IN THE SUPREME COURT OF FLORIDA

CASE NO. 80,182

ROY CLIFTON SWAFFORD,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

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

SUPPLEMENTAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This proceeding involves the appeal of the circuit court's summary denial of Mr. Swafford's motion for post-conviction relief. The circuit court denied Mr. Swafford's claims without an evidentiary hearing. This appeal followed.

Mr. Swafford filed a Motion to Temporarily Relinquish Jurisdiction and Hold Appeal in Abeyance. This Court granted said motion and ordered an evidentiary hearing "for the purpose of getting the facts regarding Attorney Ray Cass' status as a special deputy sheriff and ex parte communication between the State and the trial judge." An evidentiary hearing was held March 29, 1993, where the presiding judge made factual findings, but reached no legal conclusions. Mr. Swafford's request for supplementary briefing was granted by this Court.

Mr. Swafford does not waive any claims previously discussed. He relies upon the presentations in his initial brief regarding any claims not specifically addressed herein.

Citations in this brief to designate references to the records, followed by the appropriate page number, are as follows:

"R. ___" - Record on appeal to this Court in first direct appeal;

"PC-R1. ___" - Record on appeal from denial of the first Motion to Vacate Judgment and Sentence.

"PC-R2. ___" - Record on appeal from denial of the second Motion to Vacate Judgment and Sentence.

All other citations will be self-explanatory or will otherwise be explained.

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SUPPLEMENT TO THE STATEMENT OF THE CASE

The previously filed initial brief contains a Statement of the Case. However, additional facts were established at the evidentiary hearing held on March 29, 1993. These facts must be viewed in the proper context. Here, Mr. Swafford supplements the previous Statement of the Case, repeating facts only to the extent necessary to establish the proper context.

A. October 1990 Ex Parte Contact.

On September 7, 1990, a warrant was signed setting Mr. Swafford's execution for November 13, 1990.

On October 1, 1990, Jerome Nickerson who was the Assistant CCR assigned to represent Mr. Swafford resigned. The resignation was effective upon the entry of a stay of execution in Mr. Swafford's case.

On October 15, 1990, a Rule 3.850 motion was filed. On October 18, 1990, a motion to compel production of Chapter 119 materials was filed on behalf of Mr. Swafford.

On October 22, 1990, the State submitted its response wherein it conceded an evidentiary on Mr. Swafford's Brady claim and on his ineffective assistance of counsel claim.

A status hearing was held on October 24, 1990. The State again conceded that an evidentiary hearing was appropriate. The State also disclosed in excess of one thousand (1000) pages of additional 119 material. However, no opportunity to review and amend the Rule 3.850 motion was provided.

At the March 29, 1993, evidentiary hearing, it was established that, after the October 24, 1990, hearing, the judge had his law clerk contact the Assistant Attorney General, Barbara Davis, and discuss ex parte the contents of an order denying Rule 3.850 relief. Specifically the following facts were found by the presiding judge at the March 29th hearing:

> THE COURT: Rowe. Apparently the Judge, himself, did not communicate direct with either the Attorney General's office, Miss Barbara Davis, or the State Attorney's office, but apparently from his testimony and the testimony of his law clerk, Mr. Rowe, apparently he directed Mr. Rowe to call the Attorney General's office, request a proposed order to be prepared.
>
> And I'll set for what Mr. Rowe was testifying. I'll make a finding of fact that the Judge did direct his law clerk to call the Attorney General's office to have the proposed order to be prepared, and ultimately it looks like it might have been prepared by the State Attorney's office after the Attorney General's contacted them. But I'll find that Judge Hammond did direct his clerk to call the State Attorney -- or the Attorney General's office and that to request and prepare a proposed order.
>
> And that I'll also find that though Mr. Rowe attempted to also call the CCR office, he did that after hours. He apparently talked to a male voice. Did not ask the man's name. Did not ask the man's position, other than Mr. Rowe said it was someone that seemed to know what was going on. So, he did not ascertain the man's name or whether or not he was talking to a lawyer, an investigator, a paralegal, maybe a secretary or, as pointed out, maybe the janitor in there.
>
> I find that it was after hours and, frankly, I'll make a finding that it was

> ineffectual as far as at least even putting CCR on notice that the Judge had directed that his clerk call the Attorney General's office and get a proposed order.

(PC-R2. 1777-79)(emphasis added).

The court further found that the order denying Mr. Swafford's 1990 3.850 motion was "ultimately" prepared by the State and that there was no attempt to furnish a copy of the proposed order to Mr. Swafford's counsel for review and opportunity to file objection:

> [THE COURT:] I'll further find that before it was signed by Judge Hammond or ultimately an order prepared by the Attorney General or the State Attorney's office was signed, there was no attempt to get a copy to the CCR so that it had an opportunity to review it and an opportunity to file any objections to the proposed order, as pointed out in the Rose case.

(PC-R2. 1779)(emphasis added).

Finally, the court found that Judge Hammond's law clerk did not attempt to remedy the situation by arranging a conference call between the trial court, the State, and the defense counsel concerning the proposed order denying Mr. Swafford's 3.850 nor did the law clerk attempt to notify both parties by way of written communication giving opposing sides an equal opportunity to respond:

> [THE COURT:] I should make a further finding of fact as far as the contact of the Attorney General's office, there was no attempt at the time by Judge Hammond's law clerk. He did not attempt to either, one, set up a conference call so at the same time he was talking to the Attorney General's

> office he could talk to, you know, either attorney or at least a representative of the CCR office. Nor, was it done by way of written communication, where at least maybe through the mail they would have had basically the same amount of opportunity to know what was going on. So, those are the findings of fact I'm going to make and, frankly, at this point I'm going to do nothing further.

(PC-R2. 1779)(emphasis added).

Because the collateral counsel in October of 1990 received facsimile transmitted copies of the order, he was completely unaware of the ex parte contact between the State and the judge (PC-R2. 1607-08). He was not in a position to note the type similarities that alerted subsequent counsel to the ex parte contact. Counsel in 1990 had "no information" whatsoever "that there had been ex parte contact between the judge and the State regarding Mr. Swafford's case (PC-R2. 1608-09).

B. May 1992 Ex Parte Contact.

A second Rule 3.850 motion was filed on November 21, 1991. The motion was premised upon a full examination of the Chapter 119 materials and subsequent further disclosures.

The State filed its Response on February 10, 1992.

Subsequently, Barbara Davis, the assigned Assistant Attorney General, received another phone call from Judge Hammond's law clerk directing her to draft an order for the judge's signature denying the second motion to vacate (PC-R2. 1579). Pursuant to the discussion with the judge's law clerk, Ms. Davis prepared the order and provided it to Sean Daly, the Assistant State Attorney

assigned to the case (PC-R2. 1579). Mr. Daly then sent the order to the judge with a copy mailed to Mr. Swafford's collateral counsel on May 29, 1992. The cover letter made no mention of the judge's ex parte direction to provide the draft order (PC-R2. 1227-1233). The judge, thereafter, signed the order before collateral counsel had ever received Mr. Swafford's copy.

C. Trial Counsel's Status As a Special Deputy Sheriff.

In December of 1992, collateral counsel learned that Mr. Swafford's trial counsel, Ray Cass, had received a special deputy appointment in Volusia County. At the March 29, 1993, evidentiary hearing, Mr. Swafford was not permitted to present evidence from Mr. Pearl, co-counsel, and Mr. Cass detailing the exculpatory evidence that was withheld by the Volusia County Sheriff's Office and the State Attorney:[1]

> MR. MCCLAIN: For the record I need to proffer, then, what I would be presenting. What I would present is I would have Mr. Pearl, the Volusia County Sheriff's Office report of March 17th, 1982, indicating Mr. Walsh was arrested in Arkansas with various types of .38 ammunition.
>
> He strongly resembled the composite drawing made of the suspect. He also made statements to the police that he had killed three people in Florida. Actually, he didn't make those statements to the police. He had made those statements to other people who reported them to the police.

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[1]Mr. Swafford sought to introduce the evidence to show that the special deputy appointments of Mr. Cass and Mr. Pearl led the State to take advantage of them.

The Volusia County Sheriff's report dated July 20th, 1982, Mr. Walsh was a traveling companion. Mr. Lestz gave information to the police that Walsh had committed three murders in Florida, and that one of those victims had been a white female. He also indicated that they had been in the Daytona Beach area the weekend that Brenda Rucker was murdered. He further implicated Mr. Walsh in that homicide.

The Volusia County Sheriff's Office report dated August 30, 1982, the third traveling companion, Levi, implicated -- I'm sorry. For the court reporter's benefit, Levi is spelled L-e-v-i; Walsh is W-a-l-s-h, and Lestz is L-e-s-t-z. Levi implicated both Walsh and Lestz and indicated that the two of them had disappeared at the time that the homicide occurred, approximately 6:00 a.m. on the date of the homicide, and left him. That they were in the neighborhood several blocks away from a convenience store.

In addition, there is the results of Lestz' polygraph examination, in which he failed it and claiming he was not involved. There's also the Volusia County Sheriff's report dated January 31st of 1983, indicating further the results of Letsz' polygraph and further indicating that Levi had, again, implicated Walsh and Lestz in the Brenda Rucker murder.

There was also a search warrant and an affidavit prepared by Detective Boucher to search Walsh's van, which was located in the State of Illinois. In that affidavit prepared by Detective Boucher, he indicated that Lestz had indicated he had had a homosexual relationship with Walsh; that Walsh liked to burn people while having sex with them. That there were burns on Lestz, which he showed to Detective Boucher, which Detective Boucher said were very similar to the burn marks on Brenda Rucker and were consistent with those burns.

Detective Boucher also indicated that there were two crime scenes in Florida.

There was where the body was found, but that's not where the homicide occurred. The homicide occurred in a different location. Again, it is important information as it relates to the trial. Further, Lestz again implicated Walsh and Levi in the Brenda Rucker murder.

Then there's the Volusia County Sheriff's Office report dated July 26, 1982. Walsh was found with various guns, various types of .38 caliber ammunition.

MS. ROPER: Objection, Your Honor. This is not a proffer. He's reading what's in the record. What are these people going to testify to?

MR. MCCLAIN: I believe I said they're going to testify to they were not provided with these documents, and that if had they have been they would have used them and presented them to a jury.

MS. ROPER: You presented a list of documents that could be put into the record, and instead of having --

MR. MCCLAIN: I don't tell you how to do a proffer. I'm making a proffer for the court reporter. If you wish to object, please make an objection.

MS. ROPER: Well, I object. I don't plan on --

MR. MCCLAIN: I believe that I'm entitled under the rules to make an oral proffer of the evidence that I intend to produce or wish to produce, but for the Court's ruling.

THE COURT: None of this has already been --

MR. MCCLAIN: Mr. Pearl has never taken the stand and testified that these documents were not given to him. He's never taken the stand and testified that he believes Mr. Swafford is innocent. He believes these

documents show he was innocent and certainly would have been pursued and presented at Mr. Swafford's trial, either by him if he had been counsel or by Mr. Cass, and Mr. Cass had known about these documents.

THE COURT: Now, I understand, Mr. McClain, what you're trying to do is a proffer of what you feel Mr. Pearl would have testified --

MR. MCCLAIN: And will testify to this here today if allowed.

(PC-R2. 1686-90).

MR. MCCLAIN: I have spoken with Mr. Pearl several times about this matter. I have provided him with these documents. He has reviewed these documents, and we categorically state they were not provided to him at any point in time during his representation of Mr. Swafford.

(PC-R2. 1692).

THE COURT: How about if we just go with your recitation of what you anticipate.

MR. MCCLAIN: It's not going to take very long.

THE COURT: Secondly, can we excuse Mr. Pearl, then, if he -- you indicated he had expressed concern about I guess, what does he life in Lake County?

MR. MCCLAIN: Yes, Your Honor.

THE COURT: About trying to get on the road before dark.

MS. ROPER: I don't have any problem with excusing Mr. Pearl as long as you're satisfied with your ruling that he's not going to testify.

THE COURT: Any problems with me telling the deputy to go ahead and excuse Mr. Pearl?

MS. ROPER: No, Your Honor.

THE COURT: All right. Go ahead and tell Mr. Pearl he's excused.

MR. MCCLAIN: Your Honor, previously -- and I can't find the document right handy. It was either in the State's response or it was the State's response to motion for rehearing filed back in 1990. The State did attach and handwritten note to Howard and it just indicated "Howard" on it and I believe there was initials that were supposed to be Gene White's initials and the State's position was there was no Brady claim because this note indicated that Gene White had opened up his complete file to Howard Pearl.

So, the State's argument previously has been premised upon that and has maintained that there was no policy so, therefore, there could not be a Brady claim and that Mr. Pearl had complete access. There was not any evidence taken other than the submission of that one-page document to some pleading that the State filed, and so Mr. Pearl has not testified.

Continuing on with the proffer, Your Honor, there's the Volsuia County Sheriff Report dated July 26th, 1982, in which Walsh was found with various guns, various types of .38 caliber ammunition. Walsh became extremely nervous when shown pictures of the victim's body and refused to state where he was at the time of the murder.

He also had in his back pocket a copy of the BOLO of the suspect and would -- and he explained only that he had gotten it left on the windshield of his car. Then, in addition, Lestz and Levi both indicated Walsh had sold his guns within a day or two of when the homicide would have occurred.

A July 23rd, 1982 statement of Lestz, again indicating that Walsh would burn Lestz with cigarettes and urinate on him.

Again, Lestz met Walsh at the Holiday Inn in Daytona Beach during that weekend of the homicide. Levi's statement of August 25th, 1982, in which he also implicated Walsh and Lestz in Rucker's murder, he confirmed Lestz' statement that Walsh, Lestz and Levi had been dropped off at a laundromat within blocks of the Fina station the day before the murder and that the other two had left at sometime prior to 6:00 a.m. on the morning of the murder and where -- he didn't know of their whereabouts. And when they came back, they attempted to get rid of the gun.

Turning to another matter of -- it's the letters that Roger Harper wrote to Gene White. There's a letter dated 4/2 of '84, a letter dated 8/12 of '84, a letter dated May 16th of '85, a letter dated 6/6/ of '85, and a letter dated August 5th of '85. Mr. Pearl also has reviewed all of these documents and again indicates he was not provided with these documents. These documents go to show Roger Harper's bias and interest and motive in testifying in the fashion that he did. And, in fact, they contradict Mr. Harper's testimony with reference to what he expected to get out of his testimony.

There's also a Parole Commission letter to Gene White dated August 30th of 1985, and this reflects Mr. Harper's status, parole status, at that point in time and, again, it's inconsistent with his trial testimony.

Mr. Pearl [would] testif[y] that these documents he had not seen he would have used. They were important information to present to the jury in considering Harper's testimony.

MS. ROPER: Your Honor, I think I will make a proffer. I can guarantee you that Howard Pearl will not take the stand to say he didn't get these documents because he was a deputy sheriff.

MR. MCCLAIN: Now that Mr. Pearl's gone, it's very convenient for Miss Roper to make that proffer.

MS. ROPER: Well, will you proffer that, that he will say that?

MR. MCCLAIN: I'm proffering that he will say that he did not get this information for whatever reason. That's my proffer.

MS. ROPER: Fine. That's your Brady claim. Now, if you want to have a valid claim here -- never mind.

MR. MCCLAIN: Your Honor, that's my proffer of what Mr. Pearl would say.

And in addition, there was other police reports. One dated March 19th, regarding where the body was found on the morning of the murder. There was a witness from the Sheriff's Office who had been there and did not see the body. Mr. Pearl had not seen that report.

He was also unaware of the report dated March 22nd, indicating that the body had been reported to park rangers a day earlier than the trial testimony indicated; and he was also unaware of documents indicating that the crime scene was not secured for two days after the body was found. That's his proffer.

(PC-R2. 1692-97).

MR. MCCLAIN: Mr. Cass is going to be testifying in reference to his status as special deputy sheriff. If she doesn't care what he says about that and she's going to stand by her objection no matter what he says, then --

MS. ROPER: I'm not objecting to that, Your Honor. I am objecting to, I think, the Court mentioned about a proffer asking Mr. Cass about these same items he didn't receive, which is basically a brady claim indication, Your Honor. Relitigation.

THE COURT: Let me ask you this, Mr. McClain: Now, I don't know if Mr. Cass has something that you feel he could say beyond

what you have just already put on the record that Mr. Pearl would have testified to had he taken the stand in reference to what they would have done had they known about these alleged items of evidence.

Is it your understanding that Mr. Cass would, in essence, say the same things that you have just put on the record?

MR. MCCLAIN: Yes. Mr. Cass is adamant Mr. Swafford is innocent, wrongly convicted, and he feels terrible that he did not get these documents because with these documents he's convinced he should clearly have shown his innocence.

MS. ROPER: Objection to counsel testifying.

MR. MCCLAIN: I'm making a proffer.

MS. ROPER: In lieu of Mr. Cass taking the stand, that's -- I understood that's what we did on Mr. Pearl in lieu of Mr. Pearl on proffer taking the stand and saying the same thing. Mr. McClain just put on the record where he understood Mr. Pearl would testify to had he been called to give testimony on proffer, since I already said he could not, as evidence in chief on those issues.

THE COURT: So, the State agrees, at least as far as just adopting for Mr. Cass, what Mr. McClain has already put on the record for Mr. Pearl and in that respect?

MS. ROPER: We would agree to that, Your Honor. We wanted to hear from Mr. Cass as a witness as to the circumstances of the status.

(PC-R2. 1699-1700)(emphasis added).

Without considering this proffered evidence, the judge did find that Ray Cass was issued a special deputy appointment. This appointment was made by Sheriff Duff who handed out this

appointment for "I'll make a finding, basically call it political patronage" (PC-R2. 1772). "[I]t's kind of favors to people in hopes that maybe they would think kindly towards Sheriff Duff" (PC-R2. 1772).

SUMMARY OF THE ARGUMENTS

1. The judge presiding over both Rule 3.850 proceedings initiated ex parte contact in both proceedings. He directed his law clerk to contact the State and discuss the pending motions in order to obtain a draft order for his signature. This procedure denied Mr. Swafford due process. Both orders denying must be vacated and the case remanded to circuit court for further proceedings which comport with due process.

2. Mr. Swafford filed a motion to disqualify Judge Hammond for engaging in ex parte communications with the State. The motion was facially sufficient. It was error for Judge Hammond to deny the motion.

9. Mr. Swafford's trial counsel was a special deputy sheriff. An evidentiary hearing must be ordered on whether counsel's status affected his ability to render effective assistance and/or affected the State's disclosure of exculpatory evidence.

ARGUMENT I

THE CIRCUIT COURT'S DENIAL OF ALL OF MR. SWAFFORD'S CLAIMS WAS ERRONEOUS.

A(3). Ex Parte Communication.[2]

Mr. Swafford argued in his initial brief that the State and the trial court engaged in ex parte communications during Mr. Swafford's initial 3.850 proceedings and that these communications were not disclosed by either the judge or the State. This ex parte contact only became apparent when collateral counsel reviewed the type of the orders signed by the judge. These orders 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. Mr. Swafford further argued that this undisclosed ex parte communication must void the prior 1990 3.850 proceedings, and warrants consideration of the merits of Mr. Swafford's claims. Rose v. State, 601 So. 2d 1181 (Fla. 1992). In light of the State's contention in its Answer Brief that there was no

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[2]In the previously filed initial brief, Argument I contained sections and subsections. The March 29, 1993, evidentiary hearing only related to subsection A(3) of Argument I. This was the subsection arguing that the undisclosed ex parte contact in October of 1990 rendered the order denying the motion to vacate subject to a valid attack in the second Rule 3.850 filed in November of 1991. In light of the March 29, 1993, evidentiary hearing, this should probably be a separate free standing argument. However,to assist this Court in cross-referencing, Mr. Swafford inserts the designation of Argument I, Sec. A(3).

ex parte contact, Mr. Swafford requested a remand to get the facts. This Court granted that request.

On March 29, 1993, an evidentiary hearing was held "for the purpose of getting the facts regarding . . . the ex parte communication between the State and the trial judge" pursuant to this Court's order. The presiding judge made factual findings, but reached no legal conclusions. The court, nonetheless, noted that the factual circumstances in Mr. Swafford's 1990 3.850 proceedings were strikingly similar to the factual circumstances in Rose:

> [THE COURT:] As far as the ex parte communication -- and I would certainly concede the language in Rose versus the State is very, very similar in a lot of respects to what we have here . . .
>
> * * *
>
> Apparently the State filed a response to Rose's motion, 3.850 motion, and apparently on the response agreed that an evidentiary hearing was required. And then apparently subsequently the State submitted a proposed order adopted in his entirety by the Trial Judge denying all relief. And it goes on to say that the new trial counsel was not served with a copy of the proposed order, nor provided an opportunity to file objections to it.
>
> And they go on, the Supreme Court, and this is a direct quote, "Under these facts, we must assume that the Trial Court in an ex parte communication had requested the State to prepare the proposed order," which certainly, frankly, seems to be the situation we have here.

(PC-R2. 1776-77)(emphasis added).

The presiding judge found that Judge Hammond, Mr. Swafford's original trial judge, had directed his law clerk, Randy Rowe, to call the Attorney General's office and request a proposed order to be prepared and that Mr. Rowe was "ineffectual" in putting Mr. Swafford's counsel on notice that Judge Hammond had directed him to get a proposed order from the State:

> THE COURT: Rowe. Apparently the Judge, himself, did not communicate direct with either the Attorney General's office, Miss Barbara Davis, or the State Attorney's office, but apparently from his testimony and the testimony of his law clerk, Mr. Rowe, apparently he directed Mr. Rowe to call the Attorney General's office, request a proposed order to be prepared.
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> And I'll set for what Mr. Rowe was testifying. I'll make a finding of fact that the Judge did direct his law clerk to call the Attorney General's office to have the proposed order to be prepared, and ultimately it looks like it might have been prepared by the State Attorney's office after the Attorney General's contacted them. But I'll find that Judge Hammond did direct his clerk to call the State Attorney -- or the Attorney General's office and that to request and prepare a proposed order.
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> And that I'll also find that though Mr. Rowe attempted to also call the CCR office, he did that after hours. He apparently talked to a male voice. Did not ask the man's name. Did not ask the man's position, other than Mr. Rowe said it was someone that seemed to know what was going on. So, he did not ascertain the man's name or whether or not he was talking to a lawyer, an investigator, a paralegal, maybe a secretary or, as pointed out, maybe the janitor in there.
>
> I find that it was after hours and, frankly, I'll make a finding that it was

> ineffectual as far as at least even putting CCR on notice that the Judge had directed that his clerk call the Attorney General's office and get a proposed order.

(PC-R2. 1777-79)(emphasis added).

The court further found that the order denying Mr. Swafford's 1990 3.850 motion was "ultimately" prepared by the State and that there was no attempt to furnish a copy of the proposed order to Mr. Swafford's counsel for review and opportunity to file objection:

> [THE COURT:] I'll further find that before it was signed by Judge Hammond or ultimately an order prepared by the Attorney General or the State Attorney's office was signed, there was no attempt to get a copy to the CCR so that it had an opportunity to review it and an opportunity to file any objections to the proposed order, as pointed out in the Rose case.

(PC-R2. 1779)(emphasis added).

Finally, the court found that Judge Hammond's law clerk did not attempt to remedy the situation by arranging a conference call between the trial court, the State, and the defense counsel concerning the proposed order denying Mr. Swafford's 3.850 nor did the law clerk attempt to notify both parties by way of written communication giving opposing sides an equal opportunity to respond:

> [THE COURT:] I should make a further finding of fact as far as the contact of the Attorney General's office, there was no attempt at the time by Judge Hammond's law clerk. He did not attempt to either, one, set up a conference call so at the same time he was talking to the Attorney General's

> office he could talk to, you know, either attorney or at least a representative of the CCR office. Nor, was it done by way of written communication, where at least maybe through the mail they would have had basically the same amount of opportunity to know what was going on. So, those are the findings of fact I'm going to make and, frankly, at this point I'm going to do nothing further.

(PC-R2. 1779)(emphasis added).

As noted by the presiding judge at the evidentiary hearing, Mr. Swafford's case is nearly identical to Rose v. State, 601 So. 2d 1181 (Fla. 1992). As in Rose, Mr. Swafford filed his initial 3.850 and the State filed a response agreeing that an evidentiary hearing was required (PC-R1. 367). The trial court's law clerk contacted the State in an ex parte communication and the State prepared an order denying the 3.850 motion without providing Mr. Swafford a reasonable opportunity to respond to it (PC-R2. 1574-75, 1578, 1776-79).

In Rose, this Court reversed the denial of Rule 3.850 relief because it "appeared" that the State and trial judge had ex parte communications during which the State was directed to prepare the order denying relief. This Court maintained that "[u]nder these facts we must assume that" ex parte communication had taken place. Rose v. State, 601 So. 2d at 1182, 83. However, in Mr. Swafford's case, no assumption is necessary. At the evidentiary hearing, the presiding judge made the factual finding that there was ex parte communication between the trial court and the State (PC-R2. 1776-79).

The trial court's actions in initiating ex parte discussions with the State regarding the merits of Mr. Swafford's case denied Mr. Swafford his right to have his case adjudicated by an impartial tribunal, in violation of Florida law, due process, equal protection, and the Eighth and Fourteenth Amendments. The ex parte communication between the trial court and the State denied Mr. Swafford "the cold neutrality of an impartial judge:"

> Nothing is more dangerous and destructive of the impartiality of the judiciary than a one-sided communication between a judge and a single litigant. Even the most vigilant and conscientious of judges may be subtly influenced by such contacts. No matter how pure the intent of the party who engages in such contacts, without the benefit of a reply, a judge is placed in the position of possibly receiving inaccurate information or being unduly swayed by unrebutted remarks about the other side's case. The other party should not have to bear the risk of factual oversights or inadvertent negative impressions that might easily be corrected by the chance to present counter arguments. As Justice Overton has said in this Court:
>
> > [C]anon [3A(4)] implements a fundamental requirement for all judicial proceedings under our form of government. Except under limited circumstances, no party should be allowed the advantage of presenting matters to or having matters decided by the judge without notice to all other interested parties. This canon was written with the clear intent of excluding all ex parte communications except when they are expressly authorized by statutes or rules.
>
> In re Inquiry Concerning a Judge: Clayton, 504 So. 2d 394, 395 (Fla. 1987).

> We are not here concerned with whether an ex parte communication actually prejudices one party at the expense of the other. The most insidious result of ex parte communications is their effect on the appearance of the impartiality of the tribunal. The impartiality of the trial judge must be beyond question. In the words of Chief Justice Terrell:
>
> > This Court is committed to the doctrine that every litigant is entitled to nothing less than the cold neutrality of an impartial judge. . . . The exercise of any other policy tends to discredit the judiciary and shadow the administration of justice.
> >
> > . . . The attitude of the judge and the atmosphere of the court room should indeed be such that no matter what charge is lodged against a litigant or what cause he is called on to litigate, he can approach the bar with every assurance that he is in a forum where the judicial ermine is everything that it typifies, purity and justice. The guaranty of a fair and impartial trial can mean nothing less than this.
>
> State ex rel. Davis v. Parks, 141 Fla. 516, 519-20, 194 So. 613, 615 (1939). Thus, a judge should not engage in any conversation about a pending case with only one of the parties participating in that conversation. Obviously, we understand that this would not include strictly administrative matters not dealing in any way with the merits of the case.

Rose v. State, 601 So. 2d 1181 (Fla. 1992)(emphasis added).

In Mr. Swafford's case, the trial court initiated ex parte discussions with the State regarding the life or death issue of whether there should be an the evidentiary hearing. Mr. Swafford

was entitled to impartial legal determinations, not determinations made by the opposing party:

> The attorney general of the state is not a disinterested expert in a criminal case but, in fact, is an arm of the prosecution. See section 16.01, Fla. Stat. (1989). Ex parte communication between a trial judge and assistant attorney general concerning a pending criminal case is totally inappropriate and will mandate reversal if: 1) The defense has requested that the trial judge recuse himself or has requested a mistrial which is denied; 2) where the defendant can demonstrate that there was prejudice as a result of the improper communication; or 3) the judge is sitting as the trier of fact. See Livingston v. State, 441 So. 2d 1083 (Fla. 1983); State v. Steele, 348 So. 2d 398 (Fla. 3rd DCA 1977).

Love v. State, 569 So. 2d 807, 810 (Fla. 1st DCA 1990).

The Code of Judicial Conduct emphasizes the importance of an independent and impartial judiciary in maintaining the integrity of the fact-finding process. See Code of Judicial Conduct, Canon 1, Canon 2A, Canon 3A(4), Canon 3C. Canon 3A(4) emphasizes, "A judge should accord to every person who is legally interested in a proceeding, or his lawyer, full right to be heard according to law, and, except as authorized by law, neither initiate nor consider ex parte or other communications concerning a pending or impending proceeding." (Emphasis added).[3]

When a court is required to make legal determinations and findings of fact, "the findings must be based on something more

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[3]Canon 3A(4) of the Code of Judicial Conduct was the Canon relied upon by this Court in Mr. Rose's case. See Rose, 601 So. 2d at 1183.

than a one-sided presentation of the evidence . . . [and] require the exercise by an impartial tribunal of its function of weighing and appraising evidence offered, not by one party to the controversy, but by both." Simms v. Greene, 161 F.2d 87, 89 (3rd Cir. 1947). A death-sentenced inmate deserves at least as much.

> [T]he reviewing court deserves the assurance [given by even-handed consideration of the evidence of both parties] that the trial court has come to grips with apparently irreconcilable conflicts in the evidence... and has distilled therefrom true facts in the crucible of his conscience.

E.E.O.C. v. Federal Reserve Board of Richmond, 698 F.2d 633, 640-41 (4th Cir. 1983), quoting Golf City, Inc. v. Sporting Goods, Inc., 555 F.2d 426, 435 (5th Cir. 1977).

Rule 3.850 proceedings are governed by the principles of due process. Huff v. State, 18 Fla. L. Weekly S396 (Fla. July 1, 1993); Holland v. State, 503 So. 2d 1250 (Fla. 1987). Due process cannot be squared with the treatment that the motion to vacate received in this capital case. A 3.850 movant "should [be] afforded an opportunity to raise objections and make alternative suggestions to the order before the judge sign[s] it." Huff v. State, 18 Fla. L. Weekly at S396. Due process requires notice and an opportunity to be heard. However, here the order denying 3.850 relief was entered only after ex parte discussions about the content of the order. At no time was Mr. Swafford advised or given an opportunity to object. Mr. Swafford was entitled to a full and fair independent resolution from the

court; here, the claim was resolved in ex parte discussions from which he and counsel were excluded. Given the heightened scrutiny which the Eighth Amendment requires in capital proceedings, a resolution such as the one involved in this case violated due process. See Huff v. State, 18 Fla. L. Weekly at S396 ("Because of the severity of punishment at issue in a death penalty postconviction case, we have determined that henceforth the judge must allow the attorneys the opportunity to appear before the court and be heard on an initial 3.850 motion").

Mr. Swafford was entitled to all that due process allows -- a full and fair hearing by the court on his claims. Huff; Rose. These rights were abrogated by the circuit court's adoption in 1990 of the state's factually and legally erroneous order. The 1990 3.850 proceedings should be voided and this case should be remanded for a full and fair evidentiary hearing before a new circuit judge for a proper resolution of the issues. The ex parte contact was not disclosed and thus could not be presented at the time. The matter was raised within two years of discovery. Mr. Swafford has thus complied with the time limits set forth in Rule 3.850.

Moreover, ex parte contact occurred again in 1992. Judge Hammond again had his law clerk contact the Assistant Attorney General, Barbara Davis, and discuss drafting an order disposing of Mr. Swafford's second motion to vacate. No notice of this ex parte discussion was given to Mr. Swafford. The resulting draft

order was signed before service was complete. Under this Court's ruling in Huff, this second order for that reason alone must also be vacated. Mr. Swafford's due process rights were violated. No notice or opportunity to be heard was provided to Mr. Swafford.

This Court reversed in Huff even though it found no ex parte contact:

> . . . adoption of the unsolicited order, without an opportunity for Huff's counsel to object to its contents, leaves the impression that Huff's arguments were not considered. Moreover, the State's cover letter anticipated that Huff would be given an opportunity to participate in the decision-making by the judge. The effect on the appearance of the impartiality of the tribunal is precisely the "insidious result" that this Court condemned in Rose. 601 So.2d at 1183.

Huff v. State, 18 Fla. L. Weekly at S397.

This Court concluded in Huff:

> Even though the factual circumstances of the instant case are somewhat different from those in Rose, we find that the same due process concerns expressed in Rose are also present in this case. Rose was denied due process of law because his counsel was never served a copy of the proposed order; thereby depriving Rose of the opportunity to review the order and to object to its contents. In the instant case, CCR received a copy of the proposed order on Friday before the court signed it on Monday. This did not afford Huff a sufficient opportunity to review the order, much less to object to its contents.

Huff at S396. Mr. Swafford's situation is worse; ex parte has in fact been found.

Accordingly, Mr. Swafford should be put back in the position he was in before the all ex parte contact occurred. He should be returned to circuit court for consideration of his initial Rule 3.850 motion.[4]

ARGUMENT II

MR. SWAFFORD WAS DENIED A FULL AND FAIR HEARING ON HIS RULE 3.850 MOTION TO VACATE IN VIOLATION OF THE LAWS OF THE STATE OF FLORIDA AND THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION WHEN THE CIRCUIT COURT DENIED THE MOTION TO DISQUALIFY THE JUDGE.

In his initial brief, Mr. Swafford argued that he was denied a full and fair hearing on his Rule 3.850 Motion to Vacate when the circuit court denied the Motion to Disqualify the Judge. This motion had been premised upon ex parte communication between the judge and the State. This Court granted Mr. Swafford's Motion to Temporarily Relinquish Jurisdiction and Hold Appeal in Abeyance and ordered an evidentiary hearing "for the purpose of getting the facts regarding ex parte communications between the State and the trial judge." In light of that hearing, Mr. Swafford supplements his argument with the additional facts established at the hearing.

The Motion to Disqualify Judge was prompted by two incidents of ex parte communication between the trial court and the State.

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[4]Afterall the State had conceded an evidentiary hearing was required. Moreover, Mr. Swafford has proffered the testimony of his trial counsel that Brady material providing Mr. Swafford's innocence was not provided to him (PC-R2 1699-1700).

At the evidentiary hearing ordered by this Court, the presiding judge made a factual finding that ex parte communication had taken place between trial court and the State during the Appellant's (1990) 3.850 Motion to Vacate proceedings (PC-R2. 1776-79). See Argument I.

Evidence was also presented of a second incident of ex parte contact which led to the denial of Mr. Swafford's November 22, 1991, motion to vacate. Barbara Davis, the then assigned Assistant Attorney General, received a call from Judge Hammond's law clerk directing her to prepare an order denying the motion to vacate (PC-R2. 1579). She then prepared an order which she gave to the assigned Assistant State Attorney, Sean Daly. On May 20, 1992, the prosecution filed with the court a draft order summarily denying. A copy of this draft order was sent via regular U.S. mail to defense counsel (PC-R2. 1334-42). On May 22, 1992, the trial court signed the State's Order Summarily Denying Motion for Post-Conviction Relief (PC-R2. 1343-50). The order was signed verbatim. It was signed before the defendant had received service and thus before he could file an objection to the State's order.

In Huff, this Court found that the facts did not "support an assumption that the trial court and the State engaged in an improper ex parte communication regarding the order." This Court relied on the State's cover letter that accompanied the proposed order which stated that the State expected CCR to submit their

own proposed order. Huff v. State, 18 Fla. L. Weekly S396 (Fla. July 1, 1993). However, in Mr. Swafford's case no such language was forthcoming in the State's cover letter that accompanied the proposed order. The State's cover letter had only one sentence: "Enclosed is a proposed order summarily denying the motion for post-conviction relief in the above referenced case." (Appendix I). Moreover, Barbara Davis testified the draft order was prepared after an ex parte discussion with the judge's law clerk. Unlike Huff, here ex parte contact occurred. Rose v. State, 601 So. 2d 1181 (Fla. 1992).

Mr. Swafford sought to disqualify Judge Hammond because of the ex parte contact. Certainly, Mr. Swafford's well founded contention that Judge Hammond had engaged in ex parte communications with the State constitutes legally sufficient grounds for disqualification. See Rogers v. State, 18 Fla. L. Weekly S414 (Fla. July 1, 1993). Judge Hammond's refusal to disqualify himself was reversible error. Huff at S396. This Court must set aside the order denying Mr. Swafford's motion for post-conviction relief and remand for proceedings consistent with relief granted in Rose and Huff.

ARGUMENT IX

TRIAL COUNSEL'S UNDISCLOSED CONFLICT OF INTEREST IN VIOLATION OF THE LAWS AND CONSTITUTION OF THE STATE OF FLORIDA DENIED MR. SWAFFORD THE EFFECTIVE ASSISTANCE OF COUNSEL GUARANTEED UNDER THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.[5] AN EVIDENTIARY HEARING IS REQUIRED.

In Mr. Swafford's first Rule 3.850 motion, he asserted that Mr. Howard Pearl who assisted in his defense had a conflict of interest due to his status as a special deputy sheriff. This Court found that Mr. Ray Cass was lead counsel and that Mr. Pearl's role was minimal and that therefore insufficient prejudice existed to warrant a hearing. Swafford v. Dugger, 569 So. 2d 1264, 1267 (Fla. 1990).

Following this Court's decision in Herring v. State, 580 So. 2d 135 (Fla. 1991), Mr. Swafford filed a state habeas petition asking this Court to reconsider the need for an evidentiary hearing regarding Mr. Pearl's status as a special deputy sheriff. This Court again relied upon Mr. Pearl's minimal role to deny an evidentiary hearing. Swafford v. Singletary, 584 So. 2d 5 (Fla. 1991).

In December 1992, before the evidentiary hearing that this Court ordered in Herring, the State gave notice of its intent to call Ray Cass as a witness. Mr. Cass' deposition was taken by

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[5]This Argument was not contained in the previously filed initial brief because counsel did not learn of the facts giving rise to this Argument until after the initial brief was filed.

Mr. Herring's collateral counsel and Mr. Swafford's collateral counsel received a copy of this deposition four days later. In the deposition, Mr. Cass revealed:

> Q Do you know whether anyone in the public defender's office other than Mr. Pearl was a special deputy sheriff?
>
> A Oh, I was. That's when Ed Duff was the sheriff.

Cass Deposition at 16. Mr. Cass further explained the benefit of his status as a special deputy sheriff:

> But what it was good for was if you had been to a party, you know, and you got stopped by a deputy later, you show him the card and he would let you go, you didn't have to take the Breathalyzer, that sort of thing.

Mr. Cass Deposition at 18 (Appendix II).

Mr. Swafford immediately filed a Motion to Relinquished Temporarily Jurisdiction and Hold Appeal in Abeyance, maintaining that Mr. Cass' status as a special deputy sheriff had never previously been disclosed to Mr. Swafford or Mr. Swafford's collateral counsel. Mr. Swafford argued that the State relied upon Mr. Cass' role as lead counsel at trial in convincing this Court that Mr. Swafford could not have been prejudiced by Mr. Pearl's status as a special deputy sheriff. Yet, the State knew of Mr. Cass' status as a special deputy sheriff and never disclosed that information. This Court ordered a limited evidentiary hearing "for the purpose of getting the facts regarding Attorney Ray Cass' status as a special deputy sheriff."

At the limited evidentiary hearing, the presiding judge found that Mr. Cass has had a long standing political relationship with Sheriff Duff and the Volusia County Sheriff's Office:

> [THE COURT:] Addressing the deputy sheriff issue: Based on what I've heard, I'll certainly find that Attorney Ray Cass was issued a card from Sheriff Duff; and I'll find that it was -- it was not a card that Mr. Cass solicited. Just a card that was proffered to him by Sheriff Duff, and I'll make a finding of fact.
>
> The reason would be basically, as Mr. Cass testified, he and his family supported Sheriff Duff when he ran against Sheriff Thursday back in the mid to late '50's or so. And that just basically these cards are handed out by Sheriff Duff and I'll make a finding, basically call it political patronage or not but, in essence, it's kind of favors to people in hope that maybe they would think kindly towards Sheriff Duff if and when he was up for election again or maybe speak favorably on his behalf to others.

(PC-R2. 1772)(emphasis added).

The presiding judge also found that Mr. Cass was issued a deputy sheriff card in the 60's or early 70's and Mr. Cass had expected the benefit of getting out of an occasional speeding ticket (PC-R2. 1773). Despite the fact that the court found that Mr. Cass did not solicit the card and that according to Mr. Cass' recollection he quit carrying the card between 1971 and 1973 (PC-R2. 1773-74), the court found that the deputy sheriff card authorized Mr. Cass to exercise certain police powers for an indefinite duration:

> [THE COURT:] You know, it doesn't use the term "Special deputy sheriff." The thing's in the record now, so I'm not going to read the whole thing. But basically, it just -- it's got a blank for typing in someone's name. In this case it was Sharon Addison. I assume "Mr. Cass," "Raymond Cass," or something like that goes on. "Regular Constituted Deputy Sheriff, to serve and execute all legal papers and processes in Volusia County, Florida, with full power to act as deputy sheriff of Volusia County until my term expires or this appointment is revoked."
>
> And then it would have been, you know, placed or put in the date, date and the year. In this case we had the date, and it was issued to Miss Addison, now Phillips. And then a signature line and printed under that, though it's hard to read now because the signature goes over "Edward Duff," et cetera, "Sheriff." And then this bears the signature, apparently, of Sheriff Duff.
>
> Then on the backside it just has "Duration indefinite. Investigation." And then some abbreviations, which apparently would be, "Authority: Florida Statute 1957, Section 30.09." Limitations, and it just has "30.09, Subsection Number," and that was all on the backside.

(PC-R2. 1773-75)(emphasis added).

Mr. Swafford offered evidence of the prejudice caused by Mr. Cass' conflict of interest and attempted to call Mr. Pearl and Mr. Cass, to testify concerning Brady material that was not disclosed to the defense team due to Mr. Cass' conflictual relationship with law enforcement. The following argument was made:

> [MR. MCCLAIN:] Now, in this instance what occurred is originally Mr. Pearl was the trial attorney. The office -- the case load

> got too great. Mr. Cass was assigned to start doing capital work. He came on the case and ultimately he took the case over. Mr. Pearl's involvement was more preliminary in nature. He did a number of depositions leading up to the trial, but he did not actually participate at the trial.
>
> Mr. Cass did the trial. Mr. Cass and Mr. Pearl are both prepared to testify with reference to specific items, Sheriff's reports, indicating somebody else did this murder that were not provided to them.
>
> The State's response is -- and this appears in their prior pleading -- "Well, Mr. White opened up everything to Mr. Cass, and he could have gone through it if he wanted to." The problem is if that's true, Mr. Cass, because of his honorary status, because of the act of friendship, the act of trust from Sheriff Duff, didn't take Mr. White up on it, did not get the reports.
>
> Now, whether Mr. White was taking advantage or whether the Sheriff's Office was taking advantage of Mr. Cass or Mr. Cass just failed doesn't matter. The point is a nonconflicted attorney would have gone through everything, would have found these documents indicating these three people, two of which implicated that the other one, Walsh, had committed the murder. And Mr. Pearl and Mr. Cass have reviewed those documents and said, "Yes, if we had had these documents, this would have been important stuff." It would have been presented, and it would have blown the State's case out of the water.

(PC-R2. 1677-78)(emphasis added) (also see Defense Exhibit O, Appendix II.A).

Collateral counsel also argued that due to the trusting relationship Mr. Cass had with law enforcement, the State failed

to disclose a series of letters between Assistant State Attorney Gene White and the State's key witness, Roger Harper:

> In addition to those reports, there's also a series of letters that Gene White received from a witness, Roger Harper. Again, the State says Mr. White offered to open up everything. Mr. Cass said, "No, I trust you." As a result Mr. Cass didn't get these series of letters indicating that Harper was desperate for a deal and was not going to get out, and he testified in '85 or in '86 but, in fact, wouldn't be paroled until 1990.
>
> He was desperate to get out and was willing basically to do anything for it and had promised to deliver witnesses from his family in Tennessee to assist Mr. White in obtaining the conviction of Mr. Swafford.
>
> Mr. Cass and Mr. Pearl have reviewed these documents, and both say they didn't know about these letters. Had they known of these letters, they would have presented them. All of this is an outgrowth of the special deputy status of Mr. Cass and is part of the issue and you can't separate it out.

(PC-R2. 1678-79)(also see Defense Exhibit O, Appendix II.B).

Despite this argument, Mr. Swafford was not allowed to put on evidence to show the prejudice Mr. Swafford suffered:

> [THE COURT:] I'll rule that I'm going to limit any inquiry going into the special deputy sheriff status of Mr. Cass would be maybe, one, to determine whether or not he had any status with the Sheriff's office. And maybe, two, what sort of benefits, if any, that afforded him and not get into how that might have affected his performance as trial attorney. So to that extent I'll agree with the State's position on that.

(PC-R2. 1886)(emphasis added). However in Herring, this Court ordered "an evidentiary hearing to determine whether Herring's

public defender's service as a special deputy sheriff affected his ability to provide effective legal service." Herring, 580 So. 2d at 139. Thus, the March 29th hearing precluded consideration of evidence on the very issue this Court in Herring said was implicated.

At this point, there is a finding that Mr. Cass had the status as a special deputy sheriff. He was issued the card; it carried with certain rights and privilges. What is now necessry is an evidentiary as was ordered in Herring and Wright v. State, 581 So. 2d 882, 887 (Fla. 1991)("we find that we must remand for an evidentiary hearing on whether Wright's public defender's service as a special deputy sheriff affected his ability to provide effective legal assistance").

The showing of prejudice is paramount to the issue of whether Mr. Cass had an actual conflict of interest. Cuyler v. Sullivan, 446 U.S. 335, 350 (1980); Stevenson v. Newsome, 774 F.2d 1558, 1562 (11th Cir. 1985), cert. denied. In deciding whether there's an actual conflict of interest, there is a need to consider what the attorney did and what a nonconflicted attorney would have done, and determine if there's a difference. Porter v. Wainwright, 805 F.2d 930, 939 (11th Cir. 1986).

Mr. Swafford has proffered evidence concerning Brady material not turned over to the defense team due to the Volusia County Sheriff's Office efforts to take advantage of it's "political patronage." The proffer cites several Volusia County

Sheriff's reports that rendered strong and credible evidence that three other individuals committed the murder of Brenda Rucker, the victim in Mr. Swafford's case:

> MR. MCCLAIN: For the record I need to proffer, then, what I would be presenting. What I would present is I would have Mr. Pearl, the Volusia County Sheriff's Office report of March 17th, 1982, indicating Mr. Walsh was arrested in Arkansas with various types of .38 ammunition.
>
> He strongly resembled the composite drawing made of the suspect. He also made statements to the police that he had killed three people in Florida. Actually, he didn't make those statements to the police. He had made those statements to other people who reported them to the police.
>
> The Volusia County Sheriff's report dated July 20th, 1982, Mr. Walsh was a traveling companion. Mr. Lestz gave information to the police that Walsh had committed three murders in Florida, and that one of those victims had been a white female. He also indicated that they had been in the Daytona Beach area the weekend that Brenda Rucker was murdered. He further implicated Mr. Walsh in that homicide.
>
> The Volusia County Sheriff's Office report dated August 30, 1982, the third traveling companion, Levi, implicated -- I'm sorry. For the court reporter's benefit, Levi is spelled L-e-v-i; Walsh is W-a-l-s-h, and Lestz is L-e-s-t-z. Levi implicated both Walsh and Lestz and indicated that the two of them had disappeared at the time that the homicide occurred, approximately 6:00 a.m. on the date of the homicide, and left him. That they were in the neighborhood several blocks away from a convenience store.
>
> In addition, there is the results of Lestz' polygraph examination, in which he failed it and claiming he was not involved. There's also the Volusia County Sheriff's

report dated January 31st of 1983, indicating further the results of Letsz' polygraph and further indicating that Levi had, again, implicated Walsh and Lestz in the Brenda Rucker murder.

There was also a search warrant and an affidavit prepared by Detective Boucher to search Walsh's van, which was located in the State of Illinois. In that affidavit prepared by Detective Boucher, he indicated that Lestz had indicated he had had a homosexual relationship with Walsh; that Walsh liked to burn people while having sex with them. That there were burns on Lestz, which he showed to Detective Boucher, which Detective Boucher said were very similar to the burn marks on Brenda Rucker and were consistent with those burns.

Detective Boucher also indicated that there were two crime scenes in Florida. There was where the body was found, but that's not where the homicide occurred. The homicide occurred in a different location. Again, it is important information as it relates to the trial. Further, Lestz again implicated Walsh and Levi in the Brenda Rucker murder.

Then there's the Volusia County Sheriff's Office report dated July 26, 1982. Walsh was found with various guns, various types of .38 caliber ammunition.

(PC-R2. 1686-89) (also see Defense Exhibit O, Appendix II.A).

Continuing on with the proffer, Your Honor, there's the Volusia County Sheriff Report dated July 26, 1982, in which Walsh was found with various guns, various types of .38 caliber ammunition. Walsh became extremely nervous when shown pictures of the victim's body and refused to state where he was at the time of the murder.

He also had in his back pocket a copy of the BOLO of the suspect and would -- and he explained only that he had gotten it left on the windshield of his car. Then, in

addition, Lestz and Levi both indicated Walsh had sold his guns within a day or two of when the homicide would have occurred.

A July 23rd, 1982 statement of Lestz, again indicating that Walsh would burn Lestz with cigarettes and urinate on him.

Again, Lestz met Walsh at the Holiday Inn in Daytona Beach during that weekend of the homicide. Levi's statement of August 25th, 1982, in which he also implicated Walsh and Lestz in Rucker's murder, he confirmed Lestz' statement that Walsh, Lestz and Levi had been dropped off at a laundromat within blocks of the Fina station the day before the murder and that the other two had let at sometime prior to 6:00 a.m. on the morning of the murder and where -- he didn't know of their whereabouts. And when they came back, they attempted to get rid of the gun.

Turning to another matter of -- it's the letters that Roger Harper wrote to Gene White. There's a letter dated 4/2 of '84, a letter dated 8/12 of '84, a letter dated May 16th of '85, a letter dated 6/6/ of '85, and a letter dated August 5th of '85. Mr. Pearl also has reviewed all of these documents and again indicates he was not provided with these documents. These documents go to show Roger Harper's bias and interest and motive in testifying in the fashion that he did. And, in fact, they contradict Mr. Harper's testimony with reference to what he expected to get out of his testimony.

There's also a Parole Commission letter to Gene White dated August 30th of 1985, and this reflects Mr. Harper's status, parole status, at that point in time and, again, it's inconsistent with his trial testimony.

Mr. Pearl testified that these documents he had not seen he would have used. They were important information to present to the jury in considering Harper's testimony.

(PC-R2. 1694-96). (See Defense Exhibit O, Appendix II.A).

Notwithstanding the web of conflicting duties, obligations, responsibilities and loyalties arising from Mr. Cass' status as a special deputy sheriff neither the Public Defender's Office nor Mr. Cass ever disclosed to Mr. Swafford the fact that his trial attorney was simultaneously serving as deputy sheriff. Had Mr. Swafford been informed of Mr. Cass' status as a special deputy sheriff, Mr. Swafford would have demanded different counsel.

"[I]t is beyond dispute that the sixth amendment guarantee of effective assistance of counsel comprises two correlative rights: the right to counsel of reasonable competence . . . and the right to counsel's undivided loyalty." Virgin Islands v. Zepp, 748 F.2d 125, 131 (3d Cir. 1984). "The assistance of counsel means assistance which entitles an accused to the undivided loyalty of his counsel and which prohibits the attorney from representing conflicting interests or undertaking the discharge of inconsistent obligations." People v. Washington, 461 N.E.2d 393, 396 (Ill. Sup. Ct.), cert. denied, 469 U.S. 1022 (1984). Because the right to counsel's undivided loyalty "is among those constitutional rights so basic to a fair trial . . . [its] infraction can never be treated as harmless error . . . . [W]hen a defendant is deprived of the presence and assistance of his attorney . . . in, at least, the prosecution of a capital offense, reversal is automatic." Holloway v. Arkansas, 435 U.S. 475, 489 (1978)(citations omitted). Defense counsel is guilty of an actual conflict of interest when he "owes duties to a party

whose interests are adverse to those of the defendant, . . ." Zuck v. Alabama, 588 F.2d 436, 439 (5th Cir. 1979).

Mr. Swafford's trial counsel labored under an undisclosed actual conflict of interest by virtue of his status as an assistant public defender and special deputy sheriff. Defense counsel's loyalty to his fellow officers resulted in non-existent cross-examination of the officers who testified against Mr. Swafford and laudatory comments about them. A non-officer lawyer would have been far more likely to vigorously cross-examine police personnel and to suggest, if appropriate, that they were testifying contrary to fact.

Defense counsel was faced with an actual conflict of interest at trial as well. On the one hand, defense counsel was an honorary law enforcement officer. On the other hand, defense counsel had the obligation to cross-examine his fellow law enforcement officers to secure his client's freedom. Many fellow law enforcement officers testified at Mr. Swafford's trial and helped ensure his conviction.

Defense counsel's representation of Mr. Swafford while serving as a law enforcement officer is a per se violation of the sixth amendment. In fact, defense counsel's undisclosed actual conflict of interest violated the Florida Constitution, the disciplinary rules promulgated by the Florida Supreme Court and other laws as well.

In order to prevent just this sort of conflict of interest, the laws and Constitution of Florida prohibit an assistant public defender from concurrently serving as a law enforcement officer. First, defense counsel's conflicting status as both an assistant public defender and deputy sheriff violates Sec. 454.18 of the Florida Statutes, which plainly states that "No sheriff . . . or deputy . . . shall practice [law] in this state. . . ." By practicing law in Florida while serving as a special deputy sheriff, defense counsel was plainly in violation of Florida Statute section 454.18 when he represented Mr. Swafford in this capital trial.

Second, defense counsel's dual responsibilities violated the Florida Constitution. Section 5(a), Art. II of the Florida Constitution provides:

> No person shall hold at the same time more than one office under the government of the state and the counties and municipalities therein.

Since well before Mr. Swafford was tried in 1985, the Florida Attorney General has squarely construed Section 5(a) of the Florida Constitution to encompass auxiliary police officers within the constitutional prohibition against dual office holding. See, e.g., Fla. Atty. Gen. Op. 077-63 (1977)(auxiliary police officer is an "officer" within the purview of the constitutional provision against dual office holding); Fla. Atty. Gen. Op. 86-84 (1986)(same). This Court has similarly held that assistant public defenders are state officers as well. State ex

rel. Smith v. Jorandby, 498 So. 2d 948, 949 (Fla. 1986). Thus, defense counsel's simultaneous service as a law enforcement officer violated Section 5(a), Article II of the Florida Constitution.

Third, defense counsel's divided responsibilities violated the common law doctrine of incompatibility, which prohibits defense counsel's incompatible responsibilities in precisely circumstances such as these. The doctrine of incompatibility holds that:

> [i]f the duties of the two offices are such that when 'placed in one person they might disserve the public interests, or if the respective offices might or will conflict even on rare occasions, it is sufficient to declare them legally incompatible.'

Gryzik v. State, 380 So. 2d 1102, 1104 (Fla. Dist. Ct. App. 1980)(citation omitted). Here, defense counsel's functions and duties are inconsistent and contradictory. As a public defender, he owed the defendant an undivided duty of loyalty. As an auxiliary deputy sheriff, his duties included the apprehension of suspected criminals. Certainly such dual functions are "incompatible."

Fourth, trial counsel's representation of Mr. Swafford while serving as a law enforcement officer violated several of the disciplinary rules promulgated by this Court including DR5-101(A), which prohibits conflicting employment except upon consent of the client after full disclosure, and DR5-105, which mandates that a "lawyer shall decline proffered employment if the

exercise of his independent professional judgment in behalf of a client . . . is likely to be adversely affected. . . ."

The trial court erred in refusing to admit and consider evidence of the prejudice Mr. Cass' conflict of interest caused in Mr. Swafford's case. Cuyler v. Sullivan, 466 U.S. 335, 350 (1980); Stevenson v. Newsome, 774 F.2d 1558, 1562 (11th Cir. 1985), cert. denied. This evidence was relevant to Mr. Swafford's claim and therefore admissible. Porter v. Wainwright, 805 F.2d 930, 939 (11th Cir. 1986).

This Court must reverse and order a full evidentiary hearing at which Mr. Swafford may present and have considered all the evidence supporting his claim and thereafter Rule 3.850 relief. Herring; Wright; Quince v. State, 592 So. 2d 669 (Fla. 1992).

CONCLUSIONS

For the reasons stated herein and in the previously filed initial brief, this Court must vacate both denials of Mr. Swafford's motions for post-conviction relief, remand for a full evidentiary on both of Mr. Swafford's motions for post-conviction relief, and grant Mr. Swafford a new trial and a new sentencing.

I HEREBY CERTIFY that a true copy of the foregoing notice has been furnished by United States Mail, first class postage prepaid, to all counsel of record on August 23, 1993.

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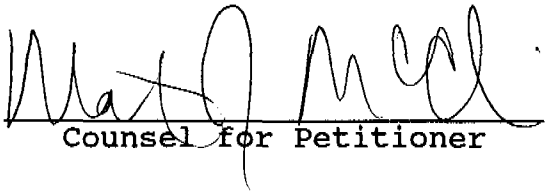
By: 
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IN THE SUPREME COURT OF FLORIDA

CASE NO. 80,182

ROY CLIFTON SWAFFORD,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

APPENDIX TO

SUPPLEMENTAL BRIEF OF APPELLANT

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