issue, raised by numerous death row inmates, over the state's objection that they were not even sheriffs of those separate counties outside Volusia County at the relevant time and that the effect of the honorary Volusia County card was beyond their expertise (PCR 1548-1550).

As this court is aware from its review in the *Harich* case, testimony in the lower court established that Sheriff Duff issued the card for good will and/or political purposes. The card was issued to dignitaries like television personality Willard Scott, and was even issued by the sheriff to newborn babies. 573 So. 2d at 304.

Assistant Public defender Raymond Cass testified below that he was assigned to litigate capital cases in September, 1983. He and Howard Pearl prepared the Swafford case together and he tried it.[2] Mr. Cass handled all phases of the trial (PCR 1708-09). Sheriff Duff of Volusia County also gave him a "Special Deputy" card (PCR 1709). At one time Mr. Cass indicated he received the card in 1978 but testified that he was pretty sure that he was given the card prior to Swafford's trial, late in law school, or when he was admitted to the bar or shortly thereafter, sometime between 1968 and 1971 or 1973 (PCR 1710; 1712; 1723). He did not solicit the card from Sheriff Duff. He had known Sheriff Duff since 1955 or 1956 (PCR 1713). Sheriff Duff never told him the purpose of the card (PCR 1712). He perceived the card as an act of niceness or a goodwill gesture (PCR 1711; 1714).

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[2] Swafford previously claimed in a motion for post conviction relief and a petition for writ of habeas corpus that Howard Pearl had a conflict of interest because he was also a special deputy sheriff while he represented Swafford. The denial of relief was affirmed by this court because Pearl's involvement in the case was minimal and Swafford could not have been prejudiced. *Swafford v. Dugger,* 569 So. 2d 1264, 1267 (Fla. 1990); *Swafford v. Singletary,* 584 So. 2d 5 (Fla. 1991).

The card was a little bigger than a personal calling card (PCR 1710). His name was typed on the card. The sheriff's signature did not appear to be an original but was put on the card at the time of printing (PCR 1722). He felt that the card was valid for as long as Sheriff Duff was in office. He thinks Sheriff Duff left office in 1986 (PCR 1713). Duff was still the Sheriff at the time of Swafford's trial (PCR 1724).

Mr. Cass did not make the card a secret. If anyone had asked him about it before 1990 he would have revealed its existence (PCR 1720). He testified, in fact, that he told CCR he had the card some two years before the "Howard Pearl/Deputy Sheriff" hearing before Judge Driver in December 1992. He voluntarily told CCR he had such a card prior to 1990. He was present in an interview and said "Well, I have one, too," although he did not have one from Marion County (PCR 1719). He was interviewed by CCR last fall or winter in connection with the Swafford case and again revealed his status as a special deputy sheriff (PCR 1725). He gave a deposition in anticipation of an evidentiary hearing in a number of cases involving Howard Pearl and indicated that Sheriff Duff had given him a card (PCR 1709).

Mr. Cass further testified that the card was not useful to him (PCR 1712). He didn't really consider the card to be worth anything (PCR 1717). If he was stopped late at night by a sheriff's officer he probably would have flashed it but the occasion never occurred (PCR 1712). He never used the card to receive a benefit or an advantage (PCR 1716). He did not need the card as a gun toter's permit. He was an investigator for the

State Attorney. He was also a civil police officer in Daytona Beach Shores, with powers of arrest, which enabled him to carry a gun. This appointment was nullified before he was sworn in at the Florida Bar (PCR 1714; 1716) or after he got back from Houston from a public defender's college in August 1973 (PCR 1723).

Sheriff Duff never indicated that he had powers of arrest (PCR 1715). He never issued him a gun, badge or uniform (PCR 1716). He never called upon him to perform the duties of a deputy. He never made a stop. He never made an arrest (PCR 1715). Mr. Cass was never compensated by Sheriff Duff (PCR 1716).

Mr. Cass did not consider himself to be one of Sheriff Duff's deputies and did not want to be a deputy (PCR 1714). He did not perceive himself as having the powers of a deputy sheriff or arrest powers (PCR 1715). He told CCR that no powers were conferred upon him by virtue of receiving the card (PCR 1720). He never supplied law enforcement with any information about Roy Swafford (PCR 1720).

Mr. Cass stopped carrying Sheriff Duff's card about the same time that he started his practice (PCR 1717) in 1973. He put it in a memorabilia box in his bedroom. He couldn't find it for the December 1992 "Howard Pearl" hearings (PCR 1722). He never notified Sheriff Duff that he didn't want his card anymore because he thought that he really wouldn't care and he didn't believe he had given him a commission in the first place (PCR 1723; 1727).

Present Sheriff Vogel's secretary Sharon Phillips testified at the hearing below. She was a receptionist when Ed Duff was the sheriff. She witnessed him hand out the cards to "most anybody." She has not law enforcement training. She was given a card. Her five and seven year old nephews had a card just like hers. If someone in the department had a baby it was given a card. She testified that it was a PR type card. She doubted that it would have gotten her out of a traffic ticket (PCR 1727-1737).

Judge Hutcheson found, based on the testimony, that attorney Ray Cass was issued a card from Sheriff Duff. It was not solicited but was proffered by Sheriff Duff. Cass and his family supported Sheriff Duff when he ran against Sheriff Thursday back in the mid to late 50's. The cards were handed out by Sheriff Duff as political patronage or favors to people in the hope that maybe they would think kindly toward him if he was up for election again or speak favorably on his behalf to others (PCR 1772). Mr. Cass was given the card sometime in the 60's or early 70's. He quit carrying the card somewhere around 1971 to 1973. He put it in a box on his dresser. This would have been a full ten years before the instant crime was committed, which was in 1983. The card became lost or was thrown away. Cass was given no duties to perform. He expected no benefits other than maybe getting out of a speeding ticket by showing the card (PCR 1773). He had no duty to arrest anyone. The card was not offered for the purpose of carrying a firearm or a concealed weapon. If, in fact, he was expecting any benefits from the card

he quit worrying about them by 1971 to 1973 when he quit carrying the card. This was ten years or more before the murder. By 1983, he was not even carrying the card so he could not expect any benefits. Judge Hutcheson further found that the card is honorary. The card that Sheriff Vogel's secretary has, which is basically the same card that Mr. Cass had, doesn't use the term "Special Deputy Sheriff" (PCR 1774). It has a blank for typing in someone's name. It states "Regular Constituted Deputy Sheriff, to serve and execute all legal papers and processes in Volusia County, Florida, with full power to act as Deputy Sheriff of Volusia County until my term expires or this appointment is revoked." There is a place for the date. A signature line follows. Underneath the signature line is the word "Sheriff." The card would then bear the signature of Sheriff Duff. On the backside it has "duration indefinite. Investigation" (PCR 1775). Judge Hutcheson found that this type of card was issued to Mr. Cass but he quit carrying it anywhere from 1971 to 1973, so he could not show it to anyone to get out of a speeding ticket or anything else, some ten years or more before this incident came up (PCR 1776).

SUMMARY OF ARGUMENT

I & II. Contact between the judge's clerk and the state should not void 1990 proceedings because post conviction counsel argued against the state's position and its proposed order and had the opportunity to criticize the judge's findings in a motion for rehearing and the state only ministerially typed changes at the clerk's behest and had no discussion with the judge, who had reached a decision before the contact. Post conviction counsel had ample opportunity in 1992 to prepare its own proposed order and by virtue of delay should not acquire critiquing rights as to the state's order.

IX. Prior to 1990 CCR knew that Mr. Cass had a deputy sheriff's card and could have raised the issue in the first Florida Rule of Criminal Procedure 3.850 motion. No conflict existed by virtue of PR card conferring only honorary deputy status.

I & II THE CIRCUIT COURT PROPERLY DENIED THE MOTION TO DISQUALIFY THE JUDGE AS WELL AS SWAFFORD'S POST CONVICTION CLAIMS.

In his initial brief Swafford argued that he was denied a full and fair hearing on his Florida Rule of Criminal Procedure 3.850 motion to vacate when the circuit court denied the motion to disqualify the judge. Swafford now alleges, based on the record developed at the evidentiary hearing below, that there were two incidents of *ex parte* contact between the state and the circuit court judge and that his contention that Judge Hammond engaged in *ex parte* communications with the state constitutes sufficient grounds for disqualification. Swafford concludes that Judge Hammond's refusal to disqualify himself was reversible error and this court must set aside the order denying Swafford's motion for post-conviction relief and remand for new proceedings. Swafford contends that he should be put back in the position he was in before all *ex parte* contact occurred and should be returned to circuit court for consideration of his *initial* Rule 3.850 motion.

Swafford argued below that the purpose of the remand in this case was only for expansion of the record in support of existing claims, in particular the issue whether the motion to disqualify should have been granted (PCR 1437). Counsel continued "And so, really, the issue is not whether there was *ex parte* contact but whether I, in good faith, looking at the record and the state of the record, could believe that there was *ex parte* contact because that's the point of view the motion is made.

It's from my point of view, Mr. Swafford's point of view, a motion to disqualify; and under the law, the facts contained in it must be taken as true... the question isn't for you to decide whether there's ex parte contact, because what does that lead to? That's not the issue. The issue is: Should Judge Hammond have granted the motion to disqualify, which is different. So, therefore, this is simply record expansion." (PCR 1438).

Pursuant to Swafford's theory of the case relief is not warranted. As fully argued in Point II of the Answer Brief of Appellee, the affidavits in support of the motion to disqualify were legally insufficient; the motion to disqualify was not timely filed; and the facts alleged in the motion would not prompt a reasonably prudent person to fear that he or she could not get a fair trial. Under analogous federal law an appearance of impropriety would not be created by the circumstances of this case and disqualification of the judge would not be mandated. *See, In re Colony Square Co.*, 819 F.2d 272 (11th Cir. 1987). It matters little that *ex parte* contact could be discerned from the record on remand since the facts must be taken as true in a motion to disqualify anyway.

There was no secretive *ex parte* contact in this case. The contact was not divulged by the state because there was no reason to believe Judge Hammond's clerk would not also be contacting CCR, particularly under warrant conditions. Judge Hammond had no reason to disclose the contact because he was unaware that CCR was not in the information loop. The clerk was not aware that the CCR lawyer did not get the message. Messages are hardly

uncommon in warrant situations. There seems to be a total lack of intent to even indulge in what could be characterized as "*ex parte*" contact. The lower court, in fact, seemed to base its decision on the fact that CCR was insufficiently noticed (PCR 1777-79).

The undisclosed contact should not void prior 1990 proceedings. The state was not the only party that prepared a proposed order (PCR 1462; D.Ex.C). Mr. Nickerson had also prepared an order reflecting his position in the case (PCR 1583). This is not a case where opposing counsel never saw the proposed order or never had the opportunity to object to it. At the status hearing on October 24, 1990, Mr. Nickerson not only objected to the state submitting an order but argued that the order was full of erroneous legal positions and factual determinations (PCR 1495). Thus, the state's position was known prior to the order.

The telephone conversation between the judge's clerk and the state was not a one-sided merits discussion to the prejudice of Swafford's right to be heard. The typing of the order for the judge to sign was a strictly ministerial function, prompted in large part, it would seem, by not only the exigencies attendant to a warrant but a lack of judicial resources, as well. The ultimate position taken by the judge was contrary to the state's position and dispensed with an evidentiary hearing. This position was adopted by the judge prior to the call to the state. There was no danger that the judge could be subtly influenced by a one-sided call because the judge's mind was already made up and

he was not the person who even made the call. The result would have been no different if the judge's secretary had typed the order. In *In re Colony Square Co.*, 819 F.2d 272 (11th Cir. 1987), the Eleventh Circuit Court of Appeals held that the fact that a judge allowed a litigant to draft the court's order without notice to the opposing party does not automatically invalidate the order. The order will be vacated only if the party can demonstrate that the process by which the judge arrived at the order was fundamentally unfair. Such was not demonstrated here as the judge came to a decision prior to any contact.

Unlike the situation in *Rose v. State*, 601 So. 2d 1181 (Fla. 1892), the nature of the contact is known in this case. The *Rose* prohibition on *ex parte* contact does not even include strictly administrative matters not dealing in any way with the merits of the case. Unlike *Rose*, the state's proposed order was not adopted as a *result* of *ex parte* communication. The result was cognitively born before the keyboard was bent.

Swafford had an opportunity to argue against the state's position at the hearing. What he really complains of is the lack of opportunity to argue against the *judge's* position, as reflected by the changes Ms. Davis was instructed to make in the order. But the very purpose of a motion for rehearing is to argue against the judge's findings. A motion for rehearing rearguing the merits of Swafford's claims was filed and entertained in this case, which cured any due process error (PCR 1576; S.Ex.A). There is no reason to believe the result would have been different if the motion for rehearing was instead styled

"objection to order." The designated heading gave Swafford no less of a voice in the proceedings. Swafford not only had a full opportunity to advance his position in a motion for rehearing but also before this court and the United States District Court for the Middle District of Florida, as well. *See, In re Colony Square,* 811 F.2d 272, 276 (11th Cir. 1987). There is nothing to be newly argued simply because the order was not typed by the judge's secretary. The facts of the case have not changed. The decision was deemed correct by this court and the federal court. Procedural bars were upheld on the basis of the law.

No bias can even be perceived. The judge talked to no one, had already made up his mind and no argument was solicited or entertained from the state. There was no one-sided persuasion by the State. Determinations were not made by the opposing party. The judge's decision was actually contrary to the state's position. In the post conviction arena a decision should not be reversed on the basis of mere "appearances" especially where the highest state court and a federal court have found the judge's order to be in accordance with the law and have decided the case in a similar manner.

There was no contact between Mr. Rowe and Ms. Davis in 1992. Mr. Rowe left a message to do a proposed order and testified that he may have called CCR. CCR could well have prepared its own proposed order from the time of filing the post conviction motion in November 1991, until May 1992, when the order was signed. Because the state's position may have more law behind it doesn't create a critiquing right when CCR could

prepare its own order citing authority for its position and against the state's. The order was not filed until June 9, 1992, and objections to it could have been prepared (PCR 1474). A motion for rehearing was subsequently filed and any merits arguments could have been made and would have been seriously considered by the court (PCR 1487-88).

The state respectfully submits that this court should recede from its decision in *Huff v. State,* 18 Fla. Law Weekly S396 (Fla. July 1, 1993). CCR had a significant period of time to prepare and submit its own order after the response was filed and the case was ripe for decision. CCR routinely prepared and submitted their own proposed orders until the advent of *Rose v. State,* 601 So. 2d 1181 (Fla. 1992), after which time such orders were discontinued in favor of the practice of simply waiting to *critique* the state's proposed order and hoping it would be quickly signed so counsel could complain that there was no opportunity to be heard. Swafford has had the opportunity to be *heard* since he filed the Florida Rule of Criminal Procedure 3.850 motion. Due process hardly mandates that he be allowed to *critique* his opponent's orders when he had the right to submit his own order, especially where the state's views are very well announced in its responses, which are served upon CCR, and which form the basis of proposed orders in the first place and any refutation thereof could be placed in the defendant's proposed order. There is no rule that mandates that the state goes first. CCR could well submit its proposed order first but does *not* because delay does not adversely affect death-sentenced defendants. In short, under

Huff, the state is left out of the "critiquing" loop and the defendant is rewarded for his inaction by even further delay.

The state would respectfully submit that the solution proposed by this court in *Huff* simply will not solve the problem. The root of the problem is the refusal to prepare orders, which problem will not be solved by simply having the attorneys appear before the court on an initial 3.850 motion. This solution also presupposes that both sides will appear prepared. The state would suggest that the solution to eliminate all the alleged improprieties is simply to mandate that the judge prepare his or her *own* order, which should be a simple matter since the court would have the defendant's motion and the state's response before it. Such duty is uniquely within the province of the trial judge, in any event, and neither party can appropriately discern the reasoning behind the judge's decision anyway. Time limits should be imposed since one of the purposes of filing proposed orders has been to prompt a decision by a reticent lower court.

IX TRIAL COUNSEL'S STATUS AS AN HONORARY DEPUTY CREATED NO ACTUAL CONFLICT OF INTEREST AND COUNSEL DID, IN FACT, ADEQUATELY REPRESENT SWAFFORD. AN EVIDENTIARY HEARING IS NOT REQUIRED FOR THE REASON THAT A FULL AND FAIR EVIDENTIARY HEARING WAS HELD BELOW.

The state would first submit that the issue of trial counsel Ray Cass' status as an honorary Volusia County Deputy Sheriff and whether such status constitutes a conflict of interest is procedurally barred. Although Swafford alleges that Mr. Cass' status first became known in a deposition before the evidentiary hearing ordered by this court in *Herring v. State,* 580 So. 2d 135 (Fla. 1991), in December 1992, such is not actually the case. Mr. Cass testified below that he told CCR that he had the card two years *before* the hearing. *Prior* to *1990*, he voluntarily told CCR that he had a card. He was present in an interview and said "well, I have one too," although he didn't have one from Marion County, but from Sheriff Duff (PCR 1718-19). Although Swafford will make much of the fact that Cass did not think his status was thusly divulged *in connection with the Swafford case,* such fact hardly militates against a finding of a procedural bar (PCR 1725). CCR would certainly be under some obligation to investigate facts thrown in their lap. They ultimately did investigate after the December 7, 1992, deposition of Mr. Cass. This information was not divulged by Mr. Cass in the *Swafford* case *either*, but in a deposition in the *Herring* case. Evidently CCR felt like chasing the ball in this instance but was content to let matters stay as they were when the same information was divulged in 1990. Thus, the fact that the information was not

specifically put in counsel's face labeled "Swafford," hardly excuses letting two 3.850 motions and appeals go forward without investigating this information and raising a conflict of interest claim. *See Swafford v. Dugger,* 569 So. 2d 1264 (Fla. 1990); *Swafford v. Singletary,* 584 So. 2d 5 (Fla. 1991). Swafford has no right to piecemeal litigation and should not be allowed to attack his trial counsel *one by one* on *identical* grounds in *separate* proceedings.[3]

It is clear from *Harich v. State,* 573 So. 2d 303 (Fla. 1990), that Sheriff Duff kept a box of cards listing those persons to whom he had given his honorary deputy PR cards. Collateral counsel could long ago have revisited such box, particularly after the decision in *Harich* and ascertained what Volusia County attorneys held such cards and which death row inmates they may have represented. It is certainly not the job of the state, as counsel now suggests, to raise claims of behalf of such defendants.

Aside from demanding the right to "discover anew" the honorary deputy sheriff status of Volusia County attorneys each time a warrant is signed or litigation is prompted in a death penalty case, counsel also demands the right to unlimited evidentiary hearings . It is clear from the decision in *Harich* and the testimony of Sheriff Vogel's secretary that these cards were issued to small children and newborn babies (PCR 1731).

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[3] Swafford has also complained in the past of a conflict of interest of an attorney who *previously* represented both Swafford and a codefendant in *another* criminal matter and who continued to represent the codefendant after conviction. *Swafford v. Dugger,* 569 So. 2d 1264, 1267 (Fla. 1990).

Under present litigation strategy, should any of those small children in Volusia County grow up and attend law school and later represent someone sentenced to death, they would be subject to the same inquisition years later that is now occurring in present capital cases. Logic demands that some limitation be put upon the needless raising and re-raising of this issue. This court's decision in *Harich* could not have been more clear. This court refused to find a *per se* conflict of interest by virtue of the mere status as a special or honorary deputy. 573 So. 2d at 306. The court refused to find an *actual* conflict by virtue of a position would could best be characterized as "honorary" *Id.* This court accepted the findings of the circuit court in *Harich* that the card was *honorary* since it was issued to dignitaries like television personality Willard Scott, newborn babies, and was issued for goodwill or political purposes with no expectation that the duties of a deputy sheriff would be performed and no duties were actually performed. *Id.* at 304. The facts of this case *parallel* the facts in *Harich*. Counsel, has, in essence, delayed proceedings and litigated a claim that can best be described as futile under existing caselaw. The state recognizes that this court has indicated that capital defendants have a due process right to a hearing on this issue. *See Wright v. State,* 581 So. 2d 882 (Fla. 1991); *Herring v. State,* 580 So. 2d 135 (Fla. 1991). If the facts, however, are not outside the parameters of the facts found in *Harich* the same result reached in *Harich* must be reached in such case. Clearly, the court's decisions do not mandate the endless raising of futile claims. Mr. Cass

specifically testified below that he told CCR that no powers were conferred upon him by virtue of receiving the card from Sheriff Duff (PCR 1720). He didn't consider the card to be worth anything (PCR 1717), and he did not consider himself connected to law enforcement by virtue of the card (PCR 1717). It is not even argued that this case is somehow outside the scope of the *Harich* decision or that the decision in *Harich* should be receded from or even reconsidered.[4] In fact, contrary authority is not even recognized. While a capital defendant may have due process right to a hearing under such circumstances, surely some duty devolves upon collateral counsel to determine whether a valid claim supports the need for a hearing so as not to waste judicial resources, not to mention the money of the taxpayers of this state. A formal judicial hearing is not the appropriate place to conduct investigation of a claim.

Beyond just presenting a futile claim, counsel further argues that "an evidentiary hearing is required." The state would point out that an evidentiary hearing *was*, in fact, held below.[5] In the absence of a *per se* or actual conflict there is no

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[4] Aside from not recognizing *Harich* as contrary authority in general, Swafford also spews out the same old arguments raised and rejected in *Harich* as to the doctrine of incompatibility and rights under Article II, section 5(a) of the Florida Constitution.

[5] Counsel belatedly contends an evidentiary hearing is needed. Contrary to the state's position below counsel argued: "I think the state's still maintaining that this should be a full blown evidentiary hearing. I contend it is records expansion." (PCR 1428). In remanding this case this court was very clear that an evidentiary hearing was to be held. What counsel asserts is that it took an actual evidentiary hearing in order for this court to determine if an evidentiary hearing is required.

express need to explore the realm of possible prejudice. This futile claim was fully and fairly litigated below. The issue of ineffective assistance of counsel was entertained and rejected in the first Florida Rule of Criminal Procedure 3.850 motion and this court affirmed the denial of relief. *Swafford v. Dugger,* 569 So. 2d 1264 (Fla. 1990). Thus, counsel's actions have been scrutinized and dissected in the past. All instances of substandard performance and the results thereof should have been apparent to counsel from that investigation, the records and the files in this case. Counsel has become no more ineffective in 1993 by virtue of the discovery of an honorary deputy sheriff card, thrown unused into a memorabilia box, where it has lain for years prior to Swafford's trial. It can also hardly be argued that collateral counsel has become more perceptive in discerning the various incidences of counsel's newly alleged ineffectiveness simply by virtue of the discovery that counsel at one time possessed such card. In essence, if a conflict exists at all it would only indicate a possible *reason* for counsel's actions. If those actions were ineffectual in their own right it would have been apparent from the record. It is clear that collateral counsel sought to have an extensive evidentiary hearing in a last ditch attempt to circumvent this court's decision in *Christopher v. State,* 489 So. 2d 22 (Fla. 1986), prohibiting the successive raising of an ineffective assistance of counsel claim, by backdooring the claim through the judicial gate by portraying it as multiple instances of malfeasance or prejudice suffered by Swafford as a result of counsel's "conflict of interest."

Swafford also weakly murmurs that he "has proffered evidence concerning *Brady* material not turned over to the defense team due to the Volusia County Sheriff's Office efforts to take advantage of its political patronage." Supplemental Brief of Appellant, p.34. This is merely an attempt to again reopen a previously rejected *Brady v. Maryland,* 373 U.S. 83 (1963), claim, *see, Swafford v. Dugger,* 569 So. 2d 1264, 1267 (Fla. 1990); *Spaziano v. State,* 570 So. 2d 289 (Fla. 1990). Moreover, the constant practice of damning both the state for not turning material over and defense counsel for not getting the material, rather than conclusively determining the fault of someone, merely presents to this court the uninvestigated, speculative type of claim that warrants no hearing at all. *Blackledge v. Allison,* 431 U.S. 63 (1977); *Maggio v. Williams,* 464 U.S. 46 (1983). The state would submit that there never should have been an evidentiary hearing on this futile claim below but the hearing ultimately held was full and fair.

The state would ask what distinguishes this case from *Harich*? The answer is absolutely nothing. As the statement of the case reflects, there is the same unsolicited card handed out for the same political patronage purposes. Again, there was no uniform, badge, gun, compensation or expected duties. There was no gain or benefit from the card. Any expectation of benefit was relinquished long before the trial in this case by virtue of counsel relegating the card to memorabilia status in a bedroom box. Unlike the situation in *Harich*, this attorney did not even want a gun toter's permit, in the first place. This claim must meet the same fate as the conflict of interest claim in *Harich*.

CONCLUSION

Based on the above arguments the State of Florida respectfully requests that the order summarily denying Swafford's successive motion to vacate judgment and sentence be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing has been furnished by U.S. Mail to Martin J. McClain, Office of the Capital Collateral Representative, 1533 South Monroe Street, Tallahasse, Florida 32301, this 15th day of September, 1993.

Margene A. Roper
Of Counsel