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

ANSWER BRIEF OF APPELLEE

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IN THE SUPREME COURT OF FLORIDA

ROY CLIFTON SWAFFORD,

Appellant,

v. CASE NO. 80,182

STATE OF FLORIDA,

Appellee.
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STATEMENT OF THE CASE AND FACTS

On the morning of Sunday, February 14, 1982, the victim, Brenda Rucker, was at work at the FINA gas station and store on the corner of U.S. Highway No. 1 and Granada Avenue in Ormond Beach, Florida. Two witnesses saw her there at 5:40 and 6:17 a.m. A third witness, who said he arrived at the station at around 6:20, found no attendant on duty although the store was open and the lights were on. At 6:27 a.m., the police were called, and an officer arrived at the station a few minutes later.

On February 15, 1982, the victim's body was found in a wooded area by a dirt road, about six miles from the FINA Station. She had been shot nine times, with two shots directly to the head. The cause of death was loss of blood from a shot to the chest. Based on trauma, lacerations, and seminal fluid in the victim's body, the medical examiner concluded that she had been sexually battered. Holes in the victim's clothing corresponding to the bullet wounds to her torso indicated that she was fully clothed when shot. The number of bullet wounds and the type of weapon used indicated that the killer had to stop and reload the gun at least once. Several bullets and fragments were recovered from the body.

Swafford and four companions drove from Nashville, Tennessee, to Daytona Beach, Florida, departing Nashville at about midnight on Friday, February 12 and arriving in Daytona Beach at about noon the next day. After setting up camp in a state park, Swafford and some others went out for the evening,

arriving back at the campground at about midnight. Then, according to the testimony at trial, Swafford took the car and went out again, not to return until early Sunday morning.

State's witness Patricia Atwell, a dancer at a bar called the Shingle Shack, testified that Swafford was there with his friends on Saturday night, that they left at around midnight, and that Swafford returned alone at about 1:00 a.m. Sunday. When Atwell finished working at 3:00 a.m., she left the Shingle Shack with Swafford. They spent the rest of the night together at the home of Swafford's friend. At about 6:00 a.m., he returned her to the Shingle Shack and left, driving north on U.S. 1, a course that would have taken him by the FINA station. In the light traffic conditions of early Sunday morning, the FINA station was about four minutes away from the Shingle Shack. According to Swafford's travelling companions, he returned to the campsite around daybreak. The court took judicial notice of the fact that sunrise took place on the date in question at 7:04 a.m.

On Sunday Swafford and his friends attended an auto race in Daytona Beach. That evening they went back to the Shingle Shack, where one of the party got into a dispute with some other people over money he had paid in the expectation of receiving some drugs. Swafford displayed a gun and got the money back. The police were called, and Swafford deposited the gun in a trash can in one of the restrooms. The police seized the gun, and ballistics tests performed later conclusively established that Swafford's gun was the gun used to kill the victim. The evidence also showed that Swafford had had the gun for some time.

Although the gun was not tested until more than a year after the murder, after authorities received a tip concerning Swafford's possible involvement, evidence established the chain of police custody and the identification of the gun.

The state also presented evidence that Swafford made statements from which an inference of his guilt of the crimes charged could be drawn. Ernest Johnson told of an incident that took place about two months after this murder. After meeting Swafford at an auto race track, Johnson accompanied him to his brother's house. When leaving the brother's house, Swafford suggested to Johnson that they "go get some women" or made a statement to that effect. Johnson testified as follows concerning what happened then:

> Q. Okay. What happened then? What was said by the Defendant?
> A. He just asked me if I wanted to go get some girl and I said yeah.
> Q. And then what took place?
> A. We got in-he asked me if I wanted to take my truck and I said no, so we went in his car.
> All right. We went and got a six-pack of beer and started riding. And he said do you want to get a girl, and I said, yeah, where do you want to get one, or something like that. He said, I'll get one.
> So, as we was driving, I said, you know, where are you going to get her at. He said, I'll get her. He said-he said, you won't have to worry about nothing the way I'm going to get her, or he put it in that way. And he said-he said, we'll get one and we'll do anything we want to her. And he said, you won't have to worry about it because we won't get caught.
> So, I said, how are you going to do that. And he said, we'll do anything we want to and I'll shoot her.

> So, he said if-you know, he said that he'd get rid of her, he'd waste her, and he said, I'll shoot her in the head.
>
> I said, man, you're crazy. He said, no, I'll shoot her in the head twice and I'll make damn good sure that she's, you know, she's dead. He said, there won't be no witnesses.
>
> So, I asked him, I said, man, don't-you know, don't that bother you. And he said, it does for a while, you know, you just get used to it.

Johnson then told the jury that he and Swafford went to a department store parking lot late at night, that Swafford selected a victim, told Johnson to drive the car, directed him to a position beside the targeted victim's car, and drew a gun. Johnson at that point refused to participate further and demanded to be taken back to his truck.

The jury found Swafford guilty of first-degree murder and sexual battery and recommended a sentence of death. The trial court then sentenced Swafford to death for the first-degree murder.

The trial court found the murder to have been committed for the purpose of avoiding or preventing a lawful arrest; to have been especially heinous, atrocious, or cruel; to have been committed in a cold, calculated, and premeditated manner without any pretense or moral or legal justification; committed while engaged in, or in flight after, committing sexual battery.

The trial court found that one item of information adduced by the defense constituted a nonstatutory mitigating circumstance. Based on the parties' stipulation that Swafford's father, were he able, would have testified that Swafford had

attained the rank of Eagle Scout, the trial court found that Swafford had indeed been an Eagle Scout and noted "the efforts required to achieve such an honor." The court found the factor entitled to very little weight in mitigation, commenting that it did "demonstrate that the Defendant, at some point in his life, had training and supervision that should have led him to become a lawful contributing citizen." This court affirmed the conviction and sentence on direct appeal. *Swafford v. State,* 533 So.2d 270 (Fla. 1988). [1]

Swafford's post conviction and habeas claims were later rejected by this court. Many of such claims should have been raised on direct appeal and were found to be procedurally barred. *Swafford v. Dugger,* 569 So.2d 1264 (Fla. 1990).

Swafford subsequently filed a petition for writ of habeas corpus in the United States District Court, Middle District of Florida, Orlando Division. Oral argument was had on his claims on November 14, 1990 (App. 16). All relief was denied by G. Kendall Sharp, United States District Judge on November 15, 1990 (App. 88). Swafford then appealed the denial of habeas relief to the United States Court of Appeals for the Eleventh Circuit. Briefs were filed therein. Swafford then filed a motion to hold proceedings in abeyance pending resubmission of *Brady v. Maryland* and related issues to the Florida state courts. (App. 119). Such motion was predicated on the premise that the state of

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[1] "1 PCR" refers to the record on appeal from the first motion to vacate, Supreme Court Case No. 76,884. "2 PCR" refers to the record below on this second motion to vacate, now the topic of appeal. "R" refers to the record on direct appeal, Supreme Court Case No. 69,359.

Florida was continuing to withhold documents. On December 16, 1991, United States Circuit Judge Peter Fay granted Swafford's motion to hold proceedings in abeyance (App. 138). On November 22, 1991, Swafford filed a successive motion to vacate judgment of conviction and sentence (2 PCR 126). On May 22, 1992, Circuit Judge Kim C. Hammond summarily denied the motion for post conviction relief and an order denying the same with attachments was filed on July 24, 1992 (2 PCR 1227-1314). On June 9, 1992, Swafford filed a motion for rehearing and to disqualify Judge (2 PCR 1315-1408). Said motion was denied on July 1, 1992 (2 PCR 1409-1412). Notice of Appeal was filed by Swafford on July 16, 1992 (2 PCR 1413-1414).

SUMMARY OF ARGUMENT

1. The circuit court's summary denial of Swafford's claims was not erroneous. Swafford could have litigated all Chapter 119 claims before the filing of the first motion to vacate and certainly within the two year limit of Florida Rule of Criminal Procedure 3.850. The new evidence is neither *Brady v. Maryland*, 373 U.S. 83 (1963) material, nor demonstrative of factual innocence of the type that would produce an acquittal upon retrial or change the sentencing outcome. Swafford's gun killed the victim, a fact that can't be changed by the speculations of a cadre of successive collateral soldiers attacking each predecessor's performance.

2. Judge Hammond properly declined to disqualify himself. While CCR alleges a history of ex parte contact between the lower court and the state beginning in the first post conviction proceedings, CCR counsel must have had some faith in the integrity of the lower court for it allowed Judge Hammond to rule on the successive motion to vacate before moving to have him disqualify himself. The motion to disqualify was not only untimely but was accompanied by two legally insufficient supporting affidavits. *Rose v. State*, 601 So.2d 1181 (Fla. 1982), spoke not to bias but the appearance of impropriety. There are no grounds present in the instant case to prompt a reasonably prudent person to fear that he or she would not get a fair and impartial hearing.

3. CCR has been through all pertinent records in this case. The Chapter 119 issue was litigated in the first post conviction proceeding and CCR was given access to all requested records. A

later perception by a successive attorney that some document may have importance that was not reproduced does not mean that access to public records files has been withheld. That the existence of a document can be hypothesized from another document does not mean such document has been withheld, even exists, or that access to files has been denied. An obvious attempt is being made to keep the door open for the filing of yet another repetitive motion. This is Chapter 119 gridlock at its finest.

4. The claim that counsel was ineffective at the guilt/innocence and penalty phase is a successive claim not raised within the two year period of Florida Rule of Criminal Procedure 3.850. All allegations of ineffectiveness should have been raised in the first motion.

5. The claim that Swafford's jury was improperly instructed in regard to the heinous, atrocious and cruel aggravating factor is procedurally barred for failure to object to such instruction or request an alternate instruction.

I THE CIRCUIT COURT'S DENIAL OF SWAFFORD'S CLAIMS WAS NOT ERRONEOUS.

Swafford first complains that the circuit court erred in applying a procedural bar to his claims. He contends that an evidentiary hearing would have been ordered if this were his first Florida Rule of Criminal Procedure 3.850 motion, as he presented claims premised upon *Brady v. Maryland*, 373 U.S. 83 (1963), *Strickland v. Washington*, 466 U.S. 668 (1984), and *Richardson v. State*, 546 So.2d 1037 (Fla. 1989), and facts which demonstrate he is factually innocent of the offense for which he was convicted and sentenced to death. He contends that the circuit court denied the motion to vacate and signed the state's proposed order simply because there had been a prior motion to vacate. He argues, citing *Lightbourne v. Dugger*, 549 So.2d 1364 (Fla. 1989), and *Jones v. State*, 591 So.2d 911 (Fla. 1991), that an evidentiary hearing is required on a second motion to vacate where, accepting the allegations as true, relief is warranted or where, accepting newly discovered evidence as true, a basis for relief is shown. He further complains that the circuit court held that a second motion is barred per se and did not address his factual allegations as to why his motion should have been considered on the merits.

Swafford next complains that the circuit court did not consider or allow evidentiary resolution regarding his proffer that CCR had not fulfilled its obligations to him during the first motion to vacate. Swafford contends that his attorney in the first proceedings did not render competent assistance as he was going through a divorce and personal crisis; at that time Governor Martinez' policy was to keep the pressure on attorneys representing clients on death row; CCR received Mr. Swafford's case under the pressure of an impending execution date at a time when death warrants were outstanding on numerous other CCR clients; CCR was underfunded and understaffed to meet the burden of multiple warrants and had a caseload of nonwarrant cases; and as a result of the warrant he was required to file the first Rule 3.850 motion six months early and counsel did not begin working on his case until twenty days before it was filed. Counsel ultimately resigned on October 1, 1990, effective November 1, 1990, and stayed on only until the stay of execution could be obtained for Swafford. Swafford alleges that the facts presented in his second 3.850 motion establish that he was entitled to an evidentiary hearing and relief and such facts were not presented before because prior counsel did not do his job. Counsel failed to contact witnesses, did not know the case,

and there were omissions in pleading, investigation and presentation. Swafford argues that pursuant to *Spalding v. Dugger*, 526 So.2d 71 (Fla. 1988), capital petitioners in Florida are entitled to the effective post-conviction assistance of counsel. The Overton Commission is alleged to have recognized that inmates are entitled to competent counsel in post-conviction relief proceedings, and implicitly recognized that the pace of warrant signings and lack of adequate funds and staff for CCR rendered CCR unable to provide competent representation.

Swafford further complains that the state's violations of Chapter 119 precluded a full presentation of his claims in his first motion to vacate. He alleges that the state intentionally and deliberately withheld Chapter 119 evidence until October 24, 1990, at which point the state only partially complied when it dumped one thousand pages of material on counsel, who was unable to review those documents within that time frame or to amend the motion to vacate. Only after a stay was entered and new counsel had time to review the material was it discovered that Chapter 119 still had not been complied with. Swafford argues that, at the very least, an evidentiary hearing is required to show that the state precluded a full presentation in the prior motion to vacate. Citing *State v. Kokal*, 562 So.2d 324 (Fla. 1990); *Provenzano v. Dugger*, 561 So.2d 541 (Fla. 1990); *Mendyk v. State*, 592 So.2d 1076 (Fla. 1992); and *Jennings v. State*, 583 So.2d 316 (Fla. 1991), Swafford argues that the state has an obligation to comply with Chapter 119 and to give a collateral litigant time to review the material once it is disclosed. He notes that in each of these decisions this court held that sixty days was a reasonable amount of time to review the documents and amend a pending motion but he was given no time and was unable to learn that the state had not, in fact, even fully complied with Chapter 119.

Swafford further alleges that during the initial proceedings the state and the judge engaged in ex parte communications which were not disclosed. Such communications became apparent when collateral counsel reviewed the type of the order signed by the judge. They were prepared on the same machine used to prepare the state's pleadings. While the case proceeded under warrant, prior counsel received faxed copies of these orders which distorted the type and precluded discovery of the ex parte contact. Swafford argues that pursuant to *Rose v. State*, 601 So.2d 1181 (Fla. 1992), this undisclosed ex parte communication must void the prior proceedings and his claims must be reconsidered.

Swafford also contends that he plead substantial, serious allegations which go to the fundamental fairness of his conviction and to the appropriateness of his death sentence. He claims that pursuant to Rule 3.850 and the precedents of this court a post-conviction movant is entitled to an evidentiary hearing unless the motion or files and records in the case conclusively show that the prisoner is entitled to no relief. Because the trial court denied the motion without an evidentiary hearing and without attaching any portion of the record to the order of denial, review is limited to determininig whether the motion conclusively shows on its face that he is entitled to no relief. Allegations must be treated as true except to the extent that they are conclusively rebutted by the record. He claims that he has alleged facts which, if proven, would entitle him to relief and that the files and records in his case do not conclusively show that he is entitled to no relief and that this court as in *Hoffman v. State*, 571 So.2d 449 (Fla. 1990), has no choice but to reverse the order under review, remand, and order a full and complete evidentiary hearing on Swafford's second 3.850 claims.

Ordinarily, when a post conviction movant alleges facts which, if proven, would entitle him to relief and the files and records do not conclusively show he or she is entitled to no relief an evidentiary hearing should be held. *See, Hoffman v. State*, 571 So.2d 449 (Fla. 1990). This rule does not obtain, however, as far as *successive* motions are concerned and *Lightbourne v. Dugger*, 549 So.2d 1364 (Fla. 1989), did not create such a rule. The denial of a prior motion did not bar Lightbourne's claim that cellmates acted in concert with the state in obtaining incriminating statements from him only because such acts were unknown to his attorney and could not have been ascertained by the exercise of due diligence prior to the statutory time limit. In the present case the lower court found no *Brady v. Maryland*, 373 U.S. 83 (1963), violation and determined that CCR had access to all files (2 PCR 1228). All claims should have been raised in

the first Florida Rule of Criminal Procedure motion. To the extent that ineffective assistance of CCR counsel or Chapter 119 violations are alleged any "newly discovered evidence" is not of such nature that it would probably produce an acquittal on retrial or a life sentence as required pursuant to *Jones v. State,* 591 So.2d 911, 915-917 (Fla. 1991). Even accepting such allegations as true does not warrant relief and the facts alleged hardly demonstrate factual innocence. Much of such evidence goes to support weak claims already rejected. Swafford's other myriad complaints are addressed elsewhere herein.

II SWAFFORD WAS NOT DENIED A FULL AND FAIR HEARING ON HIS MOTION TO VACATE WHEN THE CIRCUIT COURT DENIED THE MOTION TO DISQUALIFY THE JUDGE.

On June 8, 1992, after the lower court summarily denied his second Florida Rule of Criminal Procedure 3.850 motion, Swafford filed a Motion for Rehearing and to Disqualify Judge and Supporting Points of Authority. The recusal motion was supported by two accompanying affidavits alleged to have attested to the lower court's bias. Swafford alleges that the recusal motion was filed because ex parte contact between the court and the Office of the State Attorney led to the denial of his November 22, 1991, motion to vacate. On May 20, 1992, the prosecution filed with the court a draft order summarily denying relief on Swafford's second motion to vacate. A copy of this draft was sent via regular U.S. Mail to defense counsel. On May 22, 1992, the trial court adopted the state's order summarily denying the motion for post conviction relief. Swafford complains that the order was entered before he could file an objection to the state's order and without his being given the benefit of a hearing to argue the need for an evidentiary hearing. Swafford argues that because there was no "on the record" directive from the court ordering the state to provide a written order, the inescapable conclusion is that the order was the product of ex parte communication between the state and the court in violation of *Rose v. State*, 601 So.2d 1181 (Fla. 1992). Swafford alleges that he moved to recuse the trial court on the basis of this ex parte communication and a history of ex parte communications which occurred throughout this case. This is alleged to be the second time the court has signed a state's proposed order denying post-conviction relief. Swafford, who was under warrant at the time, filed his first motion to vacate on October 15, 1990. On October 22, 1990, the state filed, along with its response, a proposed order for evidentiary hearing. Swafford alleges that the next day the state, apparently subsequent to ex parte discussions with the same court, filed a notice of hearing for October 24, 1990. The defense was not contacted in advance to determine the feasibility of holding the hearing on twenty-four hours notice. The hearing was held on October 24, 1990, after which the court determined that it would review the issues involved and act accordingly. On October 30, 1990, the court issued its order summarily denying defendant's motion for post-conviction relief. Swafford alleges that this order was printed on the same word processor which produced the other state pleadings.

He complains that Paragraphs 1C, 1D, 1I, 3C, 3H, 3I, 3J, 3K, 3L, 3M, 3N, 3O, 3P, 7, 8, 9, 10, 11, 12, 13, 14 and 15 of the court's order are either identical to the state's previously proposed order, or are slightly modified with different introductory or closing clauses; that the court's order contains the same spacing errors in Paragraphs 1I, 3F and 3M as found in the state's proposed order, again indicating that both orders were prepared on the same equipment, or using the same computer disk; that the caption matches the caption on the state's pleadings and not the caption on the orders prepared and signed by the court on November 5, 1990. He concludes that "obviously, ex parte contact occurred" and the state printed a revised draft order which the judge signed. Pursuant to *Rose*, he argues that it is improper for the state to prepare an order for the court's signature without the defense being given an opportunity to object. Under such facts, it must be assumed that the trial court, in ex parte communication, had requested the state to prepare the proposed order. Swafford concludes that this court must reverse and remand.

In ruling on the motion for disqualification, the lower court was well aware of the limited function it must perform when reviewing such a motion: "[T]he judge with respect to whom the motion is made may only determine whether the motion is legally sufficient and is not allowed to pass on the *truth* of the allegations." *Livingston v. State,* 441 So.2d 1083, 1086 (Fla. 1983). Judge Hammond noted it would be reversible error for him to attempt to refute the allegations of the motion, *see, Lake v. Edwards,* 501 So.2d 759 (Fla. 5th DCA 1987), and he did not do so. (2 PCR 1409).

To be legally sufficient, a motion to disqualify is required, among other things, to be accompanied by two or more supporting affidavits, which also must be legally sufficient. Swafford's motion was accompanied by two affidavits in which the affiants stated that they had reviewed his motion and that based

solely on this reading of his allegations and supporting materials, they "believed" that the lower court demonstrated prejudice and a predisposition to rule against Swafford.[2] The lower court properly found these affidavits were wholly inadequate and not legally sufficient (2 PCR 1410). "An affidavit the statements of which are alleged on information and belief is, by the weight of authority, insufficient in any instance where one is required to make affidavit as to the substantive truth of facts stated, and not merely as to good faith." *Hahn v. Frederick,* 66 So.2d 823, 825 (Fla. 1953). *See also, Raybon v. Burnette,* 135 So.2d 228 (Fla. 2d DCA 1961).

In *Hahn, supra,* each of the two affiants had stated that he had read the main affidavit and that the facts therein were "true to the best of his knowledge, information and belief," and that he believed the judge was prejudiced against the defendant. In finding the affidavits insufficient, the *Hahn* court held that in order to support in substance the facts stated in the main affidavit, the supporting affidavits must state that the affiant "has knowledge" of the facts and "knows them to be true." It is a well settled rule that "the facts of an affidavit must be stated in a positive, and not a qualified manner." 66 So.2d at 825. As far as containing adequate language, the two affidavits in the instant case do not even go as far as those in *Hahn*. It

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[2] Affiant Fred Bingham, II merely stated "After review of these materials, I believe that Judge Kim C. Hammond has demonstrated in and out of judicial contexts his prejudice against Mr. Swafford and his predisposition to rule against Mr. Swafford." (2 PCR 1398). Affiant Terri Backhus stated the same thing (2 PCR 1400).

would appear that no serious attempt was made by CCR to have Judge Hammond remove himself from a case nearly completely litigated. Had CCR wished to have its allegations proved or disproved so that a factual record would be before this court, it could have chosen a vehicle which would have allowed the judge to pass on the truth of the allegations.

To be legally sufficient, a motion to disqualify must also contain asserted facts which are reasonably sufficient to create a well founded fear in the mind of a party that he or she will not receive a fair trial. *Fischer v. Knuck,* 497 So.2d 240, 242 (Fla. 1986). To determine whether the motion is legally sufficient, a court must determine if the facts alleged, which must be taken as true, would prompt a reasonably prudent person to fear that he or she could not get a fair and impartial trial. *Deren v. Williams,* 521 So.2d 150, 152 (Fla. 5th DCA 1988). Judge Hammond properly concluded that "It does not appear that the facts alleged in the instant motion are reasonably sufficient to create such a well founded fear, nor would they prompt a reasonably prudent person to fear not getting a fair hearing." (2 PCR 1411). As this court recognized in *Rose v. State,* 601 So.2d 1181, 1183 (Fla. 1992), "the judicial practice of requesting one party to prepare a proposed order for consideration is a practice born of the limitations of time." 601 So.2d at 1183. The issue in this case is not the alleged bias of the trial judge. Such bias was not presupposed in *Rose* on the basis of an ex parte contact. In fact, the *Rose* opinion reflects that, after reversing the order denying Rose's motion for post-conviction

relief, this court directed the trial court, evidently the *same judge*, to *reconsider* Rose's motion and to hold an evidentiary hearing. 601 So.2d at 1184. Under *Rose*, there was no basis for Judge Hammond to recuse himself. Unlike the situation in *Rose*, opposing counsel was provided and admittedly received a copy of the draft order. Any error in cutting off counsel's time to respond was cured by the filing of a motion for rehearing in which counsel could have made any additional legal arguments in support of his request for an evidentiary hearing. The same was considered and denied by the trial court (2 PCR 1409-1412). It cannot seriously be argued that any alleged ex parte contact led to the denial of relief. Thus, as in *Rose*, the motion and necessity of a hearing actually were reconsidered, but *before* the case reached this court. Nothing in the record supports the claim that Swafford did not get that to which he was entitled: "the cold neutrality of an impartial judge." *State ex rel. Davis v. Parks*, 141 Fla. 516, 519-20, 194 So. 613, 615 (1939).

Finally, to be legally sufficient, a motion to disqualify also must be timely filed. The instant motion was not timely filed and appears to be nothing more than a delay tactic. "A motion to disqualify should be denied for untimeliness when its allowance will delay the orderly progress of the case or it is being used as a disruptive or delaying tactic." *Deren, supra*, 521 So.2d at 152. CCR alleges that Judge Hammond *previously* signed a state's proposed order. Surely this is an allegation that could have been discovered and addressed in first post conviction litigation and should have prompted counsel to seek to have Judge

Hammond removed from the case at the time of *filing* the successive motion to vacate rather than waiting until relief was denied then weakly attempting to reopen the case. Swafford alleges that on October 22, 1990, the state filed, along with its response, a proposed order for evidentiary hearing but the next day filed notice for hearing on October 24, 1990. He concludes that this was done subsequent to ex parte discussion. This conclusion could very well have been reached on October 23, 1990, and the issue addressed on October 24, 1990, in the first round of collateral litigation.[3] The record from the hearing on October 24, 1990, reflects that Judge Hammond requested his clerk to get a response from the state and was going to allow a few days for preparation but such response had already been prepared and was provided within a few hours. Judge Hammond also indicated that the state also submitted a proposed order and stated "I normally don't appreciate a prepared order prior to it being requested but I noticed both the state and the defense felt obliged to provide proposed orders on motion to stay." Such litigation was under warrant and the judge noted the eagerness to be expeditious (2 PCR 1283). Judge Hammond also noted that "I don't always necessarily agree with the proposals obviously and I might very well depart in any number of different ways or completely reject. I kind of reserve that until I have had a chance to study the issues more fully." (2 PCR 1284). The state would submit such

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[3] Ironically, the record reveals that Larry Spalding made an ex parte telephone call to Judge Hammond to apparently attempt to reschedule the hearing but the judge felt it would have been inappropriate to speak to him (2 PCR 1240).

issue is now waived. In response to the claim that counsel was not given the opportunity to object the state would direct counsel to its recitation of facts on page 4 of its Initial Brief of Appellant on appeal of summary denial of Florida Rule of Criminal Procedure 3.850 relief and application for stay of execution filed on November 8, 1990, where it is stated:

> ...After *receiving service* of this proposed order and before the court made any rulings, Mr. Swafford, through counsel, at the October 24, 1990, hearing *objected* to this proposed order and urged that the court not adopt this grossly improper and grossly inaccurate order.

Swafford also noted that "the order, even upon a cursory review, is plainly nothing more than a one-sided document presenting no more than a *condensed version* of the *State's Response*." Initial Brief of Appellant, supra, p.5. Since no evidentiary hearing was conducted it can hardly be said that any order was a rubber-stamp of the state's response or position.

III ACCESS TO THE FILES AND RECORDS PERTAINING TO SWAFFORD IN THE POSSESSION OF STATE AGENCIES HAS NOT BEEN WITHHELD IN VIOLATION OF CHAPTER 119.01 *ET SEQ.*, FLA. STAT.

Swafford contends that because of the state's continuing refusal to provide full access to investigative files it remains impossible to fully plead all claims or even know whether other claims exist. He alleges that the state has refused to comply with Chapter 119 and that several state agencies continue to withhold records despite repeated requests.

Swafford claims that despite repeated Chapter 119 record requests the Volusia County Sheriff's Department did not release almost 1600 pages of documents and 96 pages of photos until November 8, 1991, over a year after he initially requested the public records. He alleges that nondisclosure continues. He argues that the circuit court denied his claim that he was entitled to additional materials by refusing to accept his factual proffers as true, which violated this court's ruling requiring circuit courts to accept as true factual allegations contained in motions to vacate in *Lightbourne v. Dugger*, 549 So.2d 1364 (Fla. 1989). Not only was he denied full access but he was forced to litigate without the materials necessary to present his claims. In light of the disclosures made on October 24, 1990, it was determined by replacement collateral counsel that not all public records were disclosed by the VCSO. A request was mailed to the VCSO on August 13, 1991. CCR received a letter from the VCSO dated September 9, 1991, agreeing to allow CCR access to records. On October 15, 1991, two CCR representatives met with Bobbie Sheets, the Records Supervisor at the VCSO and additional materials were discovered. With the exception of two lead sheets, Swafford alleges that none of those records outlined in the request dated August 13, 1991, were located in the VCSO files on October 15, 1991. Ms. Sheets advised CCR that each investigator maintained his or her own case file and that it was possible that the documents were located in those files. She agreed that the documents were discoverable under Chapter 119. She informed CCR that Nancy Jones, Assistant Volusia County Attorney, instructed her not to allow CCR access to review the evidence held in connection with the case as it was not discoverable under Chapter 119. Swafford complains that the circuit court in denying the motion to vacate did not address this issue. On October 17, 1991, CCR representatives met with Lieutenant Hess and Detective Buscher of VCSO for the

purpose of reviewing records. A substantial number of documents, audio tapes and photographs were located which had not been previously provided to CCR. The records were purportedly sealed under an agreement that they would not be unsealed until both parties were present. However, Swafford alleges that on November 8, 1991, when CCR met with Detective Buscher for the purpose of copying the file the seal had been broken. At that time, CCR copied what it was allowed to. Other documents that CCR was not provided access to were sealed. Swafford complains that a requested in-camera inspection to determine whether the Chapter 119 request had been fully complied with was denied by the circuit court. He alleges that less than a third of the audio tapes and a few additional documents itemized in the Chapter 119 request dated August 13, 1991, have been produced from the VCSO files.

Swafford further alleges that the State Attorney's Office for the Fourteenth Judicial Circuit in and for Bay County has not complied with Chapter 119. On October 3, 1990, a CCR representative hand delivered a public records request to the State Attorney for the Fourteenth Judicial Circuit. This request was allegedly made because Roger Harper received favorable treatment from this state attorney's office in exchange for his testimony against Swafford. Terri Mullins, the secretary for State Attorney Appleman, supposedly informed CCR that the file on Swafford was thicker than originally anticipated, gesturing to an approximate thickness of 6-8 inches or 1,500 to 2,000 pages, yet when the records were finally received they were less than 350 pages. CCR has allegedly received a letter dated November 19, 1991, from State Attorney Appleman maintaining that CCR's 119 request has been complied with. Swafford complains that an in-camera inspection to determine whether the 119 request had been fully complied with was also refused.

Swafford also complains that the State Attorney's Office for the Seventh Judicial Circuit in and for Volusia County has not complied with Chapter 119. He alleges that two public records requests dated June 24, 1991, and July 3, 1991, were mailed to the State Attorney's Office for the Seventh Judicial Circuit in and for Volusia County. On July 30, 1991, State Attorney Sean Daly supposedly informed CCR that access would not be allowed, claiming that the public records request copying bill had not been paid. Swafford alleges that that same day, CCR telefaxed proof of payment to the State Attorney's Office showing the bill to have been paid since October, 1990. Swafford complains that CCR has yet to receive a reply authorizing a review.

Swafford also complains of noncompliance by the Ormond Beach Police Department. He alleges that Sergeant Mason, Records Officer, informed CCR that a copy of the transmittal sheets would not be furnished. CCR has yet to receive a copy of the Ormond Beach Police Department transmittal sheets in connection with this case.

Swafford concludes that the state's failure to provide the requested records has delayed his post-conviction investigation and made it impossible for him to fully plead and raise Brady and/or discovery violations and/or other claims which may appear in the records he seeks. He argues that the failure to comply with Chapter 119 constitutes external impediments which have thwarted his efforts to establish that he is entitled to post-conviction relief.

He asks this court, pursuant to *Provenzano v. State,* 561 So.2d 541, 547 (Fla. 1990), to compel production of the requested records, remand the case back to the trial court before a newly assigned judge, and grant an additional sixty days to amend his motion to vacate judgment and sentence with any claims or relevant factual data which are inaccessible at present due to the state's failure to provide the requested records.

The lower court found this claim to be procedurally barred as it was contained within a successive motion to vacate filed outside the two-year period provided in Florida Rule of Criminal Procedure 3.850. The claim was also found to be based upon unfounded or speculative allegations (2 PCR 1227).

Swafford's claim that the Florida Department of Law Enforcement, Fourteenth Judicial Circuit State Attorney, Seventh Judicial Circuit State Attorney, Ormond Beach Police Department, and the Volusia County Sheriff's Office failed to comply with a previous public records demand and that subsequent compliance has revealed *Brady v. Maryland,* 373 U.S. 83 (1963), material that was previously withheld is procedurally barred. *See, Bundy v. State,* 538 So.2d 445 (Fla. 1989); *Spaziano v. State,* 570 So.2d 289 (Fla. 1990);

Clark v. State, 569 So.2d 1263 (Fla. 1990); *Agan v. State,* 560 So.2d 222, 223 (Fla. 1990) and *Hall v. State,* 541 So.2d 1125, 1126 n.1 (Fla. 1989).

On October 24, 1990, Judge Hammond held a hearing on the public records claim. Jay Nickerson, then a CCR assistant, told the court that the Volusia County Sheriff's Office had *provided access* to *all* records and Swafford was *not alleging VCSO withheld anything* (1 PCR 29; 2 PCR 1262). The matter of any tapes and their transcription was also discussed at the hearing (1 PCR 63). Tapes are transcribed and part of the case file. Original tapes are maintained in evidence (2 PCR 1296). He also represented that he had been provided *all* information from the Fourteenth Judicial Circuit except for two documents which would be turned over (1 PCR 64; 2 PCR 1298). Mr. Nickerson also indicated that all records from the Seventh Circuit State Attorney file had been obtained except those that were sealed (1 PCR 30). The State Attorney did not object to CCR copying everything in the sealed box, including work product (1 PCR 37; 2 PCR 1269-1272). The lower court reviewed the records from the Ormond Beach Police Department and CCR was given access to all those records which were not exempt. (2 PCR 1265; 1284-1295). The judge also noted that Mr. Buscher provided his case file to CCR at the October 24th hearing (2 PCR 1229). FDLE was not discussed at the hearing.

Any additional claims should have been raised and litigated during the two-year period provided by Florida Rule of Criminal Procedure 3.850. Certiorari was denied in this case on March 27,

1989, *Swafford v. Florida,* 489 U.S. 1100 (1989), and Swafford possessed the right to seek public records since that time or move to compel their production. A motion to compel was not filed until October 19, 1990. Access to records was provided after an in camera inspection by the court (2 PCR 1374). That successive CCR counsel may perceive as important something previous counsel did not does not mean access to files has been withheld and is not sufficient to overcome procedural barriers. What CCR seeks is an open-ended right to repetitive investigation and piece-meal litigation.

The lower court properly found that no limited evidentiary hearing was necessary since the issue was procedurally barred and the record conclusively showed that Swafford was not entitled to relief (2 PCR 1229). The claims raised are unfounded and speculative. Swafford has, furthermore, failed to demonstrate that the state withheld material evidence which the defense with *due diligence* could not have discovered and that the outcome would have been different had this information been disclosed. *Cf. Routly v. State,* 590 So.2d 397, 399 (Fla. 1991).

IV AND VI THE CLAIMS THAT THE STATE WITHHELD MATERIAL OR EXCULPATORY EVIDENCE OR KNOWINGLY PRESENTED FALSE OR PERJURED TESTIMONY IN VIOLATION OF SWAFFORD'S RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS AND THAT NEWLY DISCOVERED EVIDENCE ESTABLISHES SWAFFORD IS INNOCENT ARE PROCEDURALLY BARRED.

In his initial motion to vacate, Swafford pled *Brady* violations, however, this court found insufficient prejudice was shown to warrant a hearing. Swafford now alleges that the state continues to withhold evidence which could exonerate him. The trial court held a hearing on October 24, 1990, and after it the state produced additional documents exceeding one thousand pages but no time was allowed counsel to review the documents and amend the 3.850 motion. Analysis of these documents allegedly established *Brady* violations and provided new leads. Swafford argues that the cumulative effect of the suppression of evidence undermines confidence in the outcome and warrants a hearing.

Swafford specifically alleges that the state withheld evidence relating to the time of death. The state's theory as set forth in closing argument was that Swafford left a woman at 6:00 a.m. on the morning of February 14, 1982, abducted Brenda Rucker at 6:15 to 6:17 a.m., and arrived at the campsite no later than 6:30 a.m. or around daybreak. Chan Hirtle and Ricky Johnson stated that Swafford arrived back at the campground between 6:00 and 6:30 a.m. Swafford argues that this theory requires the body to have been at the scene on the morning of February 14, 1982, since all of the state's witnesses testified that Swafford was back at the campsite early that morning and none of them testified that he was out of their presence the remainder of the day. Swafford complains that the state withheld a police report indicating that a witness, Charles Jackson, was at the site where the body was found on the morning of February 14, 1982. The name of the witness was never disclosed to the defense. This report was obtained during post conviction discovery. Jackson, an amateur photographer, was present at the scene at approximately 9:45 a.m., at least two hours after Swafford supposedly left the body yet at no time did he see the victim's body. Jackson was joined by his friend, Tom Connelly, also an amateur photographer. Connelly also took photographs of the area and he did not see a body at the scene. He arrived at the scene first,

accompanied by Paul Garrett, a Volusia County Deputy Sheriff. Garrett also did not see a body at the site. Jackson turned in his film to Garrett. Swafford complains that the state has turned over only two photographs allegedly taken by Jackson although the property receipt clearly shows that the roll of film contained thirty-six exposures, thus leaving thirty-four exposures outstanding. Swafford concludes that if the body was not left at the crime scene by 9:45 a.m., February 14, 1982, he did not commit the crime. Confidence in the outcome must be undermined since the jury did not know this important evidence.

Swafford also argues in Point VI of his brief that the above information constitutes newly discovered evidence establishing his innocence and thus, his conviction and death sentence violate the Eighth and Fourteenth Amendments. Swafford also alleges that Carl Johnson, who originally claimed Swafford arrived back at the campground between 6:30 and 7:00 a.m. has now advised counsel that (1) Swafford returned between 6:00 a.m. and 6:30 a.m.; (2) that it was dark enough outside that Swafford had the car's headlights on; (3) that there was no way Swafford could have committed the crime and gotten back to camp by the time he did. Swafford argues that the above must be considered in context with the following facts from the record: (1) the state alleged that the victim was raped and sexually assaulted yet, while hair was found on her body, it was found *not* to implicate Swafford; (2) the victim's abduction was witnessed at 6:17 a.m. that morning and the witness gave police a description, and helped create a sketch of the abductor, neither of which resemble Swafford; (3) the victim was fully dressed when she was shot which is not only very unusual in a rape case, but in the context of the amount of time which the crime allegedly took, stretches reality. Swafford concludes he had neither the time, opportunity, nor motive to commit the crime and is innocent. Such evidence, if presented at the time of trial, would probably have led to an acquittal. Swafford argues that this information was sufficient to require an evidentiary hearing.

Swafford further alleges that the body was actually discovered on February 14, 1982, at the Sugar Mills Ruins at approximately 2:30 p.m., and that the individuals who discovered the body reported it to the local park ranger, who did nothing. Testimony at trial, however, indicated that the body was discovered on Monday, February 15, 1982, at approximately 2:38 p.m. Detective J. D. Bushdid testified that he processed the crime scene. Doctor

Arthur J. Botting testified that he was present at the scene on February 15, 1982, and examined the body. Documents provided to CCR further indicate that law enforcement officials did not secure the crime scene until February 16, 1982. Swafford alleges that the original file at FDLE reveals that one document was placed over the next to cover up the fact that the scene was not secured until February 16, 1982. He further alleges that the description of the location of the body given by Kevin Stanton is different from the description given by Darrell Edward Ellis, who actually discovered the body on February 14, 1982. When the body was located by witnesses on February 15, 1982, it was not in the same location as it had been on February 14, 1982, and Swafford argues that valuable evidence relating to the crime may well have been lost in the twenty-four hour period prior to the actual securing of the scene. He complains that Detective Bushdid told less than the complete story on the stand when he testified that the body was discovered on February 15th. Swafford argues that the state failed to disclose this evidence to defense counsel and had it been known by the jury it would have caused it to question the accuracy of the state's findings.

Swafford also alleges that the state had doubts about the identity of Brenda Rucker's assailant. A Volusia County Sheriff's Department Report dated June 12, 1984, indicates that other unrelated suspects were still being investigated some ten months after Swafford had been indicted. Although on November 11, 1983, FDLE again cleared him through physical testing, nevertheless, on December 8, 1983, Detective Hudson of the Volusia County Sheriff's Department requested that all physical evidence procured from suspects Lestz, Walsh, and Levi be resubmitted to FDLE for testing on Evidence Numbers B1849-1857, 1858-1861, and 21 through 26. Swafford previously complained to this court that the state failed to disclose evidence implicating James Walsh in the murder and presented evidence of a secret deal with Roger Harper to secure his testimony. Swafford argues that in evaluating the prejudice from nondisclosure, consideration must be given to the cumulative effect.

Swafford argues that no scientific evidence linked him to the victim and the state was forced to rely on the gun which was recovered on February 14, 1982, which was the centerpiece of the prosecutor's opening statement. The state, in order to prove that he possessed it used an informant, Roger Harper, to link the gun to him. Harper stated that the gun was "the exact

type as Swafford had with the hammer like this." Undisclosed *Brady* material regarding Harper was presented in Swafford's previous rule 3.850 motion. Harper allegedly lied about getting a deal in exchange for his testimony. Identification of the gun was suspect, as on May 21, 1984, he was shown another gun by Swafford's attorney in deposition and identified that gun as being Swafford's. He admitted that he could not tell one gun from the other and, at trial, admitted this, as well. Swafford further alleges that the other "family members" from Nashville who testified on behalf of the state did not link the gun to Swafford. Carl Johnson stated that he never saw a gun during the trip. Chan Hirtle stated that he did not really know whether or not the gun which was entered as Exhibit #1 was Swafford's. Ricky Johnson stated that he never saw the gun until he was taken to jail on February 14, 1982 and at that time the police did not know to whom the gun belonged. Therefore, no one but Harper testified that the gun belonged to Swafford. The manner in which the gun was found was highly suspect. Two other state's witnesses, Clark Bernard Griswold and Karen Sarniak, gave two different versions as to how it was seized. Griswold said that even though he didn't see this gun on Swafford he somehow knew that Swafford hid this gun in the trash can in the men's room. Swafford, at the time of his arrest, was wearing only jeans and a black T-shirt and was not wearing a leather jacket, as Harper testified to on cross examination. The other state's witness, Sarniak, stated that Swafford put the gun in a wastepaper basket in the ladies room and the police seized the weapon. Swafford now contends that the state could not have proven a chain of custody on the gun and the bullets allegedly fired from it. Swafford alleges that his trial attorney, Raymond Cass, requested that he be provided with all materials which were discoverable. What was not known by defense counsel was that the state tampered with the chain of custody of the gun and the bullets. Copies of evidence and property receipts for the gun and bullets have now been released to CCR and such sheets are internally contradictory, and it is apparent that information had been whited-out and new information substituted. Evidence logs indicate that on June 10, 1983, Detective Hudson checked the gun, labeled Q-1, out from the Sheriff's Department. Also checked out was a set of Swafford's fingerprints labeled Q-2. The gun and fingerprints were turned over to Debbie Fisher at FDLE with a request for analysis. One copy of the submission simply indicates that the gun and fingerprints were turned over to FDLE, however, another copy has

additional handwriting indicating that Detective Hudson also submitted four bullets with the gun. This does not coincide with the initial report of February 19, 1982, of the firearms examiner at FDLE, Charles Myers, which indicates that the bullets were to be kept in FDLE's "open shooting file." Thus, there is a question as to where the bullets originated since FDLE's documents indicate the bullets did not leave that facility. Thus, Swafford argues, a serious question arises as to the authenticity of the bullets that were linked to the murder weapon. Swafford complains that evidence logs and property receipts were withheld from the defense. His trial attorney would have objected and thus their admission into evidence would have been prevented. Swafford states that he has submitted these property receipts to Lonnie Hardin, the firearms-ballistics expert who originally analyzed the gun and the bullets that were submitted to him. Hardin did not have the benefit of reviewing these evidence logs or property receipts prior to trial and it is now his opinion that the chain of custody was not intact and he would have so testified at trial. Swafford argues that should the state maintain that this evidence was discoverable but that defense counsel did not properly request it, then the same constitutes ineffective assistance of counsel. Swafford also complains that the state is continuing to withhold documents relating to the analysis of the murder weapon and test bullets by officials at FDLE. A test chart completed by Mr. Myers on February 18, 1982, has been turned over to CCR but another work sheet should have been completed by Mr. Rathman on June 15, 1983, which has not been provided.

Swafford also alleges that the state presented false evidence that the victim was shot twice in the head. The medical examiner testified that she had been shot twice in the head, specifically indicating that a bullet entrance wound was found behind the right ear and that there appeared to be a faint imprint of the muzzle of the weapon around the wound indicating that it was a closed-contact type wound; that a second entrance wound was present in the back of the head a little bit to the left side and up near the tip of the skull which didn't have the imprint on the skin. This testimony was partially consistent with the death certificate. Swafford alleges that this testimony was false and the prosecutor did nothing to correct it. While the autopsy protocol was provided to the defense, Swafford alleges that the consultation from the Department of Radiology at Halifax Hospital Medical Center was not disclosed. This report states that on February 16, 1982, the body was x-rayed

and the skull showed a wound of entrance in the right temple with fragmented bullet crossing the cranial cavity and impacting against a jagged fracture of the calvarium. Swafford argues that the x-ray, prior to the actual autopsy, showed only one bullet and a fragment in the victim's head which contradicts the autopsy protocol and the trial testimony of Dr. Botting. Swafford further argues that the state's theory, buttressed by the testimony of Ernest Wade Johnson, was that his modus operandi was to rape his victims and leave his mark by shooting them twice in the head. This testimony was premised upon the false testimony of the medical examiner. Johnson's testimony was crucial to Swafford's direct appeal. This court found that there were enough similarities between Johnson's testimony and the facts of Brenda Rucker's murder to justify allowing Johnson's testimony to be presented to the jury. If Johnson had lied about this episode, or if the medical examiner lied, Swafford argues that it directly calls into question this court's ruling. Swafford claims that these withheld documents would have been exculpatory and called the credibility of the medical examiner, the detectives, and the state's ballistics experts into question.

Swafford also argues that the defense was provided with a fabricated transcript of a key witness' statement. Two transcribed statements of Paul Seiler, the witness to the victim's abduction, were provided to the defense. These statements were taken on February 15, and February 22, 1982. During postconviction discovery CCR was allegedly provided with three statements, two of which, at first glance, appear to be identical transcriptions taken from Seiler at 3:52 p.m. on February 15, 1982. The third statement was not provided to the defense at trial. A closer inspection of these two statements, however, reveals that Seiler's answers were altered and that sections of his statement were removed before providing it to trial counsel. Therefore, counsel did not know that Seiler had stated that the vehicle he saw was not a two-tone vehicle. Since the defense knew that Swafford and his friends travelled from Nashville to Daytona in a car which was a two-tone, it was prejudicial to the defense to not provide it with information that the true vehicle being driven by the abductor was a single color vehicle.

Swafford alleges that additional documents still remain which have not been produced to the defense and it is unknown at this time what, if any, effect these documents will have on the present and what, if any, additional claims exist that have not yet been brought.

Swafford argues that *Lightbourne v. Dugger*, 549 So.2d 1364, 1365 (1989), dictates the necessity of an evidentiary hearing in this case, even though it is a successive rule 3.850 motion.

The lower court properly found all these various claims to be procedurally barred (2 PCR 1229). *See, Spaziano v. State*, 570 So.2d 289 (Fla. 1990); *Clark v. State*, 569 So.2d 1263 (Fla. 1990); *Agan v. State*, 560 So.2d 222, 223 (Fla. 1990); *Hall v. State*, 541 So.2d 1125, 1126 n.1 (Fla. 1989).

The court was also eminently correct in alternatively finding further the claims to be speculative and conclusory. *Roberts v. State*, 568 So.2d 1255, 1259 (Fla. 1990); *Kennedy v. State*, 547 So.2d 912 (Fla. 1989). As will be discussed below, the documents Swafford included in a two-volume appendix either did not support his allegations, were previously provided or are simply not *Brady v. Maryland*, 373 U.S. 83 (1963) material.

A. Time of Death

The lower court properly found no *Brady* violation (2 PCR 1229). The victim was found near *Sugar Mill Ruins*. The report cited by Swafford indicates that the photos were taken in the *Ormond Tomb* area (2 PCR 14; 1229). There is nothing that would alert the state or defense counsel to the possible relevancy of this information. Even if Mr. Jackson, Mr. Connelly and Mr. Barrett were at Sugar Mill Ruins, any claim they would have *necessarily* discovered the body is purely speculative. The body was found in bushes in the woods near paths leading away from Sugar Mill Ruins (R 746, 751, 760). State Exhibits #3, #10, and #11, pictures of the crime scene on direct appeal, (R 1622, 1627,

1628) reflect that the area is heavily wooded. This barred claim is entirely speculative and there is no reasonable probability the outcome would have been different had the defense obtained this information. *See, Routly v. State,* 590 So.2d 397, 399 (Fla. 1991).

B. Crime Scene

The lower court properly found no *Brady* violation (2 PCR 1230). The information that the body was not reported to the Ormond Beach Police until February 15, was brought out at trial (R 746). The deposition of Lieutenant Bushdid, in the record on direct appeal, shows trial counsel was informed Mr. and Mrs. Ellis reported the body February 14, 1982, but the information was not transmitted to law enforcement until Mr. Stanton found the body on February 15th. (Page 37 of Deposition of Lt. Bushdid). Defense counsel was apprised of the names of the Ellises and Mr. Stanton and there was nothing withheld.

C. Identity of Assailant

The lower court properly found no merit to this allegation (2 PCR 1230). Police routinely eliminate other suspects in cases and that this was carefully done in this case does not make for a *Brady* claim. The prosecution is not required to make a complete and detailed accounting to the defense of all police investigatory work on a case. *Moore v. Illinois,* 408 U.S. 786, 795 (1972); *Spaziano v. State,* 570 So.2d 289 (Fla. 1990). The state need not actively assist the defense in investigating a case. *Hegwood v. State,* 575 So.2d 170 (Fla. 1991).

D. Chain of Custody

The lower court properly found no merit to this allegation (2 PCR 1230). Swafford's friends provided information that he had the murder weapon in his possession (R 847-48, 858-60). The purported gap in the chain of custody would not have provided a means to successfully challenge the chain. In Florida, in order to challenge chain of custody, a defendant must show there is some evidence of tampering. *Peek v. State*, 395 So.2d 492, 495 (Fla. 1981). Even if defense counsel had the documents, it would not have changed the outcome. *Routly v. State*, 590 So.2d 397, 399 (Fla. 1991). This claim is based entirely on speculation. Years after the judgment and sentence have become final CCR demands that every notation be justified under the guise of a *Brady* violation. Reading the typed portion of Debbie Fischer's report reveals a request was made to "Examine Q-1 for safe operating condition, trigger pull, and with any/all projectiles or casings *held in your files* for case number...." (2 PCR 719). The claim that Roger Harper lied about getting a deal in exchange for his testimony was entertained by this court on appeal from the first denial of post conviction relief and this court affirmed the finding of the lower court that no *Brady* violation had occurred; Swafford had not established the materiality of the information; and the result of the proceeding would not have been different. *Swafford v. Dugger*, 569 So.2d 1264, 1267 (Fla. 1990). Such claim was rejected by the federal district court as well. *See* App. p. 16 hereto.

E. Victim Shot Twice in Head

This claim was properly found to have no merit (2 PCR 1231). The unsigned radiology report is not *Brady v. Maryland,* 373 U.S. 83 (1963), material, nor would the outcome have changed had defense counsel had this report. The report, itself, indicates it is a "preliminary" report and a "final" report would be rendered (2 PCR 753). X-rays are no more than pictures subject to professional interpretation based on all known information, which includes information that would not be visible on an x-ray, such as a muzzle imprint on flesh, which could exactly determine the entrance. The language of the report is not inconsistent with the *two* wounds described in the autopsy report - one entering behind the right ear, one from the vertex left of the midline with a fracture line with *two* slugs being recovered from the frontal midline and the left temporal lobe and describes one pathway and references a fragment (2 PCR 744-745). Collateral counsel labors under the misapprehension that that which is incomplete is material and exculpatory. The wheels of justice need not grind to a halt because of mere belated suspicions.

F. Seiler Statement

The lower court properly found this allegation to be procedurally barred (2 PCR 1231). *See, Bundy v. State,* 538 So.2d 445 (Fla. 1989); *Spaziano v. State,* 545 So.2d 843 (Fla. 1989). The fact that Seiler had made statements was brought out at trial (R 1273). Furthermore, the car Swafford was driving was maroonish-brown (R 889). Seiler testified at trial he could not remember the color of the car (R 1285). In a prior deposition he said the car was some sort of brownish color (R 1287). He also said he

really didn't look at the color of the car (Page 9 of May 13, 1985 Deposition). Seiler had also previously described the car as a blue Monte Carlo with a white landau top (Page 10 of May 13, 1985 Deposition). Further statements about the car color would not have changed the outcome. *See, Routly v. State,* 590 So.2d 397, 399 (Fla. 1991).

G. Additional Documents

For the same reasons expressed in Argument III herein the lower court properly found this meritless claim to be procedurally barred (2 PCR 1232).

H. Newly Discovered Evidence

The lower court properly found Swafford's claim that newly discovered evidence that Charles Jackson, Tom Connelly and Paul Garrett did not see a body the morning of February 14, 1982, and that Carl Johnson now believes Swafford returned to the campsite between 6:00 a.m. and 6:30 a.m. establishes his innocence to be procedurally barred for the reasons previously discussed herein and further found the claims of newly discovered evidence to be insufficient to justify relief as Swafford failed to meet the actual prejudice test of *Jones v. State,* 591 So.2d 911 (Fla. 1991), i.e., that the evidence was of such a nature that it would probably produce an acquittal on retrial (2 PCR 1232). Swafford was in the area of the Fina station at the time of the abduction. His gun was the murder weapon. That a witness may be off fifteen or so minutes in his estimation of the time Swafford returned to the campsite hardly establishes his innocence. The jury could well have found Patricia Atwell's testimony as to the time

Swafford left her not credible and the testimony of his travelling companions was that he arrived at the camp around daybreak. Swafford had the gun and the time. His statements to Ernest Johnson also indeicate he had the motive and inclination. Swafford is not an innocent man.

V THE SUCCESSIVE CLAIM THAT SWAFFORD WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AT THE GUILT-INNOCENCE PHASE OF HIS TRIAL, IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS IS PROCEDURALLY BARRED.

The eyewitness to the abduction, Paul Seiler, furnished the police with a composite of the person who abducted Brenda Rucker. Counsel obtained a mugshot of Swafford at the time of his arrest. Swafford alleges that there is no resemblance between the man Seiler witnessed abducting the victim and Swafford. Swafford complains that counsel did not enter the mugshot into evidence so that he could have adopted the prosecution's sketches and entered them into evidence. Seiler testified that the sketch looked like the abductor yet could not say that Swafford was the same man. His testimony allegedly contradicted the statements he gave to the police wherein he described the abductor as having a full bushy beard. Swafford plead in his previous Florida Rule of Criminal Procedure 3.850 motion that the state failed to disclose that Seiler had criminal charges pending against him. Swafford complains that defense counsel never asked Seiler on the stand whether or not the person he saw wore a beard, and never asked about the hairline as Swafford had a noticeable receding hairline and never wore a beard. Swafford complains that had trial counsel shown the photographs to the jury they would have seen the difference.

Although Swafford has previously complained that the state should have disclosed information that Paul Seiler was facing criminal charges at the time of trial he now alleges that counsel failed to learn and present that fact to the jury. Swafford alleges that Seiler's testimony was that he was not sure if Swafford could be the man he saw abduct the victim and but for the pending charges he would have said that he was *positive* Swafford was *not* the abductor. Swafford alleges that prior to his deposition he told Swafford's trial counsel that there was no way that Swafford was the man he saw abduct Rucker. Swafford concludes that the jury should have been told of the pending charges so that they could have considered whether Seiler's testimony had been tainted by prosecutorial misconduct.

Swafford next complains that counsel did not investigate Roger Harper's background or get his criminal record in Florida, Tennessee or elsewhere. During trial, counsel was, therefore, unable to properly cross examine Harper

as to bias, reasons he would lie, and a likelihood of untruthfulness. Swafford alleges that Harper not only had a deal to testify but was negotiating directly with the prosecutor for the reward before the trial as evidenced by letters from Harper to his attorney and to the prosecutor, Eugene White. Harper testified to a deal, but not to the extent, nor to the reward. Swafford complains that the jury should have been apprised of the fact that Harper was a repeatedly convicted felon, that not only was there a deal to get out of prison early, but that he would get a substantial reward for his testimony. Swafford also complains that counsel failed to adequately cross examine regarding Harper's claims about reading newspaper accounts of the abduction. Counsel left the inference that the incident happened on the fifteenth. Swafford alleges that it was ineffective not to point out that Swafford was in jail on the morning of the fifteenth and could not have read the paper at a restaurant. Counsel should have established that there was no such article. This would be damning impeachment against Harper. Swafford also complains that Harper's trial testimony was that it was after daylight when Swafford returned to camp, yet he also says he was asleep. In his statement he said it was 6:00 a.m. when Swafford returned. Because the time of the return is critical, Swafford argues that this should have been pointed out to the jury. Carl Johnson, who also testified at trial, has since stated that it was before 6:30 a.m. and that it was dark when Swafford arrived at the camp. Swafford claims that had this been brought out at trial it would have impeached Roger Harper and established Swafford's alibi. In Harper's deposition he stated that he had only two felonies and a couple misdemeanors in his criminal record. Swafford complains that had counsel investigated he would also have found that Harper had been convicted prior to Swafford's trial of strong armed robbery in September 1976; breaking and entering in December, 1976; flight to avoid arrest in October 1977; resisting arrest in July, 1979; and petty larceny and conspiracy to conceal in August, 1980. These offenses are in addition to those Harper acknowledged under oath, including the 1982 felony for which he was incarcerated at the time. Swafford also complains that counsel failed to point out the discrepancy between Harper's recollection of seeing Swafford with the gun in his coat pocket at the Shingle Shack and Clark Griswald's testimony that Swafford wasn't wearing a jacket.

Swafford next complains that counsel had police reports which could have been used to impeach Mr. Hirtle's testimony. A response in the transcript of the tape-recorded interview in Nashville, Tennessee on June 22, 1983, alluded to what time Swafford returned to the camp. While Hirtle testified it was 6 to 6:30 a.m., he was more certain of the time in his interview and stated "it was early 6, 6:30... real early." Swafford complains that it would also have been important for counsel to ask him about his knowledge of Swafford's possession of the murder weapon. On page eight of such interview Hirtle said he had never seen the weapon in Swafford's possession, a position he repeats on page twelve of the interview. On page eleven of the interview he discussed the fact that the whole group generally drank Miller beer while police reports indicated empty Michelob bottles were found at the scene of the crime. Swafford concludes that failure to impeach the state witnesses was deficient performance. He alleges that it would have been powerful evidence, especially in light of Patricia Atwell's testimony that these witnesses had discussed pinning the crime on Swafford.

Swafford also complains that if counsel had gone to Tennessee to investigate he would have found that Harper and Kenneth Johnson wanted revenge against Swafford because he had been involved in affairs with their wives and both believed he was responsible for destroying their marriages. He alleges that such bias brings into question the testimony, not only of Harper and Kenneth Johnson, but also Carl Johnson and Ernest Johnson, their father and uncle, and also raises a question about the testimony of Chan Hirtle, who is a close friend of the Johnson family. Swafford also alleges that counsel should have talked to family members concerning the feud that exists between the Swaffords and the Johnsons.

Swafford next complains that counsel failed to depose state witnesses, Clark Griswald or Karen Sarniak. These two witnesses were the only connection between the murder weapon and Swafford. Swafford alleges that had counsel deposed these witnesses, he could have used them to impeach one another as their trial testimony was contradictory. Griswald said that the gun was in a trash can in a men's room and he found it while Sarniak swore the gun was in the trash in the ladies' room and that a police officer found it.

Swafford also complains that counsel failed to impeach the pathologist. The state presented evidence the victim had been shot twice in the head but it appears from records that this was not true. Swafford complains that counsel

failed to point out to the jury the x-rays which contradicted this testimony. Ernest Johnson's testimony was introduced as "Williams Rule" evidence to allege Swafford killed women by shooting them twice in the head. Counsel could have shown that the victim was only shot in the head once and that only one bullet was removed from the head.

Swafford next complains that counsel was ineffective when he conceded that a robbery and sexual assault occurred. Swafford was found innocent of the robbery charge. Had counsel investigated and defended against the sexual assault charge, Swafford claims he may not have been convicted of it nor had his sentence aggravated by the sexual battery. He complains that there was no evidence, hair or semen to link him to the victim yet counsel conceded a rape had occurred in his closing argument. The rape was used as aggravation to justify imposition of the death penalty.

Patricia Atwell allegedly overhead members of the Johnson family and Chan Hirtle say they "might as well hang it on Roy as anybody." A short hearing was held out of the presence of the jury where Ms. Atwell repeated her allegation. Defense counsel knew there was at least one other witness who heard the statement. The witness told counsel of the incident and was willing to testify but Swafford alleges that counsel failed to call him. Swafford claims that this testimony would have bolstered Atwell's testimony and raised doubt concerning the testimony of the state's witnesses.

Swafford alleges that family members repeatedly witnessed jury misconduct and noted that Swafford was often in the presence of the jury in handcuffs and/or shackles. Swafford complains that the family brought these things to counsel's attention yet the issue was never raised. Family members supposedly heard a woman juror say to the others, while they were choosing the jury, that Swafford was clearly guilty and they should get the trial over with. The same thing allegedly happened to a male juror. Family members supposedly told Mr. Cass that the jurors were rushing to the newspaper racks every day to read them. The family also alleges that the jurors saw Swafford brought in every day in shackles because the window at the hall overlooked the parking area where the prisoners were unloaded. The jurors were supposedly openly discussing the fact that Swafford was a murderer and that they wished the trial would hurry up so that they could go ahead and get back to work. Two jurors in the ladies room allegedly discussed the fact that Swafford was clearly guilty of killing Brenda Rucker, the crime was brutal and

electrocution was too good for him and that they should get this over with. These women were two of the twelve jurors on the case.

Swafford argues that the previous Florida Rule of Criminal Procedure 3.850 motion combined with the *instant* one alleges numerous errors in the context of ineffectiveness of counsel. He concludes that the cumulative effect totally undermines any belief in the reliability of the outcome of the prior proceedings. He argues that an evidentiary hearing is required.

The lower court properly found the claim that Swafford was denied effective assistance of counsel at the guilt/innocence phase of trial barred not only as a *successive* motion, but also because it was made more than *two years* from the time certiorari was denied (2 PCR 1232). *See,* Fla.R.Crim.P. 3.850. *Bundy v. State,* 538 So.2d 445 (Fla. 1989); *Spaziano v. State,* 545 So.2d 843 (Fla. 1989).

Swafford alleged ineffective assistance of counsel at the guilt phase in his first Florida Rule of Criminal Procedure 3.850 motion. This court agreed with the lower court that the allegations were refuted by the record, represented trial strategy, or were legally insufficient and that Swafford demonstrated no prejudice under any of the claims and it was not error to refuse to hold an evidentiary hearing. *Swafford v. Dugger,* 569 So.2d 1264, 1268-69 (Fla. 1990).

The ineffective assistance at the guilt/innocence phase claim was subsequently presented to the United States District Court, Middle District of Florida, Orlando Division. The admissibility of the bolo was raised on direct appeal and Judge Sharp refused to disturb this evidentiary ruling on federal habeas review as it did not render the entire trial fundamentally

unfair (App. 102). The court also found Swafford's ineffective assistance of counsel claim based upon counsel's argument for admission of this evidence to be without merit because he could not demonstrate the requisite prejudice (App. 103). Seiler testified, in any event, that he was not sure if Swafford could be the man he saw abduct the victim. The district court also found that Swafford failed to offer any evidence that the state improperly influenced Paul Seiler's testimony. It found that Swafford was not implicated in the murder until June of 1983; therefore, Seiler's arrest in 1982 could not have been connected with Swafford's case. In addition, Seiler went to trial on the charges (App. 101). The court also found that counsel's failure to request and introduce witnesses' rap sheets was not error so serious as to deprive Swafford of a fair trial (App. 107). The court also found that counsel was not ineffective for failing to reveal the secret deal between the state and Harper because the prosecutor did reveal to the jury his efforts on behalf of Harper in exchange for Harper's truthful testimony. Counsel did explore Harper's motivation for testifying against Swafford during a deposition. To the extent that counsel erred in not discovering or revealing the reward money, the court found that Swafford had not demonstrated that if such information had been revealed the result of his trial would have been different (App. 107-108). Counsel also subjected the medical examiner and the pathologist to a rigorous cross examination, questioning the pathologist on each bullet wound, demonstrating that at least several of shots were delivered when the victim was very close to death and

probably unconscious and that there was no tearing of the victim's clothing. In addition, counsel argued several weaknesses in the testimony of the state's experts to the jury in closing argument (App. 113). In any event, the x-rays did not contradict the testimony of the pathologist as discussed elsewhere herein. The district court also found that it could not be assumed that Swafford's attorney could have obtained an expert witness to refute the medical examiner's testimony in regard to a sexual battery. No fault with the findings of the medical examiner is alleged. In any event, counsel argued that sexual battery had not been established in his motion for judgment of acquittal. Testimony reflected that Swafford had engaged in intercourse for several hours immediately preceding the time of the incident; accordingly, counsel reasonably argued that Swafford had no reason to abduct and rape the victim (App. 105). Swafford raised the claim that his right to a fair trial was violated by the employment of excessive security measures throughout his trial in the last Florida Rule of Criminal Procedure 3.850 motion. This court clearly relied on a state procedural bar as the independent state basis for disposition of these claims (App. 94). Thus, the district court found this claim to be procedurally barred as Swafford did not demonstrate cause for such default or that a consideration of the merits was necessary to prevent a miscarriage of justice (App. 94).

Thus, it is clear that this claim of ineffectiveness has previously been presented to the lower court, this court, and the federal courts. Summary dismissal was appropriate in the absence

of the raising of any new or different grounds for relief. *See,* Florida Rule of Criminal Procedure 3.850.

In the event the allegations could be considered new or different, then the failure to raise such grounds in the prior collateral attack constitutes an abuse of the 3.850 process. Summary denial of a successive motion which merely raised additional grounds attacking the competence of counsel, an issue which had already been rejected in a prior 3.850 proceeding is proper. *Spaziano v. State,* 545 So.2d 843 (Fla. 1989); *Tafero v. State,* 561 So.2d 557 (Fla. 1990); *Squires v. State,* 565 So.2d 318 (Fla. 1990). This is especially true where such claims have been rejected on the merits or no *Brady v. Maryland,* 373 U.S. 83 (1963), violation has been found and a second bite at the apple is sought by recasting such claims in the guise of an ineffective assistance of counsel claim. The consensus of opinion is that Swafford arrived at the camp at daybreak which, unfortunately for Swafford, occurred at 7:04 a.m. The outcome would not have changed had counsel questioned the witnesses more about their estimates as to the time Swafford returned. A jury verdict cannot be impeached and Swafford forgets that voir dire is an educational process for the jury and the jury is later instructed on the standards of proof so that the remarks supposedly overheard by Swafford's family do not warrant reversal. The outcome would have been no different even if another person had heard members of the Johnson family talk about pinning it on Roy in view of the fact that Swafford'sf gun was the murder weapon.

VII THE SUCCESSIVE CLAIM THAT SWAFFORD WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AT THE SENTENCING PHASE IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS IS PROCEDURALLY BARRED.

Swafford complains that defense counsel did no investigation and presented no mitigation on his behalf except for stipulating to the fact that he had been an eagle scout.

Swafford alleges that ample evidence in mitigation was available such as: (1) his experience as a Native American profoundly affected his character and he had anger towards the U.S. Government for taking the land of his Indian family (2) the children were whipped by both parents when they misbehaved (3) he suffered a childhood marked by poverty and social unrest (4) as an adolescent he began drinking alcohol, smoking marijuana and became addicted to sniffing glue (5) he was present when President Kennedy was assassinated (6) he was involved in an automobile accident and eight of his teeth were knocked back into his gums, received no treatment for the injuries until three days after the accident, at which time he was strapped to the chair and not given anything to deaden the pain; there was a marked change for the worse in his temperament after the accident; he complained of constant headaches and became very sensitive to light and became more withdrawn and his temper got shorter; he spent more time with older boys and often stayed away all night and started getting into trouble with the law; he drank more and took drugs more frequently (7) there are a number of alcoholics on both sides of his family (8) even when he was abusing alcohol and drugs, he was always a hard worker (9) at age seventeen he was arrested for breaking into parking meters, was tried the day after and sentenced to a work house where he served on a chain gang; his head was shaved and he was made to wear shackles and work outside in the blistering sun in a rock quarry; when he refused to go out on the third day he was put into a hole in the yard with a door on top for twenty-four hours and was seriously affected by this experience; the shaved head was a source of embarrassment and he did not return to school (10) he was in a cell with a boy named Larry Thaxton and a third boy in a Nashville jail when a third boy began having a seizure; the guards ignored it and as a result the boy died; he and Larry had to ride to the hospital with the dead boy sitting between them to make it look as though he were still alive; the body was left

at the hospital and the newspaper reported that the boy had died on the way to the hospital (11) he was a very good father (12) he was an alcoholic which created many problems for him.

Swafford complains that counsel did not discover this information and concentrated his efforts on the guilt phase of the trial. He alleges that repeated efforts were made by his family to speak with counsel which were ignored. His father, mother, brother Randy, and his wife Amy, all attended trial expecting to be called as witnesses, but counsel failed to call them. The only family members who testified at trial were called by the state which left the judge and jury with the impression that even those closest to him felt he should die.

Swafford further complains that defense counsel failed to obtain and present psychological testing, although a memorandum from his file indicates he felt that was something which should be done. Swafford has now employed Doctor Pat Flemming, whose report indicates that long term drug and alcohol use could have increased neurological damage, but the glue sniffing alone could have caused neurological damage evident in Swafford's behavioral history and verified by test results. She opined that the environment helped direct the outlets for the impulsivity, lack of judgment, and impaired behavioral control. The glue sniffing and head injury may have caused chronically misfiring cortical cells that caused Swafford to be "immediately" oriented and to act in an impulsive fashion. The generalized damage that he evidences reduces his ability to make adequate judgments and the resulting consequences have caused considerable chaos in his life. He has sufficient cerebral dysfunction to significantly disrupt his control, behavior and thought processes. Dr. Flemming diagnosed Swafford as having organic personality syndrome. Swafford denied that he committed the murder that resulted in the death sentence. She opines that he intellectually knows the requirements of the law, but is unable to utilize this knowledge on a consistent basis. It is her professional judgment that if evidence of neurological damage and the resulting behavioral and emotional dyscontrol had been introduced, his history would have been understandable to the triers of fact. No effort was made to present the etiology, nor adequately present mitigating circumstances. An aggravating factor presented during the trial was that the crime was committed in a cold, calculated, and premeditated manner. Dr. Flemming opines that this is inconsistent with Swafford's history and brain damage. The organic

personality, resulting from brain damage, results in persistent disturbance including affective instability, recurrent outbursts, and impaired social judgment. In her opinion this pattern is contradictory to the aggravators presented. The impulsivity and poor behavioral control does not allow the brain damaged patient to also make and execute plans in an orderly, premeditated and calculated manner. Swafford alleges that there was no tactical or strategic reason for not presenting complete mental health mitigation.

Swafford also alleges that counsel committed affirmative errors constituting a breach of loyalty which amounted to an abandonment of all penalty phase defenses. Swafford alleges that in closing argument, at the guilt phase, trial counsel conceded the ultimate issue at penalty phase.

> I would say to you, in my opinion, and I may -- I am giving you my opinion, this is a death penalty case, I don't think there is any question of it, only if, only if you decide that Roy Swafford is the person that is responsible for the premeditated killing of Brenda Rucker and of her sexual battery and of a robbery.

Swafford further alleges that this argument was surpassed by the following admission during the close of his penalty phase proceedings:

> Now, I would not under any circumstances argue that the state has not established at least five, at least five of the aggravating factors.

(R 1472).

Swafford argues that counsel not only stipulated that the guilty party should forfeit his life, but then proceeded to stipulate as to the basis for that sentence. He contends that counsel's concession of the principal issue at the penalty phase denied him the right to have the issue presented to the jury as an adversarial issue and therefore, constitutes ineffective assistance. He also argues that the state was not held to its burden of persuading the jury that he should die. He contends that prejudice should be presumed because of the constructive absence of an attorney dedicated to the protection of his clients rights under our adversarial system of justice. He concludes that he is entitled to a new sentencing proceeding because no reliable adversarial testing occurred.

The lower court properly found the claim that Swafford was denied the effective assistance of counsel at the penalty phase

to be barred not only because it was presented in a *successive* motion, but also because it is made more than *two years* from the time certiorari was denied (2 PCR 1232). *See,* Fla.R.Crim.P. 3.850. *Bundy v. State,* 538 So.2d 445 (Fla. 1989); *Spaziano v. State,* 545 So.2d 843 (Fla. 1989).

In his first Florida Rule of Criminal Procedure 3.850 motion, Swafford contended that testimony should have been presented about his Indian heritage and interest in the same, his family life, community service, change in behavior after the assassinations of John Kennedy and Martin Luther King and a car accident; and alcohol, drug and inhaling solvent abuse. The lower court noted that: "Defense counsel proffered certain testimony at the penalty phase, but Swafford's father refused to testify and his mother, although present, did not take the stand for personal reasons." (1 PCR 445). The lower court held that there was no reasonable probability that the omitted mitigation would have affected the jury's recommendation, nor it would have affected the sentence imposed by the lower court. The court found as a mitigating factor that Swafford had attained the status of an Eagle scout and knew that it entailed a good deal of dedication and hard work. Thus, it was apparent to the court at the original sentencing that in his youth Swafford showed potential, but as an adult, turned to a life of crime. The court found that the proffered evidence was not so extreme as to mitigate the circumstances of this crime or the five aggravating factors of prior conviction of a violent felony; committed during a sexual battery; committed to avoid arrest; especially heinous,

atrocious, or cruel; and cold, calculated and premeditated. The court found that the allegations regarding what a mental health expert could have added to the mitigating circumstances is speculative, and even if the allegations were true, it would not have changed the outcome (1 PCR 446). To prevail on a claim of ineffective assistance, both substandard performance and prejudice caused by that performance must be demonstrated. *Strickland v. Washington,* 466 U.S. 668 (1984). To be granted an evidentiary hearing on such a claim, a petitioner must allege specific facts not conclusively rebutted by the record that show a deficient and prejudicial performance. *Kennedy v. State,* 547 So.2d 912 (Fla. 1989). The lower court found that Swafford's allegations were refuted by the record, represented trial strategy, or were legally insufficient. It also held that Swafford had demonstrated no prejudice under any of the claims. On appeal from the denial of post conviction relief, this court agreed that Swafford's claims failed to meet the prejudice test of *Strickland* and held that the court did not err in refusing to hold an evidentiary hearing. *Swafford v. Dugger,* 569 So.2d 1264, 1268 (Fla. 1990).

The ineffective assistance at the sentencing phase claim was subsequently presented to the United States District Court, Middle District of Florida, Orlando Division. United States District Judge G. Kendall Sharp found that counsel's penalty phase closing argument focused on potential residual doubt in the minds of the jurors. The court found Swafford's allegation that family members could have testified as to his preoccupation with

his native American heritage as unconvincing testimony at best. To the extent that family members could have testified further to his community service record as a teenager and young adult, the court found that the argument that Swafford was an asset to his community was developed for the sentencer to a limited extent by the stipulation that he was an Eagle scout. It noted that during post conviction proceedings, Judge Hammond noted that at the original sentencing, the court appreciated that in his youth he showed promise, and recognized that his attainment of Eagle scout entailed a good deal of dedication and hard work. Although Swafford alleged that counsel overlooked evidence which suggested possible mental health problems, Swafford did not allege and the proffered evidence did not show that he was suffering any specific disturbance at the time of the crime resulting from specific mental problems. Judge Sharp noted further that the trial judge stated "this court is convinced that there is no reasonable probability the omitted mitigation would have affected the jury's recommendation, nor would it have affected the sentence imposed by the court." Thus, Judge Sharp did not find that Swafford was prejudiced by the failure to present mitigating evidence. He further found the allegation that counsel virtually stipulated to a death sentence without merit. *Swafford v. Dugger*, No. 90-846-Civ-Orl-18 (U.S.D.C., Middle District, November 15, 1990). (See, App. pp. 114-117).

Thus, it is clear that this claim has previously been presented to this court and the lower court and rejected. Summary dismissal was appropriate in the absence of the raising

of any new or different grounds for relief. *See,* Florida Rule of Criminal Procedure 3.850. If any allegations could be considered new or different, then the failure to raise such grounds in the prior collateral attack constitutes an abuse of the 3.850 process. *Smith v. State,* 453 So.2d 388 (Fla. 1984); *Songer v. State,* 463 So.2d 229 (Fla. 1985); *Francois v. State,* 470 So.2d 687 (Fla. 1985). Summary denial of a successive motion which merely raised additional grounds attacking the competence of counsel, an issue which had already been rejected in a prior 3.850 proceeding is proper. *Spaziano v. State,* 545 So.2d 843 (Fla. 1989).

VIII SWAFFORD'S ALLEGED *ESPINOSA V. FLORIDA*, 112 S.CT. 2926 (1992), CLAIM IS PROCEDURALLY BARRED AS JURY INSTRUCTIONS WERE NOT OBJECTED TO AND THE CLAIM WAS NOT TIMELY RAISED IN A SUCCESSIVE MOTION.

A. THE JURY INSTRUCTIONS

At the conclusion of the penalty phase the jury was instructed as follows.

> The aggravating circumstances that you may consider are limited to any of the following that are established by the evidence: First one, the Defendant has been previously convicted of a felony involving use or threat of violence to some person; second, the crime of burglary with assault is a felony involving the use of threat or violence to another person; third, the crime for which the Defendant is to be sentenced was committed while he was engaged in the commission of the crime of sexual battery; fourth, that the crime for which the Defendant is to be sentenced was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody; five, that the crime for which the Defendant is to be sentenced was specifically -- especially wicked, evil, atrocious or cruel; six, the crime for which the Defendant is to be sentenced was committed in a cold, calculated and premeditated manner without any pretense or morals or legal justification.

(R 1482-83).

B. SWAFFORD'S ALLEGATIONS

Swafford first complains that the first and second of the above instructions actually concerns the same aggravating factor, and the jury was instructed it could consider the same aggravating circumstance twice. Although the judge considered them as one in his sentencing order Swafford argues, nonetheless, that the jury was never informed that they could not find six separate aggravating factors based on the instructions and in sentencing

him to death the judge specifically considered and relied upon the jury's death recommendation.

Second, Swafford complains that the fifth instruction on the heinous, atrocious or cruel aggravating circumstance was the identical instruction held to violate the Eighth Amendment in *Espinosa v. Florida,* 112 S.Ct. 2926 (1992). Swafford notes that the limitation approved in *Proffitt v. Florida,* 428 U.S. 242 (1976), was not utilized by the jury. Under *Espinosa,* Swafford argues that it must be presumed that the jury found this aggravator and weighed it against the mitigating circumstances. The judge considered the jury's death recommendation in sentencing him to death and, as a result, Swafford argues that an extra thumb was placed on the death side of the jury scale.

Third, Swafford complains that the jury was not instructed in the sixth instruction that before the cold, calculated and premeditated aggravating factor could be applied that the jury must find "a careful plan or prearranged design." Swafford further argues that the CCP aggravating circumstance is overbroad. He acknowledges that this court has applied narrowing or limiting constructions by holding that it is reserved for murders "characterized as execution or contract murders or those involving the elimination of witnesses" and by requiring a "heightened" form of premeditation. Swafford complains however, that these narrowing appellate limitations were not provided to his jury for consideration.

Fourth, Swafford complains of the existence of an automatic aggravator. He alleges that he was convicted on the basis of felony murder and that the use of the underlying felony as an aggravating factor violated the Eighth Amendment because the aggravating circumstance of "in the course of a felony" was not a means of genuinely removing the class of death-eligible persons and thereby channeling the jury's discretion. Felony murder was found as a statutory aggravating circumstance. The murder was allegedly committed while the defendant was engaged in the commission of a sexual battery. Unlike the situation in *Lowenfield v. Phelps,* 484 U.S. 231 (1988), Swafford alleges that the narrowing function did not occur at the guilt phase.

Fifth, Swafford complains that no limiting instructions were provided in the fourth jury instruction dealing with the aggravator of the crime being committed for the purpose of avoiding or preventing a lawful arrest. Pursuant to *Geralds v. State,* 601 So.2d 1157, 1163 (Fla. 1992), *Perry v. State,* 522 So.2d 817, 820 (Fla. 1988), and *Rogers v. State,* 511 So.2d 526, 533 (Fla. 1987),

Swafford contends that the jury should have been instructed that the finding of this aggravating factor requires proof beyond a reasonable doubt that the dominant or the only motive for the murder was the elimination of a witness and that the mere fact that the victim could identify the defendant, without more, is insufficient to prove this factor beyond a reasonable doubt.

Swafford argues that all of these various claims can be entertained under *Espinosa*, which, he maintains, is a change in Florida law. He insists that this court must now conduct a harmless analysis which comports with the Eighth Amendment and *Stringer v. Black*, 112 S.Ct. 1130 (1992). He further argues that application of the harmless beyond a reasonable doubt standard requires this court to presume an error was harmful unless and until the state proves that there is no possibility that the jury vote for death would have changed but for the extra thumbs on the death side of the scale. He argues that it would be impossible to understand how the jury vote would not have been affected by the erroneous application of "heinous, atrocious and cruel" and "cold, calculated and premeditated." Swafford notes that the judge found mitigation present but indicates that the question is what the jury could have found and whether a binding life recommendation could have been returned. He argues that other mitigating evidence was present in the record that the jury could have reasonably have found warranted a life sentence. Even with the six unconstitutionally vague instructions, the jury vote recommending death was split. He concludes that the error was not harmless beyond a reasonable doubt under *Espinosa* and *Stringer*.

In Claim VII of his second motion to vacate judgment and sentence Swafford argued that the sheer number and types of errors involved in his trial when considered as a *whole*, virtually dictated the sentence he would receive (2 PCR 116). He further noted "The flaws in the system which sentenced Mr. Swafford to death are many. They have been pointed out throughout not only this pleading, but also in Mr. Swafford's direct appeal, and initial Rule 3.850 Motion and State Habeas Petition and while there are means for addressing each individual

error, the fact is that addressing these errors on an individual basis will not afford adequate safeguard against an improperly imposed death sentence..." (2 PCR 116). Swafford then recited claims previously raised on direct appeal and in his initial Florida Rule of Criminal Procedure 3.850 motion. Among the claims *admittedly* raised in the first 3.850 motion was the claim that "Mr. Swafford's sentencing jury was improperly instructed on the "especially heinous, atrocious, or cruel aggravating circumstance, and the aggravator was improperly argued and imposed, in violation of *Maynard v. Cartwright, Hitchcock v. Dugger,* and the eighth and fourteenth amendments." (2 PCR 121). The lower court found all the recited but unargued instances of alleged error to be procedurally barred in a successive petition and found the claim raised issues already presented and litigated on direct appeal and in a previous motion to vacate (2 PCR 1233).

The record reflects that prior to giving the instructions the court stated "For the record, counsel has met with the Court concerning possible instructions to be given at this proceeding, and I'm asking counsel at this time is there any objection to the proposed instructions that have been tentatively worked out?" Defense counsel responded "Not on behalf of the defense, Your Honor." (R 1460-61). This claim was not raised on direct appeal. Swafford filed a boilerplate claim in Point IV on his direct appeal complaining that the aggravating circumstances have been applied in a vague and inconsistent manner in Florida (Initial Brief of Appellant, p.46). This court held that "This broadside attack on the sentencing law is not related, in Swafford's

argument, to any action or ruling in the lower court that affected his sentencing. Moreover, Swafford did not raise or preserve these issues for appeal by motion or objection in the lower court. For these reasons we are unable to provide appellate review of the issues raised." *Swafford v. State,* 533 So.2d 270, 278 (Fla. 1988). In his first Florida Rule of Criminal Procedure 3.850 motion Swafford complained that the heinous, atrocious, or cruel instruction violates *Maynard v. Cartwright,* 486 U.S. 356 (1988). This court found the claim to be procedurally barred because it should have been raised, if at all, on direct appeal. *Swafford v. Dugger,* 569 So.2d 1264, 1267 (Fla. 1990).

This issue should not be revisited on a successive motion. *Espinosa v. Florida,* 112 S.Ct. 2926 (1992), was not argued below and provides no basis for reconsideration of a procedurally defaulted claim by this court. It is a settled rule of Florida procedure that, in order to preserve an objection, a party must object after the trial judge has instructed the jury except where there has been an advance request for a specific jury instruction that is explicitly denied. *See, Harris v. State,* 438 So.2d 787, 795 (Fla. 1983); *Buford v. Wainwright,* 428 So.2d 1389, 1390 (Fla. 1983). In *Ragsdale v. State,* 17 F.L.W. S620 (Fla. Oct. 15, 1992), this court clarified its opinion to address the jury instruction issue that arose by reason of the United States Supreme Court's decision in *Espinosa* and citing *Sochor v. Florida,* 112 S.Ct. 2114, 2123 (1992), found that "although the instruction was given to the jury, this issue was neither preserved at trial nor raised in this appeal."

17 F.L.W. at S622. Most recently in *Melendez v. State,* No. 75,081 (Fla. Nov. 12, 1992), this court held a previous finding that the matter was not preserved to be dispositive, notwithstanding the intervening decision in *Espinosa*. For the same reasons that *Maynard v. Cartwright,* 486 U.S. 356 (1988), and *Clemons v. Mississippi,* 494 U.S. 738 (1990), were found *not* to have announced a *new rule* in *Stringer v. Black,* 112 S.Ct. 1130 (1992), Swafford had the tools to timely raise this claim and need not have awaited the decision in *Espinosa v. Florida,* 112 S.Ct. 2926 (1992), to raise the claim. The decision in *Maynard* was controlled by *Godfrey v. Georgia,* 446 U.S. 420 (1980), and did not announce a new rule. 112 S.Ct. at 1136. This claim could have been raised at the time of trial and on direct appeal on the basis of then-existing precedent.

Should this court find the claim is not barred, relief is not warranted. *Espinosa,* holds that an aggravating circumstance weighed in determining whether to impose the death penalty is invalid if its description is so vague as to leave the sentencer without sufficient guidance for determining the presence or absence of the factor and it is necessary under the Florida sentencing scheme that the jury not be permitted to weigh invalid aggravating circumstances. *See, Espinosa v. Florida,* 112 S.Ct. 2926, 2928 (1992). This is so because the trial court gives great weight to the jury's recommendation and thereby indirectly weighs the invalid aggravating factor that it had to be assumed the jury found. 112 S.Ct. at 2928. This reasoning is flawed and should be addressed by this court. What the judge gives great weight to is a recommendation of life or death. He or she can only

hypothesize the *reasoning* behind the recommendation. The judge *cannot* follow in the error or tilt the scale toward the side of death because his reasoning is *constrained* by the edicts of this court. Prior to the penalty phase in this case this court held that the HAC factor could be supported by evidence of actions of the offender preceding the actual killing, including forcible abduction, transportation away from possible sources of assistance and detection, and sexual abuse. *See, e.g., Routly v. State,* 440 So.2d 1257, 1264 (Fla. 1983); *Lightbourne v. State,* 438 So.2d 380, 391 (Fla. 1983); *Smith v. State,* 424 So.2d 726, 733 (Fla. 1982); *Griffin v. State,* 414 So.2d 1025, 1029 (Fla. 1982). The court also held that fear and emotional strain preceding a victim's almost instantaneous death may be considered as contributing to the heinous nature of the capital felony. *Adams v. State,* 412 So.2d 850, 857 (Fla. 1982). This is the law this court created and later applied on appeal in this case. *Swafford v. State,* 533 So.2d 270, 277 (Fla. 1988). What is the purpose or value of case law if it is not a directive to the lower judiciary? Under *Walton v. Arizona,* 497 U.S. 639 (1990), it must be *presumed* that the trial judge in the case at hand was familiar with this body of case law. It follows from such presumption that this *case law* is the basis for finding the HAC factor, especially since the judge could not know if the jury even considered the factor.[4] The *Espinosa* decision was based on the fallacious notion that "Florida has essentially split the weighing process in two." *Espinosa v.*

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[4] Even a properly instructed jury could ignore an aggravating factor or consider it inappropriately.

Florida, 112 S.Ct. 2926, 2928 (1992). Having been armed with the law, it is clear that the trial judge is a superior actor and not simply a co-actor with the jury. This misconception was evidently given life based on theories gleaned from a reading of *Tedder v. State,* 322 So.2d 908 (Fla. 1975). The *Tedder* problem is a recurring one because it is all too easy to postulate what it is *Tedder* stands for. Unless this court sets parameters, a perfectly valid aggravating factor must be deemed invalid under the reasoning in *Espinosa*. Perhaps the best method would be to make clear what *Tedder* does *not* hold. *Tedder* does not instruct the sentencing judge to ignore the law and blindly follow the jury. The judge is actually a check on the jury, which is more likely to act on whim or caprice, being legally untrained. This court is a check against misapplication of the ultimate penalty for political gain and its proportionality review ensures that like crimes are punished uniformly. For all intents and purposes this court is the ultimate sentencer. It creates the law and ensures that it is applied. It ensures that the sentence is proportional. Its proportionality analysis would be retroactively skewed if a jury override was stricken solely because the community wanted the offender to live. Since the court still undertakes such analysis it must be assumed that unsuccessful overrides fall down in the proportionality department, as well. Under such a trifurcated system it hardly matters that an advisory body of laymen is not instructed on up to the minute case law. Under such a system the jury is *not* a *sentencer*. That the decision in *Espinosa* ignores the role of this

court is no better reflected than in this case. This court performed its *Clemons* function on direct appeal and ensured that a misinstructed jury did not, in fact, find an act to be heinous, atrocious or cruel which was not. Now, because of a misreading of *Tedder*, the court is asked to look at the sentence anew and pretend that the murder was not heinous, atrocious or cruel even though the victim was abducted, terrorized, sodomized and tauntingly shot nine times, with most of the bullets directed at the torso and extremities. *Swafford v. State,* 533 So.2d 270, 278 (Fla. 1988). Under *Espinosa* this court erred in applying its own case law and reaching the right result because a layman was not apprised of evolutionary refinement in case law. Such a result was achieved by giving such layman equal status with not only the sentencing judge but necessarily with this court as well. It is clear that this is an extremely heinous, atrocious and cruel crime. Under Florida's trifurcated system jury error is cured and this factor was properly applied. In a similar case this court declined to strike a properly applied HAC factor and determined that any error in instruction was harmless since there was no reasonable possibility that the erroneous instruction contributed to the jury recommendation. *See, Melendez v. State,* No. 75,081 (Fla. Nov. 12, 1992). What remains to be accomplished is to simply make clear that *Tedder* does not authorize giving great weight to hypothesized jury misapplications of aggravating factors because the sentencing judge's very role is to ensure such factors are correctly applied in accordance with the precedents of this court.

Even in the event this court should look anew at the sentence, after eliminating the HAC factor, the same result should obtain upon a harmless error analysis considering the remaining aggravating factors and the minuscule evidence in mitigation.

Swafford further complains that limiting appellate constructions were not provided to the jury in their instructions on the cold, calculated and premeditated aggravating factor and the avoiding or preventing a lawful arrest aggravator. This is *Espinosa* taken to its "umpteenth power." The suggested limiting instructions for the large part did not evolve in case law until years after Swafford's trial. If left untouched *Espinosa* will provide authority for arguing for constant resentencing in older cases simply on the basis of the evolution of the law. The same clairvoyance expected of the trial judge must also be expected of defense counsel, however. If these claims do flow from *Espinosa*, then the jury instructions should have been objected to at trial and the issues raised on appeal on the basis of *Godfrey v. Georgia* or any existing opinions of this court. This court has already indicated in its opinion on appeal from the denial of post conviction relief that the attack on the CCP instruction should have been raised, if at all, on direct appeal and found such claim procedurally barred. *Swafford v. Dugger*, 509 So.2d 1264, 1267 (Fla. 1990).

The claim that the jury was instructed that it could consider the same aggravator twice is likewise not preserved.

The "automatic aggravator" claim was rejected by this court on direct appeal. The court found that Swafford's first degree murder conviction is based on premeditation rather than the felony-murder rule. *Swafford v. State,* 533 So.2d 270, 278 (Fla. 1988). This argument has been repeatedly rejected. *Squires v. State,* 450 So.2d 208, 22 (Fla.) *cert. denied,* 469 U.S. 892 (1984). *Espinosa* provides no occasion at all to revisit this issue.

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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IN THE SUPREME COURT OF FLORIDA

ROY CLIFTON SWAFFORD,

Appellant,

v. CASE NO. 80,182

STATE OF FLORIDA,

Appellee.
_____/

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

APPENDIX TO

ANSWER BRIEF OF APPELLEE

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direct a verdict on that charge. The parties do not tell us, and the record does not show, the basis for this ruling, but it was almost certainly on the authority of the numerous cases discussed above which uniformly, but incorrectly under current law, hold that an accused must be present at the scene in order to be convicted of first-degree felony murder. Concerning the certified question, it is apparent from a plain reading of the statute, as amended, that the offense defined in section 782.04(3), Florida Statutes (1975 and thereafter) requires that the killing be performed by a nonprincipal. It is clear from the facts that the murder here was committed by one or both of respondent's two cofelons. Consequently, having objected to the lesser included instruction, respondent may not be convicted of second-degree felony murder.

We summarize our holdings as follows. First, section 777.011 is controlling and a principal does not have to be at the scene of the crime. Second, second-degree felony murder as defined in section 782.04(3) requires that the killing be done by a nonprincipal. We answer the certified question in the affirmative and approve the result below.

It is so ordered.

EHRLICH, C.J., and OVERTON, BARKETT, GRIMES and KOGAN, JJ., concur.

McDONALD, J., dissents.

Roy Clifton SWAFFORD, Appellant,

v.

STATE of Florida, Appellee.

No. 68009.

Supreme Court of Florida.

Sept. 29, 1988.

Rehearing Denied Dec. 2, 1988.

Defendant was convicted in the Circuit Court, Volusia County, Kim C. Hammond, J., of first-degree murder and sexual battery, and was sentenced to death, and he appealed. The Supreme Court held that: (1) witness' testimony that defendant said, in response to witness' question whether he would not be "bothered" after abducting, raping, and murdering victim selected in parking lot, that "you just get used to it" was admissible; (2) description was not admissible under identification exception to hearsay rule; (3) evidence supported finding of aggravating circumstances; and (4) nonstatutory mitigating evidence that defendant had attained rank of Eagle Scout did not overcome aggravating circumstances.

Affirmed.

Barkett, J., filed dissenting opinion, in which Ehrlich, C.J., concurred.

1. Criminal Law ⇐406(1)

In context of criminal trial, admission of defendant is admissible if it tends in some way, when taken together with other facts, to establish guilt. West's F.S.A. § 90.803(18).

2. Criminal Law ⇐406(6)

Witness' testimony, that in response to witness' question whether defendant would not be "bothered" after abducting, raping, and murdering victim selected in parking lot, defendant said, "you just get used to it," was admissible as admission, when viewed in context of defendant's having just said they could get girl, do anything they wanted to with her, and shoot her twice in head so there would not be any witnesses, as tending to prove that defendant had committed just such offense two months earlier, with which he was presently charged; while testimony had effect of casting defendant in bad light, it cannot be said that its sole relevancy was on matter of defendant's character or propensity. West's F.S.A. §§ 90.404(2)(a), 90.803(18).

3. Criminal Law ⇐338(7)

Probative value of witness' testimony that defendant said, in response to witness'

question whether he would not be "bothered" after abducting, raping and murdering victim selected in parking lot, that "you just get used to it," was not outweighed by danger of "unfair" prejudice; defendant's statement was evidence which tended to prove that he had committed just such crime only two months before, with which he was presently charged. West's F.S.A. § 90.403.

4. Criminal Law ⇐421(6)

Description of suspect in police bulletin and testimony of officer who prepared bulletin were not admissible under exception to hearsay rule for statements of identification; witness in case never made identification of suspect, but only gave description. West's F.S.A. § 90.801(2)(c).

5. Homicide ⇐357(8)

Motive to eliminate potential witnesses to "antecedent crime" can provide basis for finding as aggravating circumstance, in determining whether to impose death sentence, that murder was committed for purpose of avoiding or preventing lawful arrest; it is not necessary that arrest be imminent at time of murder. West's F.S.A. § 921.141(5)(e).

6. Homicide ⇐357(8)

Circumstances of murder supported finding as aggravating circumstance, in determining whether to impose death sentence, that murder was committed for purpose of avoiding or preventing lawful arrest, where victim had been abducted and sexually battered. West's F.S.A. § 921.141(5)(e).

7. Homicide ⇐357(1)

Evidence supported finding as aggravating circumstance, in determining whether to impose death sentence, that murder was especially heinous, atrocious, or cruel, given defendant's actions preceding actual killing, including abduction and sexual abuse, victim's fear and mental anguish, and defendant's firing nine bullets into victim's body, most of which were directed at torso and extremities. West's F.S.A. § 921.141(5)(h).

8. Homicide ⇐357(3)

Evidence that defendant shot victim nine times, including two shots to head at close range, and that he had to stop and reload his gun to finish carrying out shootings supported finding as aggravating circumstance, in determining whether to impose death sentence, that murder was committed in cold, calculated, and premeditated manner without any pretense of moral or legal justification. West's F.S.A. § 921.141(5)(i).

9. Homicide ⇐357(8)

Trial court could find as aggravating circumstance, in determining whether to impose death sentence, that defendant committed murder while engaged in, or in flight after, committing sexual battery, where defendant's first-degree murder conviction was based on premeditation, however, engaged-in-felony aggravating circumstance could be found even had conviction rested on felony-murder rule.

10. Homicide ⇐357(4)

It was within authority of trial court to find that nonstatutory mitigating circumstance of defendant's having attained rank of Eagle Scout was entitled to very little weight in mitigation, in determining whether to impose death sentence for first-degree murder, and that it did not outweigh aggravating circumstances.

James B. Gibson, Public Defender and Daniel J. Schaffer, Asst. Public Defender, Seventh Judicial Circuit, Daytona Beach, for appellant.

Robert A. Butterworth, Atty. Gen. and Belle B. Turner, Asst. Atty. Gen., Daytona Beach, for appellee.

PER CURIAM.

Roy Swafford appeals his convictions of first-degree murder and sexual battery and his death sentence. This Court has jurisdiction. Art. V, § 3(b)(1), Fla. Const. We affirm the convictions and sentence.

The evidence showed that on the morning of Sunday, February 14, 1982, the victim was at work at the FINA gas station

and store on the corner of U.S. Highway No. 1 and Granada Avenue in Ormond Beach, Florida. Two witnesses saw her there at 5:40 and 6:17 a.m. A third witness, who said he arrived at the station at around 6:20, found no attendant on duty although the store was open and the lights were on. At 6:27 a.m., the police were called, and an officer arrived at the station a few minutes later.

On February 15, 1982, the victim's body was found in a wooded area by a dirt road, about six miles from the FINA Station. She had been shot nine times, with two shots directly to the head. The cause of death was loss of blood from a shot to the chest. Based on trauma, lacerations, and seminal fluid in the victim's body, the medical examiner concluded that she had been sexually battered. Holes in the victim's clothing corresponding to the bullet wounds to her torso indicated that she was fully clothed when shot. The number of bullet wounds and the type of weapon used indicated that the killer had to stop and reload the gun at least once. Several bullets and fragments were recovered from the body.

Swafford and four companions drove from Nashville, Tennessee, to Daytona Beach, Florida, departing Nashville at about midnight on Friday, February 12 and arriving in Daytona Beach at about noon the next day. After setting up camp in a state park, Swafford and some others went out for the evening, arriving back at the campground at about midnight. Then, according to the testimony at trial, Swafford took the car and went out again, not to return until early Sunday morning.

State's witness Patricia Atwell, a dancer at a bar called the Shingle Shack, testified that Swafford was there with his friends on Saturday night, that they left at around midnight, and that Swafford returned alone at about 1:00 a.m. Sunday. When Atwell finished working at 3:00 a.m., she left the Shingle Shack with Swafford. They spent the rest of the night together at the home of Swafford's friend. At about 6:00 a.m., he returned her to the Shingle Shack and left, driving north on U.S. 1, a course that would have taken him by the FINA station. In the light traffic conditions of early Sunday morning, the FINA station was about four minutes away from the Shingle Shack. According to Swafford's travelling companions, he returned to the campsite around daybreak. The court took judicial notice of the fact that sunrise took place on the date in question at 7:04 a.m.

On Sunday Swafford and his friends attended an auto race in Daytona Beach. That evening they went back to the Shingle Shack, where one of the party got into a dispute with some other people over money he had paid in the expectation of receiving some drugs. Swafford displayed a gun and got the money back. The police were called, and Swafford deposited the gun in a trash can in one of the restrooms. The police seized the gun, and ballistics tests performed later conclusively established that Swafford's gun was the gun used to kill the victim. The evidence also showed that Swafford had had the gun for some time. Although the gun was not tested until more than a year after the murder, after authorities received a tip concerning Swafford's possible involvement, evidence established the chain of police custody and the identification of the gun.

The state also presented evidence that Swafford made statements from which an inference of his guilt of the crimes charged could be drawn. Ernest Johnson told of an incident that took place about two months after this murder. After meeting Swafford at an auto race track, Johnson accompanied him to his brother's house. When leaving the brother's house, Swafford suggested to Johnson that they "go get some women" or made a statement to that effect. Johnson testified as follows concerning what happened then:

Q. Okay. What happened then? What was said by the Defendant?

A. He just asked me if I wanted to go get some girl and I said yeah.

Q. And then what took place?

A. We got in—he asked me if I wanted to take my truck and I said no, so we went in his car.

All right. We went and got a six-pack of beer and started riding. And he said, do you want to get a girl, and I said yeah, where do you want to get one, or something like that. He said, I'll get one.

So, as we was driving, I said, you know, where are you going to get her at. He said, I'll get her. He said—he said, you won't have to worry about nothing the way I'm going to get her, or he put it in that way. And he said—he said, we'll get one and we'll do anything we want to to her. And he said, you won't have to worry about it because we won't get caught.

So, I said, how are you going to do that. And he said, we'll do anything we want to and I'll shoot her.

So, he said if—you know, he said that he'd get rid of her, he'd waste her, and he said, I'll shoot her in the head.

I said, man, you're crazy. He said, no, I'll shoot her in the head twice and I'll make damn good and sure that she's, you know, she's dead. He said, there won't be no witnesses.

So, I asked him, I said, man, don't—you know, don't that bother you. And he said, it does for a while, you know, you just get used to it.

Johnson then told the jury that he and Swafford went to a department store parking lot late at night, that Swafford selected a victim, told Johnson to drive the car, directed him to a position beside the targeted victim's car, and drew a gun. Johnson at that point refused to participate further and demanded to be taken back to his truck.

The jury found Swafford guilty of first-degree murder and sexual battery and recommended a sentence of death. The trial court then sentenced Swafford to death for the first-degree murder.

The trial court admitted Johnson's testimony, under two separate theories, as similar fact evidence and as an admission of guilt. Swafford now argues that the trial court erred in admitting Johnson's testimony because it presented information about a collateral crime, wrong, or act that was not relevant to a material issue of fact, contrary to *Williams v. State*, 110 So.2d 654 (Fla.), *cert. denied*, 361 U.S. 847, 80 S.Ct. 102, 4 L.Ed.2d 86 (1959), and codified in subsection 90.404(2)(a), Florida Statutes (1985).[1] To support this theory, Swafford relies on *Drake v. State*, 400 So.2d 1217 (Fla.1981), where this Court found the collateral events introduced by the state insufficiently similar to the facts of the crime charged to support comparison under the "mode of operating theory of proving identity." *Id.* at 1219. Swafford also relies on *Peek v. State*, 488 So.2d 52 (Fla.1986), which found that, because a sufficiently unique pattern of criminality to justify a finding of identity based on the collateral crime did not exist, evidence of the collateral crime should have been excluded as irrelevant. *Drake* and *Peek* are not controlling in this case.

The state did not present Johnson's testimony to establish that Swafford had committed a separate crime so similar in the manner of its commission to the crime charged that it pointed, with logical relevancy, to Swafford as the perpetrator of the instant homicide because the statement did not refer to a crime that had been committed. Rather, it offered the testimony primarily to inform the jury of a particular statement made by Swafford. In response to Johnson's question whether he would not be "bothered" after abducting, raping, and murdering a victim selected in a parking lot, Swafford said "you just get used to it." Swafford's statement that "you just get used to it," when viewed in the context of his having just said that they could get a girl, do anything they wanted to with her and shoot her twice in the head

1. § 90.404(2)(a), Fla.Stat. (1985), provides as follows:

(2) OTHER CRIMES, WRONGS, OR ACTS.—

(a) Similar fact evidence of other crimes, wrongs, or acts is admissible when relevant to prove a material fact in issue, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, but it is inadmissible when the evidence is relevant solely to prove bad character or propensity.

so there wouldn't be any witnesses, was evidence which tended to prove that he had committed just such a crime in Daytona Beach only two months before. An admission may be admissible if it is relevant, and relevant evidence is defined as evidence *tending* to prove or disprove a material fact. § 90.401, Fla.Stat. (1985). The trial judge properly permitted the jury to consider this evidence for what it was worth.[2]

[1] An admission of a party-opponent is admissible as an exception to the hearsay evidence rule. § 90.803(18), Fla.Stat. (1985). In contrast to other hearsay exceptions, admissions are admissible in evidence not because the circumstances provide special indicators of the statement's reliability, but because the out-of-court statement of the party is inconsistent with his express or implied position in the litigation.[3] *McCormick on Evidence* § 262 (E. Cleary ed. 1984). The admissibility of admissions of a party has been recognized by numerous Florida decisions. *E.g., Hunt v. Seaboard Coast Line R.R.*, 327 So.2d 193 (Fla.1976); *Roberts v. State*, 94 Fla. 149, 113 So. 726 (1927); *Parrish v. State*, 90 Fla. 25, 105 So. 130 (1925); *Daniels v. State*, 57 Fla. 1, 48 So. 747 (1909); *Dinter v. Brewer*, 420 So.2d 932 (Fla. 3d DCA 1982); *Darty v. State*, 161 So.2d 864 (Fla. 2d DCA), *cert. denied*, 168 So.2d 147 (Fla.1964).[4] Of course, like all evidence, an admission must be relevant; i.e., it must have some logical bearing on an issue of material fact. In the context of a criminal trial, an admission of the defendant is admissible if it tends in some way, when taken together with other facts, to establish guilt. 4 C. Torcia, *Wharton's Criminal Evidence* §§ 651–653 (14th ed. 1987); *see, e.g., United States v. Venditti*, 533 F.2d 217, 220 (5th Cir.1976) (admission was "open to the prosecutor's permissible suggestion of an adverse inference"); *United States v. Nakaladski*, 481 F.2d 289 (5th Cir.) (admission relevant to intent), *cert. denied*, 414 U.S. 1064, 94 S.Ct. 570, 38 L.Ed.2d 469 (1973); *Myers v. State*, 256 So.2d 400 (Fla. 3d DCA 1972) (admission capable of raising inference of guilt admissible); *Ebert v. State*, 140 So.2d 63, 65 (Fla. 2d DCA 1962) ("an admission of

2. Numerous decisions of this Court indicate that if evidence is relevant it will be admitted and its probative value left to the trier of fact. *E.g., Brown v. State*, 473 So.2d 1260 (Fla.) (while admissibility of a statement was not challenged on appeal, the Court's discussion of it in resolving an issue of fact indicates its relevance and shows that such an admission has probative value even without specific referential facts), *cert. denied*, 474 U.S. 1038, 106 S.Ct. 607, 88 L.Ed.2d 585 (1985); *Jones v. State*, 440 So.2d 570, 577 (Fla.1983) (court found evidence to the effect that, prior to the time of the offense charged, the defendant had said that he was going to "kill a pig" admissible under an exception to the hearsay rule and relevant to the question of whether the defendant was guilty of the crime charged); *Johnson v. State*, 438 So.2d 774 (Fla.1983) (although the statement that Johnson would not mind shooting people to obtain money was not an admission of specific incriminating facts, it was capable of supporting an inference of guilt and was therefore properly considered), *cert. denied*, 465 U.S. 1051, 104 S.Ct. 1329, 79 L.Ed.2d 724 (1984); *Rose v. State*, 425 So.2d 521, 522 (Fla.1982) (statement that defendant "did not know what he was capable of doing" was relevant evidence tending to show guilt when considered in light of other evidence concerning the defendant's motive), *cert. denied*, 461 U.S. 909, 103 S.Ct. 1883, 76 L.Ed.2d 812 (1983); *Antone v. State*, 382 So.2d 1205 (Fla.) (the relevance of a statement made after a crime lay in its support of an inference concerning the defendant's knowledge of certain criminal activity), *cert. denied*, 449 U.S. 913, 101 S.Ct. 287, 66 L.Ed.2d 141 (1980).

3. The hearsay exception for declarations against interest made by nonparties was discussed in *Baker v. State*, 336 So.2d 364 (Fla.1976). The admissibility of such statements is also recognized in the federal courts, although the theory is somewhat different: under Federal Rule of Evidence 801(d)(2), admissions are defined as not coming within the hearsay rule, rather than as exceptions to it. *United States v. Clemons*, 676 F.2d 122 (5th Cir.1982); *United States v. Roe*, 670 F.2d 956 (11th Cir.), *cert. denied*, 459 U.S. 856, 103 S.Ct. 126, 74 L.Ed.2d 109 (1982); *United States v. Archbold-Newball*, 554 F.2d 665 (5th Cir.), *cert. denied*, 434 U.S. 1000, 98 S.Ct. 644, 54 L.Ed.2d 496 (1977).

4. In some cases this hearsay exception has been referred to, mistakenly, as being grounded in the fact that the party's statement was an "admission against interest." *E.g., Parrish v. State*, 90 Fla. at 32, 105 So. at 133; *Daniels v. State*, 57 Fla. at 4, 48 So.2d at 748; *Darty v. State*, 161 So.2d at 870. More recent authorities make clear that a statement of a party is admissible as an admission and "need not have been consciously against the interest of its maker at the time it occurred." *Hunt v. Seaboard Coast Line R.R.*, 327 So.2d 193, 196 (Fla.1976).

guilt or of conduct from which guilt may be inferred" was admissible); *Brown v. State*, 111 So.2d 296, 298 (Fla. 2d DCA) (defendant's statement was "a declaration or admission of independent facts which might go to prove guilt or from which guilt might be inferred"), *cert. denied*, 114 So.2d 6 (Fla.1959).

[2] Swafford argues that even if his admissions are recognized as an exception to the hearsay rule, the evidence still must be tested against the restrictions embodied in the *Williams* rule because it showed the commission of a collateral crime or wrongful act. *Williams*, however, explicitly recognized the "general canon of evidence that any fact relevant to prove a fact in issue is admissible into evidence unless its admissibility is precluded by some specific rule of exclusion." 110 So.2d at 658. This Court also observed that "evidence which has a reasonable tendency to establish the crime laid in the indictment is not inadmissible merely because it points to another crime," *id.* at 663, and concluded that "evidence of any facts relevant to a material fact in issue except where the sole relevancy is character or propensity of the accused is admissible unless precluded by some specific exception or rule of exclusion." *Id.*

Since *Williams* we have acknowledged many times its basic teaching that evidence showing collateral crimes or wrongful acts is admissible if it is relevant for any purpose other than to show the bad character or criminal propensity of the accused. *E.g., Craig v. State*, 510 So.2d 857 (Fla. 1987), *cert. denied*, — U.S. —, 108 S.Ct. 732, 98 L.Ed.2d 680 (1988); *Medina v. State*, 466 So.2d 1046 (Fla.1985); *Justus v. State*, 438 So.2d 358 (Fla.1983), *cert. denied*, 465 U.S. 1052, 104 S.Ct. 1332, 79 L.Ed.2d 726 (1984); *State v. Statewright*, 300 So.2d 674 (Fla.1974); *Bryant v. State*, 235 So.2d 721 (Fla.1970); *Mackiewicz v. State*, 114 So.2d 684 (Fla.1959), *cert. denied*, 362 U.S. 965, 80 S.Ct. 883, 4 L.Ed.2d 879 (1960). The examples given in *Williams* and in subsection 90.404(2)(a) are not an exclusive list of the purposes for which such evidence can be found relevant. While Johnson's testimony certainly had the effect of casting Swafford in a bad light, it cannot be said that its *sole* relevancy was on the matter of character or propensity.[5]

The framework within which every evidentiary problem must be resolved entails an analysis of two related issues: relevance and materiality. To be admissible, evidence first must be relevant to a particular material issue to be proved. This basic framework is of special importance when the evidence to be admitted poses an unusual danger of unfair prejudice to an accused. *See* § 90.403, Fla.Stat. (1985).

[3] Swafford also argues that his statement had little or no probative value and therefore should have been excluded because the damaging effect of the testimony improperly prejudiced him and outweighed any probative value. Swafford made the challenged statement in response to a serious question posed by Johnson following Swafford's concrete proposal of a criminal act. Although the proposal and solicitation were not similar enough to the crime charged to support a "similar facts" presentation under the modus operandi theory of *Drake* and *Peek* there was enough similarity to give probative value to Swafford's statement. We fail to see how Swafford's statement was *unfairly* prejudicial and therefore hold that the court properly admitted the testimony in question.

[4] Next, Swafford argues that the trial court erred in excluding evidence the de-

5. In a number of cases this Court has held admissible statements of a defendant made either before or after the time of the crime charged. In some of these cases, the testimony about the statements also showed the commission of separate crimes or wrongs or cast the defendant's character in a bad light. In *Waterhouse v. State*, 429 So.2d 301 (Fla.), *cert. denied*, 464 U.S. 977, 104 S.Ct. 415, 78 L.Ed.2d 352 (1983), the Court found the testimony about the incident relevant and admissible "because it included, and explained the context of, an incriminating admission." *Id.* at 306. Similarly, in *Phillips v. State*, 476 So.2d 194, 196 (Fla.1985), a statement of the defendant, challenged as being irrelevant and prejudicial because it was damaging to his character, was found to be "relevant to discredit appellant's alibi and to explain the context of an incriminating admission."

fense sought to introduce. The defense called a person who had told the police that he had seen a man at the FINA station at 6:17 a.m. on the day of the crime, and the witness described from the stand the man he saw. The defense then sought to introduce a police bulletin and the testimony of the officer who had prepared it, suggesting that the bulletin and testimony would provide a better description of the person seen than the witness's recollection over three years later. The court excluded the bulletin and officer's testimony on the ground of hearsay.

Swafford claims that the police bulletin, derived from the witness' description of the man he saw, was not hearsay because it came within the exception for statements of identification under subsection 90.801(2)(c), Florida Statutes (1985). This position is erroneous because a description is not an identification. *See, e.g., Hendrieth v. State*, 483 So.2d 768, 769 (Fla. 1st DCA 1986). An "identification of a person after perceiving him," subsection 90.801(2)(c), is a designation or reference to a particular person or his or her photograph and a statement that the person identified is the same as the person previously perceived. The witness in this case never made an identification of the person he had seen; he only gave a description. This testimony does not meet the definition of "identification" as used in subsection 90.801(2)(c). *See, e.g., State v. Freber*, 366 So.2d 426 (Fla.1978); *Brown v. State*, 413 So.2d 414 (Fla. 5th DCA 1982); *Henry v. State*, 383 So.2d 320 (Fla. 5th DCA 1980).

[5, 6] Swafford's remaining arguments pertain to the death sentence. First, he contends that the court erred in finding the murder to have been "committed for the purpose of avoiding or preventing a lawful arrest." § 921.141(5)(e), Fla.Stat. (1985). A motive to eliminate potential witnesses to "an antecedent crime" can provide the basis for this aggravating circumstance. *Menendez v. State*, 419 So.2d 312, 315 n. 2 (Fla.1982). It is not necessary that an arrest be imminent at the time of the murder. *See, e.g., Herring v. State*, 446 So.2d 1049 (Fla.), *cert. denied*, 469 U.S. 989, 105 S.Ct. 396, 83 L.Ed.2d 330 (1984); *Riley v. State*, 366 So.2d 19 (Fla.1978).

Although some decisions have approved findings of motive to eliminate witnesses based on admissions of the defendant, *Kokal v. State*, 492 So.2d 1317, 1319 (Fla.1986); *Bottoson v. State*, 443 So.2d 962, 963 (Fla. 1983), *cert. denied*, 469 U.S. 873, 105 S.Ct. 223, 83 L.Ed.2d 153 (1984); *Johnson v. State*, 442 So.2d 185, 188 (Fla.1983), *cert. denied*, 466 U.S. 963, 104 S.Ct. 2182, 80 L.Ed.2d 563 (1984), in others the factor has been approved on the basis of circumstantial evidence without any such direct statement.[6] *Routly v. State*, 440 So.2d 1257, 1263 (Fla.1983) ("express statement" not required), *cert. denied*, 468 U.S. 1220, 104 S.Ct. 3591, 82 L.Ed.2d 888 (1984). While Swafford's statement to Johnson did not contain any clear reference to his motive for the murder specifically, the circumstances of the murder were similar to those in many cases where the arrest avoidance factor has been approved. *E.g., Cave v. State*, 476 So.2d 180, 188 (Fla.1985) (evidence left "no reasonable inference but that the victim was kidnapped from the store and transported some thirteen miles to a rural area in order to kill and thereby silence the sole witness to the robbery"), *cert. denied*, 476 U.S. 1178, 106 S.Ct. 2907, 90 L.Ed.2d 993 (1986); *Routly v. State*, 440 So.2d at 1264 ("no logical reason" for the victim's abduction and killing "except for the purpose of murdering him to prevent detection"). Other cases have applied the same reasoning on similar facts. *E.g., Burr v. State*, 466 So.2d 1051 (Fla.), *cert. denied*, 474 U.S. 879, 106 S.Ct. 201, 88 L.Ed.2d 170 (1985); *Martin v. State*, 420 So.2d 583 (Fla.1982), *cert. denied*, 460 U.S. 1056, 103 S.Ct. 1508, 75 L.Ed.2d 937 (1983); *Griffin v. State*, 414 So.2d 1025 (Fla.1982).

6. Swafford relies on cases in which the support for the factor was too speculative because other possible motives existed. These cases are inapplicable. Even without direct evidence of the offender's thought processes, the arrest avoidance factor can be supported by circumstantial evidence through inference from the facts shown. *See, e.g., Harich v. State*, 437 So.2d 1082, 1086 (Fla.1983), *cert. denied*, 465 U.S. 1051, 104 S.Ct. 1329, 79 L.Ed.2d 724 (1984).

[7] Next, Swafford argues that the trial court erred in finding the murder to have been "especially heinous, atrocious, or cruel." § 921.141(5)(h), Fla.Stat. (1985). In numerous cases the Court has held that this aggravating factor could be supported by evidence of actions of the offender preceding the actual killing, including forcible abduction, transportation away from possible sources of assistance and detection, and sexual abuse. *See, e.g., Routly v. State,* 440 So.2d at 1264; *Lightbourne v. State,* 438 So.2d 380, 391 (Fla.1983), *cert. denied,* 465 U.S. 1051, 104 S.Ct. 1330, 79 L.Ed.2d 725 (1984); *Smith v. State,* 424 So.2d 726, 733 (Fla.1982), *cert. denied,* 462 U.S. 1145, 103 S.Ct. 3129, 77 L.Ed.2d 1379 (1983); *Griffin v. State,* 414 So.2d at 1029. In *Parker v. State,* 476 So.2d 134, 139 (Fla. 1985), we quoted the statement in *Adams v. State,* 412 So.2d 850, 857 (Fla.), *cert. denied,* 459 U.S. 882, 103 S.Ct. 182, 74 L.Ed.2d 148 (1982), that "fear and emotional strain preceding a victim's almost instantaneous death may be considered as contributing to the heinous nature of the capital felony." Moreover, the victim's mental state may be evaluated for purposes of such determination in accordance with a common-sense inference from the circumstances. *Preston v. State,* 444 So.2d 939, 946 (Fla.1984) ("victim *must have* felt terror and fear as these events unfolded") (emphasis added). In addition to factors based on events preceding the shooting—abduction, fear, mental anguish, and sexual abuse—the killing itself occurred in such a way as to show a wanton atrocity. Swafford fired nine bullets into the victim's body, most of them directed at the torso and extremities. *See, e.g., Troedel v. State,* 462 So.2d 392, 297–98 (Fla.1984).

Aggravating circumstances must be proved beyond a reasonable doubt. *Johnson v. State,* 438 So.2d 774 (Fla.1983), *cert. denied,* 465 U.S. 1051, 104 S.Ct. 1329, 79 L.Ed.2d 724 (1984); *Williams v. State,* 386 So.2d 538 (Fla.1980). Evaluating the evidence and resolving factual conflicts in a particular case, however, are the responsibility of the trial court judge. When a trial court judge, mindful of the applicable standard of proof, finds that an aggravating circumstance has been established, the finding should not be overturned unless there is a lack of competent, substantial evidence to support it. *See Stano v. State,* 460 So.2d 890, 894 (Fla.1984), *cert. denied,* 471 U.S. 1111, 105 S.Ct. 2347, 85 L.Ed.2d 863 (1985). There is competent, substantial evidence in the record to support the trial court's finding that this murder was especially heinous, atrocious, or cruel.

[8] Swafford also claims that the trial court erred in finding the murder to have been "committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification." § 921.141(5)(i), Fla.Stat. (1985). The evidence showed, however, that Swafford shot the victim nine times including two shots to the head at close range and that he had to stop and reload his gun to finish carrying out the shootings. This aggravating factor can be found when the evidence shows such reloading, *Phillips v. State,* 476 So.2d 194, 197 (Fla.1985), because reloading demonstrates more time for reflection and therefore "heightened premeditation." *See Herring v. State,* 446 So.2d 1049, 1057 (Fla.), *cert. denied,* 469 U.S. 989, 105 S.Ct. 396, 83 L.Ed.2d 330 (1984). The cold, calculated, premeditated murder, committed without pretense of legal or moral justification, can also be indicated by circumstances showing such facts as advance procurement of a weapon, lack of resistance or provocation, and the appearance of a killing carried out as a matter of course. *See, e.g., Burr v. State,* 466 So.2d 1051, 1054 (Fla.1985), *cert. denied,* 474 U.S. 879, 106 S.Ct. 201, 88 L.Ed.2d 170 (1985); *Eutzy v. State,* 458 So.2d 755, 757 (Fla.1984), *cert. denied,* 471 U.S. 1045, 105 S.Ct. 2062, 85 L.Ed.2d 336 (1985). The evidence is sufficient to sustain the finding here.

[9] Swafford argues that the trial court incorrectly found as an aggravating circumstance that he committed the murder while engaged in, or in flight after, committing sexual battery because the sexual battery was the underlying felony supporting the first-degree felony-murder conviction. Swafford is mistaken because his first-degree murder conviction is based on premed-

itation rather than the felony-murder rule. Premeditation can be proved by circumstantial evidence. *Buford v. State*, 403 So.2d 943 (Fla.1981), *cert. denied*, 454 U.S. 1163, 102 S.Ct. 1037, 71 L.Ed.2d 319 (1982); *Hill v. State*, 133 So.2d 68 (Fla.1961); *Larry v. State*, 104 So.2d 352 (Fla.1958). A finding of intent can be based on the nature of the act and the manner of its commission. *Rhodes v. State*, 104 Fla. 520, 140 So. 309 (1932). Furthermore, we have held that the engaged-in-felony aggravating circumstance can be found even where the conviction rests on the felony-murder rule. *E.g., Mills v. State*, 476 So.2d 172, 177 (Fla.1985), *cert. denied*, 475 U.S. 1031, 106 S.Ct. 1241, 89 L.Ed.2d 349 (1986).

Based on his arguments that several of the aggravating circumstances should be stricken, Swafford contends that the mitigating evidence shown should have been found to outweigh the aggravating circumstances. This argument has no persuasive force because we disagree with Swafford's arguments regarding the validity of the aggravating circumstances discussed previously. The trial court properly found all of the aggravating factors.

[10] The trial court found that one item of information adduced by the defense constituted a nonstatutory mitigating circumstance. Based on the parties' stipulation that Swafford's father, were he able, would have testified that Swafford had attained the rank of Eagle Scout, the trial court found that Swafford had indeed been an Eagle Scout and noted "the efforts required to achieve such an honor." The court found the factor entitled to very little weight in mitigation, commenting that it did "demonstrate that the Defendant, at some point in his life, had training and supervision that should have led him to become a lawful contributing citizen." "It is within the province of the trial court to decide the weight to be given particular mitigating circumstances and whether they offset the established aggravating circumstances." *Herring v. State*, 446 So.2d at 1057. We find no error in the weighing process performed in this case.

Finally, Swafford presents a number of challenges to the constitutionality of the Florida capital sentencing law. This broadside attack on the sentencing law is not related, in Swafford's argument, to any action or ruling in the lower court that affected his sentencing. Moreover, Swafford did not raise or preserve these issues for appeal by motion or objection in the lower court. *Eutzy v. State*, 458 So.2d at 757. For these reasons we are unable to provide appellate review of the issues raised. Additionally, as Swafford concedes, the arguments made have all, in one form or another, been rejected before.

We find no error affecting the judgment or sentence. We further find the sentence of death appropriate. Therefore, the convictions and sentence are affirmed.

It is so ordered.

OVERTON, McDONALD, SHAW, GRIMES and KOGAN, JJ., concur.

BARKETT, J., dissents with an opinion, in which EHRLICH, C.J., concurs.

BARKETT, Justice, dissenting.

We previously have rejected the idea that a defendant's out-of-court admission of involvement in collateral crimes somehow is exempt from the standard of relevance contained in the *Williams* Rule. In *Jackson v. State*, 451 So.2d 458 (Fla.1984), we ruled that a defendant's out-of-court admission that he was "a thoroughbred killer" and that he brandished a gun while making this statement was irrelevant and inadmissible in his trial for an unrelated murder.

> The testimony showed Jackson may have committed an assault on [a third party], but that crime was irrelevant to the case sub judice. Likewise the "thoroughbred killer" statement may have suggested Jackson had killed in the past, but the boast neither proved that fact, nor was that fact relevant to the case sub judice. The testimony is precisely the kind forbidden by the *Williams* rule and section 90.404(2).

Id. at 461. Moreover, *Jackson* cited with approval the following statement from

Paul v. State, 340 So.2d 1249, 1250 (Fla. 3d DCA 1976), *cert. denied*, 348 So.2d 953 (Fla.1977):

> There is no doubt that this admission [to prior unrelated crimes] would go far to convince men of ordinary intelligence that the defendant was probably guilty of the crime charged. But, the criminal law departs from the standard of the ordinary in that it requires proof of a *particular* crime. Where evidence has no relevancy except as to the character and propensity of the defendant to commit the crime charged, it must be excluded [citing *Williams*].

(Emphasis added.) In *Paul*, the court gave this rationale in ruling irrelevant and inadmissible a burglary defendant's confession that he had committed seventeen other unsolved burglaries.

I conclude that Swafford's alleged statement to Johnson, "you just get used to it," is no more relevant to the issues at his trial than were the admissions in *Jackson* and *Paul*. This alleged admission certainly was more equivocal than the defendant's boast in *Jackson* that he was a "thoroughbred killer." As in *Jackson*, it neither proved that Swafford had killed in the past nor was it relevant to any issue at trial, except to show criminal propensity and character. And Swafford's single, vague statement to Johnson pales in comparison to the defendant's confession in *Paul* that he had committed seventeen other burglaries.

Moreover, the probative value of this collateral-crimes evidence was, at best, slight. The potential prejudice it posed to this defendant's case, however, was substantial. The only relevance of this testimony was to establish the criminal propensity and character of Swafford. It therefore falls within the rule of exclusion contained in the final clause of section 90.404(2)(a), Florida Statutes, and should never have been heard by the jury. *See Straight v. State*, 397 So.2d 903, 908 (Fla.), *cert. denied*, 454 U.S. 1022, 102 S.Ct. 556, 70 L.Ed.2d 418 (1981); *McCrae v. State*, 395 So.2d 1145, 1152 (Fla. 1980), *cert. denied*, 454 U.S. 1041, 102 S.Ct. 583, 70 L.Ed.2d 486 (1981); *Smith v. State*, 365 So.2d 704, 706 (Fla.1978), *cert. denied*, 444 U.S. 885, 100 S.Ct. 177, 62 L.Ed.2d 115 (1979).

Accordingly, I would reverse appellant's conviction and order a new trial.

EHRLICH, C.J., concurs.

John S. ROE, Petitioner,

v.

AMICA MUTUAL INSURANCE CO., Respondent.

No. 71682.

Supreme Court of Florida.

Oct. 6, 1988.

Rehearing Denied Dec. 2, 1988.

Insured filed motion to confirm arbitration award and insurer opposed confirming award and requested jury trial. The Circuit Court, Polk County, Charles B. Curry, Acting J., refused to confirm award and appeal was taken. The District Court of Appeal, 515 So.2d 1370, affirmed and application was filed for review. The Supreme Court, Barkett, J., held that policy authorizing either party to reject at will arbitration award in excess of certain sum was not contrary to Florida Arbitration Code or to public policy.

Approved.

1. Arbitration ⇐1.2

Arbitration is favored means of dispute resolution and courts indulge every reasonable presumption to uphold proceedings resulting in award.

2. Insurance ⇐574(5)

Policy authorizing either insured or insurer to reject at will arbitration award in

court's denial of his fourth motion for postconviction relief. We have jurisdiction. Art. V, § 3(b)(1), Fla.Const.; Fla.R.Crim.P. 3.850. We affirm the trial court's denial of relief.

Clark has a long history in the courts. *Clark v. Dugger*, 559 So.2d 192 (Fla.1990), and cases cited therein.* He raised four issues in the instant motion: 1) violation of *Clemons v. Mississippi*, — U.S. —, 110 S.Ct. 1441, 108 L.Ed.2d 725 (1990); 2) ineffective assistance of counsel for failing to develop mitigating evidence; 3) unconstitutionality, on its face and as applied, of the heinous, atrocious, or cruel instruction; and 4) failure to disclose exculpatory evidence. All of these claims, or variations of them, have been considered previously. They are, therefore, procedurally barred, and we affirm the trial court's summary denial of relief. We deny a further stay of execution.

It is so ordered.

SHAW, C.J., and OVERTON, McDONALD, EHRLICH, BARKETT, GRIMES and KOGAN, JJ., concur.

NO MOTION FOR REHEARING WILL BE ALLOWED.

Roy Clifton SWAFFORD, Petitioner,

v.

Richard L. DUGGER, etc., Respondent.

Roy Clifton SWAFFORD, Appellant,

v.

STATE of Florida, Appellee.

Nos. 76769, 76884.

Supreme Court of Florida.

Nov. 14, 1990.

Following affirmance, 533 So.2d 270, of conviction of first-degree murder and sexual battery and death sentence, prisoner sought postconviction relief. The Circuit Court, Volusia County, Kim C. Hammond, J., denied relief. Prisoner appealed and also petitioned for writ of habeas corpus and requested stay of execution. The Supreme Court held that: (1) issues raised in habeas petition were procedurally barred or not meritorious, and (2) prisoner was not entitled to evidentiary hearing.

Writ denied, denial of postconviction relief affirmed, and request for stay of execution denied.

Barkett, J., dissented and filed opinion in which Kogan, J., concurred.

1. Habeas Corpus ⇐293, 295

Issue of admissibility of petitioner's statements to traveling companion was fully considered on direct appeal and was procedurally barred, and allegation that appellate counsel was ineffective in failing to convince appellate court otherwise could not be used to evade rule against using habeas corpus as a second appeal. U.S. C.A. Const.Amend. 6.

2. Habeas Corpus ⇐288

Habeas corpus is not to be used for second appeals.

3. Criminal Law ⇐641.13(7)

After appellate counsel raises an issue, failure to convince court to rule in appellant's favor is not ineffective performance. U.S.C.A. Const.Amend. 6.

4. Habeas Corpus ⇐295

Allegations of ineffective assistance of appellate counsel may not be used to evade rule against habeas corpus as second appeal. U.S.C.A. Const.Amend. 6.

5. Criminal Law ⇐641.13(7)

Failing to brief or argue nonmeritous issue is not ineffective assistance of appellate counsel. U.S.C.A. Const.Amend. 6.

* The federal courts again denied relief since the filing of our most recent opinion. *Clark v. Dugger*, 901 F.2d 908 (11th Cir.), *cert. denied*, — U.S. —, 111 S.Ct. 372, 112 L.Ed.2d 334 (1990).

6. Criminal Law ⇐641.13(7)

Appellate counsel's failure to challenge sufficiency of evidence regarding sexual battery was not ineffective assistance of counsel, where issue had no merit. U.S.C.A. Const.Amend. 6.

7. Criminal Law ⇐641.13(7)

Appellate counsel was not ineffective for failing to argue unpreserved claim that introduction of victim impact statement violated defendant's Eighth Amendment rights. U.S.C.A. Const.Amends. 6, 8.

8. Habeas Corpus ⇐490(1)

Claims concerning introduction of victim impact statement evidence in violation of *Booth v. Maryland* are cognizable in habeas corpus proceedings only in extraordinary circumstances.

9. Habeas Corpus ⇐294

Habeas petitioner's claim that jury instructions improperly shifted burden of persuasion regarding appropriate sentence was procedurally barred where trial counsel failed to object at trial.

10. Criminal Law ⇐998(13)

Postconviction proceedings cannot be used as a second appeal.

11. Criminal Law ⇐998(13)

Postconviction claims which should have been, but were not, raised on direct appeal were procedurally barred.

12. Attorney and Client ⇐21.5(1)

Conflict of interest presented by cocounsel's dual status as defense counsel and special deputy sheriff did not prejudice defendant, where cocounsel's involvement was minimal.

13. Criminal Law ⇐589(1)

Denial of motion for stay to allow further review of recently furnished investigatory files was not an abuse of discretion where state had complied with its obligations.

14. Criminal Law ⇐627.8(6), 700(2)

Test for measuring effect of failure to disclose exculpatory evidence, regardless of whether such failure constitutes discovery violation, is whether there is reasonable probability that had evidence been disclosed to defense, result of proceeding would have been different.

15. Criminal Law ⇐998(19)

Movant failed to establish materiality of information allegedly withheld by state, and thus, he was not entitled to evidentiary hearing, in postconviction proceeding, to determine whether there was a reasonable probability that had the evidence been disclosed to the defense, the result of the proceeding would have been different.

16. Criminal Law ⇐641.13(1)

To prevail on claim of ineffective assistance, both substandard performance and prejudice caused by that performance must be demonstrated. U.S.C.A. Const. Amend. 6.

17. Criminal Law ⇐998(19)

To be granted evidentiary hearing on claim of ineffective assistance, petitioner must allege specific facts not conclusively rebutted by record and show deficient and prejudicial performance by counsel. U.S.C.A. Const.Amend. 6.

18. Criminal Law ⇐998(19)

Movant was not entitled to evidentiary hearing, in postconviction proceeding, on claim of ineffective assistance of counsel, absent showing of prejudice. U.S.C.A. Const.Amend. 6.

Larry Helm Spalding, Capital Collateral Representative, Billy H. Nolas, Chief Asst. Capital Collateral Representative, and Jerome H. Nickerson, Mark E. Evans, Aaron Massie and Jerrel E. Phillips, Asst. Capital Collateral Representatives, Office of Capital Collateral Representative, Tallahassee, for petitioner, appellant.

Robert A. Butterworth, Atty. Gen., and Barbara C. Davis, Asst. Atty. Gen., Daytona Beach, for respondent, appellee.

PER CURIAM.

Roy Swafford, a prisoner under death warrant, petitions the Court for writ of habeas corpus, appeals the trial court's denial of his motion for postconviction relief,

and requests a stay of execution. We have jurisdiction. Art. V, § 3(b)(1), (9), Fla. Const.; Fla.R.Crim.P. 3.850. Finding no merit to Swafford's arguments, we refuse to issue the writ, affirm the trial court's denial of his motion, and deny a further stay.

A jury convicted Swafford of the first-degree murder and sexual battery of a gas station/store clerk. Agreeing with the jury's recommendation, the trial court sentenced him to death. We affirmed Swafford's convictions and sentence. *Swafford v. State*, 533 So.2d 270 (Fla.1988),[1] *cert. denied*, 489 U.S. 1100, 109 S.Ct. 1578, 103 L.Ed.2d 944 (1989).

[1–4] Swafford presents four issues in his habeas petition: 1) ineffective assistance of appellate counsel for not convincing this Court that one of Swafford's statements to a travelling companion should not have been admitted at trial; 2) the state failed to prove sexual battery and counsel rendered ineffective assistance by failing to raise this issue on appeal; 3) victim impact evidence violated *Booth v. Maryland*, 482 U.S. 496, 107 S.Ct. 2529, 96 L.Ed.2d 440 (1987), *South Carolina v. Gathers*, 490 U.S. 805, 109 S.Ct. 2207, 104 L.Ed.2d 876 (1989), and *Jackson v. Dugger*, 547 So.2d 1197 (Fla.1989), and counsel rendered ineffective assistance by not raising this claim on appeal; and 4) the jury instructions improperly shifted to Swafford the burden of showing life imprisonment to be the appropriate penalty. We fully considered the admissibility of Swafford's statement on direct appeal. 533 So.2d at 272–275. Habeas corpus is not to be used for second appeals. *Porter v. Dugger*, 559 So.2d 201 (Fla.1990); *Blanco v. Wainwright*, 507 So.2d 1377 (Fla.1987). After appellate counsel raises an issue, failing to convince this Court to rule in an appellant's favor is not ineffective performance. *See Porter; Harris v. Wainwright*, 473 So.2d 1246 (Fla.1985). Allegations of ineffective assistance of appellate counsel may not be used to evade the rule against using habeas corpus as a second appeal. *Porter; Harris; Blanco.* This issue, therefore, is procedurally barred.

[5, 6] If counsel had challenged the sufficiency of the evidence regarding sexual battery, we would have found no merit regarding that claim. Evidence presented at trial sufficiently supports the sexual battery conviction and the aggravating factors of heinous, atrocious, or cruel and committed during a felony.[2] Failing to brief or argue a nonmeritorious issue is not ineffective assistance of appellate counsel. *King v. Dugger*, 555 So.2d 355 (Fla.1990); *Suarez v. Dugger*, 527 So.2d 190 (Fla.1988). Therefore, we find no merit to Swafford's second issue.

[7, 8] Although Swafford argues that trial counsel objected to the introduction of victim impact evidence, the record does not show any such objections. Appellate counsel, therefore, cannot be considered ineffective for failing to argue a *Booth* violation because the claim had not been preserved for appeal. *Squires v. Dugger*, 564 So.2d 1074 (Fla.1990); *Porter*. Moreover, *Booth* claims are cognizable in habeas corpus proceedings only in extraordinary circumstances, such as were present in *Jackson*. *Clark v. Dugger*, 559 So.2d 192 (Fla.1990); *Parker v. Dugger*, 550 So.2d 459 (Fla.1989); *Jackson*. Such extraordinary circumstances are not present in this case, and Swafford's third claim is procedurally barred.

[9] The fourth claim, shifting the burden of persuasion, should have been raised on direct appeal, but trial counsel did not object to what current counsel considers error. The claim is, therefore, procedurally barred. *Squires; Porter.*

Swafford raised sixteen issues in his postconviction motion: 1) violation of *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963); 2) refusal to provide full access to the state's files; 3) ineffectiveness of counsel at the guilt phase; 4) ineffectiveness of counsel at the penalty phase; 5) conflict of interest of one of

1. The facts are set out more fully in the opinion on direct appeal.

2. The victim's being abducted also supports these aggravating factors.

Swafford's public defenders who also was a special deputy sheriff; 6) 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; 7) security measures at trial violated Swafford's rights; 8) using an improperly obtained prior conviction to aggravate the sentence; 9) violation of *Booth;* 10) the trial court failed to independently weigh the aggravating and mitigating factors; 11) the jury instructions improperly shift the burden to a defendant to show life to be the appropriate penalty; 12) violation of *Caldwell v. Mississippi*, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985); 13) failure to prove corpus delicti of sexual battery; 14) the cold, calculated, and premeditated instruction violates *Maynard v. Cartwright*, 486 U.S. 356, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988); 15) the heinous, atrocious, or cruel instruction violates *Maynard;* and 16) application of Florida Rule of Criminal Procedure 3.851 violates Swafford's rights. After considering the petition, the trial court, in a sixteen-page order reciting reasons therefor, denied it without an evidentiary hearing. Swafford argues that we should reverse the court's order and remand for such a hearing. We disagree.

[10–13] Postconviction proceedings cannot be used as a second appeal. *State v. Bolender*, 503 So.2d 1247 (Fla.), *cert. denied*, 484 U.S. 873, 108 S.Ct. 209, 98 L.Ed.2d 161 (1987). Thus, the court properly found claims 7 through 15 procedurally barred because they should have been raised, if at all, on direct appeal. *E.g., Roberts v. State*, 568 So.2d 1255 (Fla.1990); *Provenzano v. Dugger*, 561 So.2d 541 (Fla. 1990); *Buenoano v. Dugger*, 559 So.2d 1116 (Fla.1990); *Hill v. Dugger*, 556 So.2d 1385 (Fla.1990). We also agree with the trial court that the testimony complained about in claim 9 is not the type of victim impact evidence prohibited by *Booth*. As to claim 5, co-counsel's involvement in the case was minimal and Swafford could not have been prejudiced. The court correctly found claim 6 to be irrelevant. As noted by the court, we have repeatedly held that claim 16 has no merit. *E.g., Roberts; Correll v. Dugger*, 558 So.2d 422 (Fla.1990). Regarding issue 2, the court found that the dictates of *Provenzano* and *State v. Kokal*, 562 So.2d 324 (Fla.1990), had been complied with. We find no abuse of discretion in declining a stay to allow further review of the recently furnished investigatory files.

[14, 15] In claim 1, Swafford argued that the state failed to disclose exculpatory evidence. "The test for measuring the effect of the failure to disclose exculpatory evidence, regardless of whether such failure constitutes a discovery violation, is whether there is a reasonable probability that 'had the evidence been disclosed to the defense, the result of the proceeding would have been different.' " *Duest v. Dugger*, 555 So.2d 849, 851 (Fla.1990) (quoting *United States v. Bagley*, 473 U.S. 667, 682, 105 S.Ct. 3375, 3383, 87 L.Ed.2d 481 (1985)). The court found that no *Brady* violation had occurred and that Swafford had not established the materiality of the information he claims the state withheld. Thus, the court concluded: "There is no possibility that the result of the proceeding would have been different even if all this information were available." Swafford has shown no error in the court's ruling, and we hold that the court correctly refused to hold an evidentiary hearing on this claim. *Accord Roberts.*

[16–18] Claims 3 and 4 alleged ineffective assistance of counsel at both the guilt and penalty phases of trial. To prevail on a claim of ineffective assistance, both substandard performance and prejudice caused by that performance must be demonstrated. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). To be granted an evidentiary hearing on such a claim, a petitioner must allege specific facts not conclusively rebutted by the record that show a deficient and prejudicial performance. *Roberts; Kennedy v. State*, 547 So.2d 912 (Fla.1989). Here, the court found Swafford's allegations "are refuted by the record, represent trial strategy, or are legally insufficient." The court also held that Swafford had demonstrated no

prejudice under any of the claims. Regarding the evidence Swafford now advances, the court stated that Swafford's father would not testify at trial and that his mother could not and that the now-advanced information would not have changed the result. We agree that Swafford's claims fail to meet the prejudice test of *Strickland* and hold that the court did not err in refusing to hold an evidentiary hearing on claims 3 and 4. *Accord Roberts; Correll.*

Therefore, we deny the petition for writ of habeas corpus, affirm the trial court's denial of postconviction relief, and deny a further stay of execution.

It is so ordered.

SHAW, C.J., and OVERTON, McDONALD, EHRLICH and GRIMES, JJ., concur.

BARKETT, J., dissents with an opinion, in which KOGAN, J., concurs.

NO MOTION FOR REHEARING WILL BE ALLOWED.

BARKETT, Justice, dissenting.

I believe Swafford is entitled to an evidentiary hearing on his claims under *Brady v. Maryland* and on his ineffective assistance of counsel claims.

KOGAN, J., concurs.

CITIZENS OF the STATE OF FLORIDA, Appellants,

v.

Michael McK. WILSON, etc., et al., Appellees.

No. 76000.

Supreme Court of Florida.

Nov. 15, 1990.

Electric utility's petition for continued use of modified conservation cost recovery methodology, which did not apply energy conservation cost recovery factor to customers who elected to take interruptible service, was granted by the Public Service Commission. The Office of Public Counsel appealed. The Supreme Court, Grimes, J., held that the Commission's order approving continuation of utility's conservation cost methodology was neither arbitrary nor unsupported by evidence.

Affirmed.

1. Electricity ⇐11.3(4)

Public Service Commission order approving continuation of electric utility's modified conservation cost recovery methodology, which had effect of not applying energy conservation cost recovery factor to customers who agreed that electrical service may be interrupted during periods of peak demand, was not arbitrary nor unsupported by evidence where record reflected that utility did not build generation capacity for interruptible customers and these customers had not received conservation benefits from reduced fuel costs, since marginal fuel costs were lower than average fuel costs. West's F.S.A. §§ 366.80–366.85, 403.519.

2. Administrative Law and Procedure ⇐314

Electricity ⇐11.3(6)

Public Service Commission did not violate statute which prohibited ex parte communication with hearing officer or agency head after receipt of recommended order by allowing staff members to make recommendation at hearing on electric utility's petition to continue utility's continued use of modified conservation cost recovery methodology, where no hearing officer was involved in proceedings and communications complained of were made at public hearing. West's F.S.A. § 120.66.

Jack Shreve, Public Counsel, and John Roger Howe, Asst. Public Counsel, Tallahassee, for appellants.