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

INITIAL 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. 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.

REQUEST FOR ORAL ARGUMENT

The resolution of the issues involved in this action will determine whether Mr. Swafford lives or dies. This Court has allowed oral argument in other capital cases in a similar procedural posture. A full opportunity to air the issues through oral argument is necessary given the seriousness of the claims and the issues raised here. Mr. Swafford, through counsel, respectfully urges the Court to permit oral argument.

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STATEMENT OF THE CASE

On August 16, 1983, Mr. Swafford was charged by grand jury indictment with first degree murder, sexual battery and robbery. He pled not guilty. On October 28, 1985, the jury trial began. The jury returned guilty verdicts of first-degree murder and sexual battery. Mr. Swafford was acquitted of robbery. The penalty phase was conducted on November 7, 1985. Defense counsel presented no defense at the penalty phase proceedings. After the jury recommended death, Judge Hammond sentenced Mr. Swafford to death on November 12, 1985. This Court affirmed the conviction and sentence on direct appeal. Swafford v. State, 533 So. 2d 270 (1988).[1]

On September 7, 1990, Governor Martinez signed a death warrant setting Mr. Swafford's execution for November 13, 1990. This action operated to shorten Mr. Swafford's time to investigate and prepare a motion to vacate by six months. Further, the Office of the Capital Collateral Representative (CCR), the office responsible for providing effective representation to Mr. Swafford in collateral proceedings (Spalding v. Dugger, 526 So. 2d 71 (Fla. 1988)), had been overwhelmed by Governor Martinez' warrant signing policies. In the fall of 1990, CCR was on the verge of collapse. CCR had more active warrants than it had experienced attorneys to work on them. The experienced attorneys, who had not yet resigned and/or

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[1]The United States Supreme Court denied certiorari review on March 27, 1989. As a result, Mr. Swafford's two year date under Rule 3.850 was March 27, 1991.

left, were burned out and in deteriorating health.[2] In fact on October 24, 1990, this Court entered an Administrative Order recognizing the difficulties confronting CCR (PC-R1. 361).

Mr. Swafford's case was assigned to Jerome Nickerson, who resigned on October 1, 1990, but agreed to remain on at CCR only until Mr. Swafford's execution was stayed. With regard to Mr. Swafford's case Mr. Nickerson stated in an affidavit submitted with the motion to vacate at issue here:

> My name is Jerome H. Nickerson, Jr., and I was the lead attorney in Roy Swafford post-conviction litigation.
>
> Under Governor Bob Martinez' death warrant policy, I became overworked and stressed to the point where my family life was destroyed, and my physical and mental health was substantially and significantly deteriorating.
>
> For a variety of reasons (as outlined below), my investigation and litigation of Mr. Swafford's post-conviction proceedings fall below the requirements of effective legal representation as put forth in Spalding v. Dugger, 526 So. 2d 71 (Fla. 1988).
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> From July 1990 to November of 1990, I became responsible for six clients that were under death warrant. In each of these cases I was required to conduct evidentiary hearings or arguments in state circuit court, federal district court and the Florida Supreme Court, in addition to preparing pleadings for filing in the Eleventh Circuit

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[2]On October 1, 1990, Jerome Nickerson, Assistant CCR, resigned effective November 1, 1990. See Attachment A. October 8, 1990, Gail Anderson, Assistant CCR, resigned effective November 8, 1990. See Attachment B. Billy Nolas and Julie Naylor resigned effective December 31, 1990. Tom Dunn volunteered to be reactivated by the military and was sent to Saudi Arabia.

Court of Appeals and the United States Supreme Court.

In July of 1990 my wife filed for divorce. From September to mid-November I actually lived in my office in attempting to keep pace with the Governor's signing of warrants and my case load.

In one case I was required to litigate under warrant on three successive days coming within twelve hours of execution on each day before obtaining an indefinite stay of execution. In another, I was ordered to appear in Orlando by a federal judge to conduct a three day evidentiary hearing within an hour after being denied a stay of execution in the Florida Supreme Court. In one instance with no assistance from any other attorney in my office, I was required to conduct an evidentiary hearing in Mr. Swafford's case under warrant and the next day, required to begin an evidentiary hearing in another case when the Florida Supreme Court refused to enter a writ of prohibition. In addition to my warrant cases, I was also required to conduct three evidentiary hearings in non-warrant cases.

During this period of time (July to November 1990) I was unable to properly investigate Mr. Swafford's case. In Mr. Swafford's pleadings I attempted to inform the various courts that things were out of hand, that the investigation was incomplete and request for public records had not been fully complied with. In my opinion the State's case against Mr. Swafford was weak and much needed to be done on the investigation, e.g. evaluating other suspects. Under the exigencies of the death warrant, however, an incomplete investigation was done in order to be able to comply with the court's filing requirements.

I knew that the penalty phase in Mr. Swafford's case was a strong claim of ineffective assistance of counsel. However, under the stress of the warrant system and death penalty litigation at lightning speed, I had failed to secure a final psychologist report evaluating Mr. Swafford. I was

attempting to gather the type of mitigating evidence that is highlighted in Dr. Fleming's report: That Roy Swafford suffers from organic brain damage, organic personality syndrome, and behavioral and emotional dyscontrol; that Roy is a product of an impoverished family, alcoholic father and harsh discipline as a child; and a combination of glue sniffing, alcohol abuse and head injury radically changed Roy's personality.

Days before Roy's scheduled execution the State released over 1500 pages of Chapter 119 material. There was no time to properly evaluate, investigate, reinvestigate and integrate the material in Mr. Swafford's pleadings. The type of Chapter 119 that CCR is now receiving that undermines the State's conviction of Mr. Swafford is what I was attempting to locate while handling Mr. Swafford's case. Furthermore, given the late date at which these documents were released there was no way that a professionally competent and thorough investigation could be completed. This directly impacted the pleadings that were filed and prevented me from providing Mr. Swafford with effective representation during this critical time period.

My performance in Roy Swafford's case is particularly painful because I firmly believe that Roy is innocent and I know that the State's case is very weak and suspect. If I was given the proper compliance by the State with 119 requests and was able to litigate without the stress of the multiple death warrant cases, Mr. Swafford's investigations and pleadings would have yielded the claims that CCR is presently developing.

It is my further understanding that CCR has now been provided at least 1500 additional documents which had thus far been withheld. This only underscores the point that I was trying to make to the courts under warrant, i.e., that the State was willfully refusing to comply with our legitimate and lawful requests. It is also apparent that this refusal existed prior to Mr. Swafford's trial and as a result he went to trial with

> only a modicum of the existing facts at his disposal. Under the circumstances, I believe that fundamental fairness and the ends of justice dictates that his conviction be vacated.

On October 15, 1990, Mr. Swafford initiated post-conviction proceedings in state court. On October 18, 1990, counsel for Mr. Swafford filed a Motion to Compel production of documents under Fla. Statutes 119.01 et seq. pursuant to State v. Kokal, 562 So. 2d 324 (Fla. 1990). On October 22, 1990, the State submitted its response.[3] In its Response, the State conceded the appropriateness of an evidentiary hearing (PC-R1. 367). The State submitted two proposed orders on October 22, 1990, which granted an evidentiary hearing on the Brady and penalty phase ineffective assistance claims.[4] As a result of ex parte communication, the State sent out a notice of hearing on October 23, 1990, setting the matter for hearing on October 24, 1990. The State, during the October 24, 1990 hearing before the trial court repeated its concession of the need for an evidentiary hearing. Specifically the State conceded that a hearing was appropriate on the violation of Brady v. Maryland, 373 U.S. 83 (1967), as well as on the issue of ineffectiveness of counsel at

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[3]Although this response indicated service by fax on October 22, 1990, this Response was not stamped "filed" until October 31, 1990.

[4]These draft orders were not included in the record on appeal sent to this Court. These orders clearly reflect the State's concession that an evidentiary hearing was required on Mr. Swafford's motion to vacate. These draft orders are included in the Appendix to this brief.

penalty phase (PC-R1. 7). Despite the State's concessions, no evidentiary hearing was held.

At the October 24, 1990, hearing, the State produced in excess of one thousand (1000) pages of additional documents that had not been previously given to the defense (PC-R1. 455). On October 30, 1990, the circuit court signed an order denying the motion to vacate (PC-R1 436-51). A comparison of this order to other pleadings and orders of record demonstrate that this denial was drafted by the State and signed by the judge on ex parte basis.[5] Mr. Swafford's counsel was given no opportunity to review these documents. Mr. Swafford, who was then less than two weeks from scheduled execution, filed a Motion for Rehearing appending the newly produced Chapter 119 documents thereto. The State thereupon moved to strike the Appendix. The circuit court denied the Motion for Rehearing and ordered that the Appendix be stricken from the record (PC-R1. 471). An examination of this order also reveals that it too was drafted by the State and submitted to the court ex parte.[6]

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[5]This order should be compared to other pleadings filed by the State and the November 5, 1990 orders (PC-R1. 479-80). This comparison reveals that the State drafted the order the judge signed. The caption of this order contains a typographical error which appears in all of the State's pleadings. The State submitted this order ex parte.

[6]While the case was under warrant, CCR received a faxed copy of the signed orders. The faxing processing distorts the type, so that it was not obvious in the heat of the moment that the order had been drafted by the State and submitted on an ex parte basis.

On November 8, 1990, Mr. Swafford appealed to this Court. The record did not include the State's draft orders conceding that an evidentiary hearing was required. Oral argument was held on November 9, 1990. A temporary stay was issued until 1:00 p.m. on November 15, 1990. On November 14, 1990, this Court issued its opinion denying all relief. Swafford v. State, 569 So. 2d 1264 (1990). However, this Court was never advised of the ex parte communications between the State and the circuit court.

Mr. Swafford next filed for federal habeas corpus review. The federal district court denied relief. On November 15, 1990, the Eleventh Circuit granted Mr. Swafford a stay of execution in order to hear Mr. Swafford's appeal. Mr. Nickerson terminated his employment with CCR the next day, November 16, 1990.

While the appeal was pending in the Eleventh Circuit, Mr. Swafford, through newly assigned counsel, conducted the investigation into his case which Mr. Nickerson had physically and emotionally been unable to conduct. Upon further review of the documents produced by the State under warrant, it was discovered that the State had failed to fully disclose all public records. Accordingly, on May 29, 1991, collateral counsel sent another request for public records to the Florida Department of Law Enforcement ("FDLE") again requesting production of all documents. On June 19, 1991, FDLE provided counsel with its file where additional documents were discovered that have materially impacted the investigation into this case.

Analysis of the newly disclosed FDLE records revealed that yet more documents were being withheld by the Volusia County Sheriff's Department ("VCSD"). Accordingly, CCR wrote to the VCSD and detailed eighty-three (83) documents or sets of documents known to exist but withheld by the State. On October 14, 1991, the VCSD provided counsel for Mr. Swafford with what was originally represented as the complete files. However upon inspection, none of the 83 documents or sets of documents were found. Counsel thereupon requested these items and was informed that the detectives at the VCSD maintained their own files. Arrangements were then made to meet with Detective Buscher on October 17, 1991, to review the additional records. Counsel's concurrent request to review the evidence held at the VCSD was summarily denied by Nancy Jones, Esq., counsel for Volusia County. On October 17, 1991, Detective Buscher produced two (2) "Banker's" boxes of materials. He indicated that they contained everything on the case and that all documents therein had been previously produced. However upon inspection, it was apparent that at least one half (½) of the documents had never before been given to the defense. Due to the volume of documents involved, counsel asked (over protest by Detective Buscher) to seal the documents with evidence tape and to return later for the actual copying.

On November 8, 1991, when the materials were produced by Detective Buscher, the seal had been broken, indicating that someone had gained access to the materials without advising CCR.

Detective Buscher represented that his partner had opened the box because he was looking for another file relating to a different case. One thousand four hundred forty-seven (1447) additional documents were photocopied, as were ninety-six (96) additional photographs.

Mr. Swafford filed a new Rule 3.850 motion on November 21, 1991. The State filed its response on February 10, 1992. Subsequently, on May 20, 1992, the State filed with the court a proposed Order Summarily Denying Motion for Post-Conviction Relief (PC-R. 1227-1233). A copy of this draft order was sent via regular mail to defense counsel. The circuit court signed the State's Order on May 22, 1992, before collateral counsel was advised that the State had prepared a draft or before counsel was given an opportunity to respond (PC-R. 1233). The Order was signed verbatim.

As a result of the ex parte communications between the circuit court and the State, Mr. Swafford filed a Motion for Rehearing and to Disqualify Judge and Supporting Points of Authority on June 8, 1992. On June 29, 1992, the circuit court denied Mr. Swafford's recusal request and rehearing motion. This appeal followed.

SUMMARY OF ARGUMENT

1. The circuit court denied Mr. Swafford's second Rule 3.850 motion by signing the State's draft order which found that a second Rule 3.850 motion is barred per se. The circuit court failed to address Mr. Swafford's contentions that cause existed which required consideration of the motion's merits. The circuit court did not accept Mr. Swafford's allegations as true and did not address: 1) whether Mr. Swafford's prior collateral counsel's mental, physical, and personal problems which precluded effective

assistance constituted cause; 2) whether the State's failure to comply with Chapter 119 constituted cause; 3) whether the undisclosed ex parte communications between the judge and the State constituted cause. Accepting the allegations as true, an evidentiary hearing is required; and the matter must be reversed and remanded.

2. The circuit court erroneously denied the motion to recuse. The presiding judge had engaged in ex parte communications with the State. This fact contained in the motion to recuse made the motion facially sufficient, and thus required the circuit court to order a recusal.

3. Mr. Swafford has been denied access to Chapter 119 materials. The circuit court denied this claim even though Mr. Swafford has proffered evidence demonstrating that, in October of 1990, the State withheld in excess of one thousand pages of material, and despite additional evidence of the State's refusal to turn over additional material which has been withheld so far. The circuit court erred in summarily denying this claim in light of the evidence and affidavits submitted by Mr. Swafford.

4. The State violated Mr. Swafford's constitutional rights when it withheld from defense counsel exculpatory evidence it possessed. The State had a wealth of exculpatory evidence which it never disclosed to the defense. It failed to correct false or misleading testimony which accrued to its benefit and Mr. Swafford's detriment. Confidence is undermined in the outcome as a result of the State's action or inaction.

5. Mr. Swafford's trial counsel rendered ineffective assistance of counsel at the guilt phase of the proceedings. He failed to insure that Mr. Swafford receive an adequate adversarial testing. Counsel failed to adequately investigate and litigate Mr. Swafford's case. As a result, confidence is undermined in the outcome.

6. Newly discovered evidence establishes that, had the jury heard all of the relevant evidence, it probably would have acquitted Mr. Swafford.

7. Mr. Swafford's trial counsel failed to render effective assistance at the penalty phase of Mr. Swafford's trial. He failed to insure that Mr. Swafford received an adequate adversarial testing. Counsel failed to investigate. Counsel failed to prepare. Counsel failed to know the state of the law. Counsel failed to litigate. Counsel failed to present a case for a life sentence. Counsel abandoned Mr. Swafford. As a result, confidence is undermined in the outcome.

8. Espinosa v. Florida establishes that Mr. Swafford's death sentence was the product of constitutionally invalid jury

instructions and the improper application of statutory aggravating circumstances.

ARGUMENT I

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

The circuit court summarily denied Mr. Swafford's Rule 3.850 motion because Mr. Swafford had previously presented a Rule 3.850 motion (PC-R2. 1227-33). The circuit court's denial of an evidentiary hearing and Rule 3.850 relief was erroneous. Mr. Swafford's Rule 3.850 motion presented meritorious claims demonstrating that he is factually innocent of the offense for which he awaits execution. Moreover, the State clearly interfered with and impeded Mr. Swafford's access to the courts in his initial Rule 3.850 proceedings. The State intentionally sought to wear down Mr. Swafford's counsel, thereby depriving Mr. Swafford of his statutory right. The State refused to fully and timely comply with Chapter 119. The State provided one thousand pages of new Chapter 119 material on October 24, 1990, thereby depriving collateral counsel of the opportunity to review those materials. The State engaged in ex parte communications with the judge, drafting for him on an ex parte basis orders denying the motion to vacate and motion for rehearing. These claims required an evidentiary hearing when presented in Mr. Swafford's second motion to vacate.

A. THE CIRCUIT COURT ERRED IN APPLYING A PROCEDURAL BAR TO MR. SWAFFORD'S CLAIMS

If this were Mr. Swafford's first Rule 3.850 motion, there can be no doubt that an evidentiary hearing would be ordered.

Mr. Swafford's Rule 3.850 motion presented facts which demonstrate he is factually innocent of the offense for which he was convicted and sentenced to death, and, on the basis of those facts, 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). These are the types of claims which have been traditionally recognized as properly presented in Rule 3.850 motions and which have been traditionally recognized as requiring an evidentiary hearing for their proper resolution. See, e.g., Squires v. State, 513 So. 2d 138 (Fla. 1987)(allegations of Brady violations require evidentiary hearing); Gorham v. State, 521 So. 2d 1067 (Fla. 1988)(same); Heiney v. Dugger, 558 So. 2d 398 (Fla. 1990)(allegations of ineffective assistance of trial counsel require evidentiary hearing); Mills v. Dugger, 559 So. 2d 578 (Fla. 1990)(same); Smith v. Dugger, 565 So. 2d 1293 (Fla. 1990)(newly discovered evidence requires evidentiary hearing); Lightbourne v. Dugger, 549 So. 2d 1364 (Fla. 1989)(allegations of Brady/Giglio violations require evidentiary hearing).

The circuit court denied the motion to vacate by signing the State's proposed order simply because there had been a prior motion to vacate. Yet, no consideration was given to this Court's rulings in Lightbourne v. Dugger. An evidentiary hearing may be required on a second motion to vacate where accepting the allegations as true relief is warranted. Neither was any consideration given to this Court's ruling in Jones v. State, 591

So. 2d 911 (Fla. 1991). There, an evidentiary hearing was required because accepting newly discovered evidence as true, a basis for relief was shown.

Clearly, if this were Mr. Swafford's first Rule 3.850 motion, an evidentiary hearing would be required. However, this was Mr. Swafford's second Rule 3.850 motion. As a result, Mr. Swafford submitted factual allegations which explain why the second motion must be considered and heard. However, the circuit court ruled that a second Rule 3.850 motion is barred per se. Thus, the court did not address Mr. Swafford's factual allegations as to why his motion should have been considered on the merits.

1. No adequate representation

The circuit court did not consider, nor allow evidentiary resolution regarding, Mr. Swafford's proffer that collateral counsel, the Office of the Capital Collateral Representative (CCR), had not fulfilled its obligations to Mr. Swafford during his first motion to vacate. That proffer and the discussion herein demonstrate that procedural bars which the State may assert should not be permitted to overcome Mr. Swafford's right to be heard. The circumstances involved in the litigation of the prior collateral proceedings were such that in essence, Mr. Swafford had no counsel. Mr. Swafford's former attorney did not and could not render competent assistance. Mr. Swafford's former attorney had resigned; he was going through a personal crisis. He was in mental and emotional agony. He had no home; he was

living at the office. He failed to contact witnesses; he did not know the case. It is not at all surprising that there were omissions in pleading, investigation, and presentation. No attorney should be required to function under the circumstances with which former counsel had to deal in this case, for no attorney can function effectively under such circumstances.

The circumstances were systemic in that the pressure cooker intentionally created by Governor Martinez worked.[7] In fact, this Court issued an Administrative Order in October, 1990, recognizing the systemic problems and appointing a Committee to investigate. As a result, changes were recommended and were made.[8] Hopefully, those sad days in October 1990 are part of a by-gone era in capital litigation in Florida. The recent efforts to correct such circumstances should relegate them to a distant time to be remembered but never allowed to reappear. But those circumstances did directly and adversely affect Roy Swafford's case.

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[7]Governor Martinez's stated policy was to keep the pressure on attorneys representing clients on death row.

[8]This Court's Committee on Post-Conviction Relief Proceedings in capital cases, chaired by Justice Overton, commented on the problems of litigating capital cases under such circumstances and made recommendations to deal with such problems. It attempted to address the problems arising from circumstances such as those which infected the litigation of Mr. Swafford's case because the pressures created by death warrants and overburdened counsel compromise the fairness of the process and the reliability of the outcome. Yet, Mr. Swafford's prior post-conviction actions were litigated under circumstances which were the antithesis of those recommended by the Special Supreme Court Committee.

In United States v. Cronic, 466 U.S. 648 (1984), the Supreme Court spoke to circumstances in which no attorney could render effective assistance. Precisely such circumstances affected Mr. Swafford's collateral litigation. In Spalding v. Dugger, 526 So. 2d 71 (Fla. 1988), this Court noted that capital petitioners in Florida were entitled to the effective post-conviction assistance of counsel. The statute creating the CCR office required as much. Mr. Swafford, however, did not receive the assistance to which he was entitled. The circumstances surrounding Mr. Swafford's prior post-conviction actions were infected by external factors. 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, necessitating the filing of other substantial post-conviction pleadings.

It is now widely recognized that holding the first round of post-conviction proceedings under the threat of execution, posed by a pending death warrant, is inherently unfair to the person facing the death penalty.[9] For example, the Powell Committee, appointed by Chief Justice Rehnquist and chaired by former Associate Justice Powell, commented:

> Judicial resources are expended as the prisoner must seek a stay of execution in

[9]Of course, it was much more than just a pending warrant against Mr. Swafford. During the pendency of Mr. Swafford's warrant, CCR had litigated on behalf of nine other clients with pending execution dates. In addition, CCR had to file five Rule 3.850 motions where stays had been entered earlier. There were still other competing obligations.

> order to present his claims. Justice may be ill-served by conducting judicial proceedings in capital cases under the pressure of an impending execution. ... The merits of capital cases should be reviewed carefully and deliberately, and not under time pressure. This should be true both during state and federal collateral review.

Report on Habeas Corpus in Capital Cases, 45 Cr. L. Rptr. 3239, 3240 (Sept. 27, 1989) (hereinafter Powell Committee Report).

The Overton Commission, filed its Report on May 31, 1991. The Committee explicitly and commendably recognized that "each death row inmate should have competent counsel to represent him or her in postconviction relief proceedings." The Committee further recognized that the pace of warrant signings and CCR's caseload had overwhelmed CCR's ability to meet its obligation of representing death row inmates. Id. The Overton Committee thus explicitly recognized that inmates are entitled to competent counsel in postconviction relief proceedings, and implicitly recognized that the pace of warrant signings and lack of adequate funds and staff for CCR has rendered CCR unable to provide competent representation. Of course, such findings assume that postconviction proceedings play an important role in ensuring that the process which results in a death sentence is free from legal error, and that such proceedings should be conducted in an appropriate manner, given the gravity of the issues presented. The circumstances at the time that Mr. Swafford's prior submissions were made and litigated demonstrate, however, in a clear and convincing fashion, that CCR was unable to provide Mr. Swafford the competent postconviction counsel to which he was

entitled, although he was entitled to meaningful assistance, by law, see section 27.702, Fla. Stat. (1987); see Spalding v. Dugger, and by the need for fair and reliable procedures in post-conviction proceedings, as recognized by both the Powell and Overton Committees.

The first warrant for the execution of Mr. Swafford was signed by former Governor Bob Martinez on September 7, 1990, setting his execution for November 13, 1990. At the time the warrant for Mr. Swafford's execution was signed, there were two pending warrants in CCR cases, and two other warrants were signed in CCR cases the same day. Five more warrants were signed during the pendency of Mr. Swafford's warrant. Thus nine other cases with death warrants overlapped with Mr. Swafford's death warrant. These warrants were part of a stated policy of Governor Martinez of signing warrants to "keep the pressure on" defense attorneys in postconviction proceedings, primarily CCR. According to Governor Martinez' stated policy, there was a conscious decision to try to affect Mr. Swafford's legal representation by overburdening counsel with cases. The multiple warrants placed intolerable pressure on CCR as it tried to obtain stays of execution simultaneously for all of its clients. Added to this pressure was the fact that CCR was already critically underfunded and understaffed to meet the burden of multiple warrants. In addition, stays had been entered in five cases in the late spring of 1990 on the condition that CCR file motions to vacate in the fall of 1990. The multiple, independent but mutually reinforcing

circumstances of lack of funds and staff, multiple warrants, and a crushing caseload of nonwarrant cases in which pleadings had to be prepared and oral arguments and evidentiary hearings conducted combined to render CCR incapable of providing adequate representation to Mr. Swafford at any time during the litigation of Mr. Swafford's case.

As a result of the Governor's action, Mr. Swafford was required to file his first Rule 3.850 motion six months early. He was afforded an attorney who did not commence working on Mr. Swafford's case until twenty days before it was filed. The attorney was in the midst of a personal crisis -- a divorce. The attorney had no home -- he lived at the office. The attorney was mentally exhausted -- he had been working non-stop for months on other warrant cases while he lost his wife and two children. The attorney was trying to quit CCR. He resigned on October 1, 1990, effective November 1, 1990. He stayed on only until a stay of execution could be obtained for Mr. Swafford. The necessary investigation into Mr. Swafford's case simply did not get done.

The combination of death warrants, ongoing litigation in nonwarrant cases, and inadequate funding and staffing meant that during Mr. Swafford's first Rule 3.850 litigation, CCR's attorneys, investigators, and support staff were only able to respond to crises and the most pressing deadlines. Just dealing with crises and pressing deadlines required a superhuman effort, resulting in serious health and burnout problems for the staff. In Mr. Swafford's case, his attorney had an additional problem --

his life was completely falling apart around him. Quite simply, CCR was unable to represent Mr. Swafford effectively. CCR assumed responsibility for Mr. Swafford's representation under warrant, with nine other warrant cases and numerous non-warrant cases competing for resources. What happened in Mr. Swafford's case was the nightmare CCR dreaded. The facts presented in Mr. Swafford's Rule 3.850 motion establish that he was entitled to an evidentiary hearing and thereafter relief. Those facts were not presented before because CCR's prior counsel did not do his job.

Under this Court's precedent, an evidentiary hearing was required on the adequacy of CCR's representation of Mr. Swafford in 1990. Mr. Swafford did not have adequate representation under Spalding v. Dugger. Cause existed to permit consideration of the merits of Mr. Swafford's motion. Lightbourne v. Dugger.

2. Chapter 119 violations.

Mr. Swafford asserted in his second motion to vacate that the State violations of Chapter 119 precluded a full presentation of his claims in his initial motion to vacate. The State intentionally and deliberately withheld Chapter 119 evidence until October 24, 1990. At that point, partial compliance occurred when the State dumped one thousand pages of material on Mr. Swafford's overworked and emotionally drained counsel. Mr. Swafford's counsel was unable in that time frame to review those documents, let alone 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.

This Court has recognized time again the State's obligation to comply with Chapter 119. 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); Jennings v. State, 583 So. 2d 316 (Fla. 1991). In those cases, this Court also recognized the need to give a collateral litigant time to review the Chapter 119 material once it is disclosed. In each of these decisions, this Court held sixty days was a reasonable amount of time to review the documents and amend a pending motion to vacate. However, here, Mr. Swafford was given absolutely no time and thus was unable to learn that the State had not in fact fully complied with Chapter 119.

Here, it was the State's action which precluded presentation of much of the evidence presented in the second motion to vacate. At the very least, an evidentiary hearing is required on this issue. Lightbourne v. Dugger. Mr. Swafford is entitled to the opportunity to show that the State precluded a full presentation in the prior motion to vacate.

3. Ex parte communication

During the initial Rule 3.850 proceedings, the State and the judge engaged in ex parte communications. These communications were not disclosed by either the judge or the State. They 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. This undisclosed ex parte communication must void the prior proceedings, and warrants consideration of the merits of Mr. Swafford's claims. Rose v. State, 601 So. 2d 1181 (Fla. 1992).

B. AN EVIDENTIARY HEARING WAS REQUIRED

Mr. Swafford is entitled to full and fair Rule 3.850 proceedings, see Holland v. State, 503 So. 2d 1354 (Fla. 1987). A trial court has only two options when presented with a Rule 3.850 motion: "either grant appellant an evidentiary hearing, or alternatively attach to any order denying relief adequate portions of the record affirmatively demonstrating that appellant is not entitled to relief on the claims asserted." Witherspoon v. State, 590 So. 2d 1138 (4th DCA 1992).

The law strongly favors full evidentiary hearings in capital post-conviction cases, especially where a claim is grounded in factual as opposed to legal matters. "Because the trial court denied the motion without an evidentiary hearing and without attaching any portion of the record to the order of denial, our review is limited to determining whether the motion conclusively shows on its face that [Mr. Swafford] is entitled to no relief." Gorham v. State, 521 So. 2d 1067, 1069 (Fla. 1988). See also LeDuc v. State, 415 So. 2d 721, 722 (Fla. 1982). "This Court must determine whether the two allegations . . . are sufficient

to require an evidentiary hearing. Under Rule 3.850 procedure, a movant is entitled to an evidentiary hearing unless the motion and record conclusively show that the movant is not entitled to relief (citations omitted)." Harich v. State, 484 So. 2d 1239, 1240 (Fla. 1986)(emphasis added). "Because an evidentiary hearing has not been held . . . we must treat [the] allegations as true except to the extent that they are conclusively rebutted by the record." 484 So. 2d at 1241 (emphasis added). See also Mills v. State, 559 So. 2d 578, 578-579 (Fla. 1990)(citation omitted) ("treating the allegations as true except to the extent rebutted by the record, we find that a hearing on this issue is needed.") "The law is clear that under Rule 3.850 procedure, a movant is entitled to an evidentiary hearing unless the motion or files and records in the case conclusively show that the movant is entitled to no relief." O'Callaghan v. State, 461 So. 2d 1354, 1355 (Fla. 1984).

Some fact-based post-conviction claims by their nature can only be considered after an evidentiary hearing. Heiney v. State, 558 So. 2d 398, 400 (Fla. 1990). "The need for an evidentiary hearing presupposes that there are issues of fact which cannot be conclusively resolved by the record. When a determination has been made that a defendant is entitled to such an evidentiary hearing (as in this case), denial of that right would constitute denial of all due process and could never be harmless." Holland v. State, 503 So. 2d 1250, 1252-53 (Fla. 1987). "The movant is entitled to an evidentiary hearing unless

the motion or files and records in the case conclusively show that the movant is entitled to no relief." State v. Crews, 477 So. 2d 984, 984-985 (Fla. 1985). "Accepting the allegations [] at face value, as we must for purposes of this appeal, they are sufficient to require an evidentiary hearing." Lightbourne v. Dugger, 549 So. 2d 1364, 1365 (Fla. 1989).

Mr. Swafford has pled substantial, serious allegations which go to the fundamental fairness of his conviction and to the appropriateness of his death sentence. "Needless to say, these are serious allegations which warrant a close examination. Because we cannot say that the record conclusively shows [Mr. Swafford] is entitled to no relief, we must remand this issue to the trial court for an evidentiary hearing." Demps v. State, 416 So. 2d 808, 809 (Fla. 1982) (citation omitted).

Mr. Swafford was -- and is -- entitled to an evidentiary hearing on his Rule 3.850 pleadings. Hoffman. Mr. Swafford was -- and is -- entitled in these proceedings to that which due process allows -- a full and fair hearing by the court on his claims. Hoffman; Holland v. State. Mr. Swafford's due process right to a full and fair hearing was abrogated by the lower court's summary denials, which did not afford proper evidentiary resolution.

Under Rule 3.850 and this Court's well-settled precedent, a post-conviction movant is entitled to an evidentiary hearing unless "the motion and the files and the records in the case conclusively show that the prisoner is entitled to no relief."

Fla. R. Crim. P. 3.850; Hoffman; Lemon; O'Callaghan; Gorham. Mr. Swafford has alleged facts which, if proven, would entitle him to relief. Furthermore, the files and records in this case do not conclusively show that he is entitled to no relief.

As in Hoffman, this Court has "no choice but to reverse the order under review and remand," 571 So. 2d at 450, and order a full and complete evidentiary hearing on Mr. Swafford's 3.850 claims.

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.

On June 8, 1992, after the trial court summarily denied his second Rule 3.850 motion, Mr. Swafford filed a Motion for Rehearing And To Disqualify Judge And Supporting Points Of Authority ("Recusal Motion"). The Recusal Motion was supported by two accompanying affidavits attesting to the trial court's bias (PC-R2. 1315-1408). The Recusal Motion was filed because the denial of relief was the result of ex parte communication between the court and the Office of the State Attorney.

The Code of Judicial Conduct states: "A judge should [] neither initiate nor consider ex parte or other communications concerning a pending or impending proceeding." Fla. Bar Code Jud. Conduct, Canon 3 A(4) (emphasis supplied). The trier of fact cannot have ex parte communications with a party. For that

reason alone, recusal is required. Love v. State, 569 So. 2d 807 (1st DCA 1990); Rose v. State, 601 So. 1181 (Fla. 1992); McKenzie v. Risley, 915 F.2d 1396 (9th Cir. 1990).

In Suarez v. Dugger, 527 So. 2d 190 (Fla. 1988), this Court explained:

> The judge with respect to whom a motion to disqualify 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 (Fla. 1983); Bundy v. Rudd, 366 So. 2d 440 (Fla. 1978). As we noted in Livingston, "a party seeking to disqualify a judge need only show 'a well grounded fear that he will not receive a fair trial at the hands of the judge. It is not a question of how the judge feels; it is a question of what feeling resides in the affiant's mind and the basis of such feeling.'" 44 So. 2d at 1086, quoting State ex rel. Brown v. Dewell, 131 Fla. 566, 573, 179 So. 695, 597-98 (Fla. 1938).

Suarez, at 191.

Ex parte contact lead to the denial of Mr. Swafford's November 22, 1991, motion to vacate. 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 could file an objection to the State's Order. It was signed without Mr. Swafford being given the benefit of a hearing to at least argue the need to hold an evidentiary hearing. Given the fact that 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. Rose v. State, 601 So. 2d 1181 (Fla. 1992). Mr. Swafford moved to recuse the trial court on the basis of this ex parte communication and a history of ex parte communications which has occurred throughout this case.

This is the second time in which the court has signed a State's proposed Order denying post-conviction relief. Mr. Swafford, who was under warrant at the time, on October 15, 1990, filed his first motion to vacate. On October 22, 1990, the State filed, along with its Response, a Proposed Order for Evidentiary Hearing (PC-R2. 1352-66). The next day the State, apparently subsequent to ex parte discussions with the same court, filed a Notice of Hearing for October 24, 1990 (PC-R2. 1368-69). The defense was not contacted in advance to determine the feasibility of holding the hearing on twenty-four (24) hours notice. The hearing was therefore 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 (PC-R. 1370-88). This Order was printed on the same word processor which produced the other State pleadings. Indeed, 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. 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. Moreover, 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.[10]

The current situation is identical to the issue recently addressed by this Court in Rose v. State, 601 So. 2d 1181 (Fla. May 28, 1992). As observed in Rose, it is improper for the State to prepare an order for the court's signature without the defense being given an opportunity to object. As this Court stated: "Under these facts we must assume that the trial court, in an ex parte communication, had requested the State to prepare the proposed order." Rose at 320. This Court must reverse and remand.

ARGUMENT III

ACCESS TO THE FILES AND RECORDS PERTAINING TO MR. SWAFFORD IN THE POSSESSION OF CERTAIN STATE AGENCIES HAVE BEEN WITHHELD IN VIOLATION OF CHAPTER 119.01 ET SEQ., FLA. STAT.

Due to the State's continuing refusal to provide full access to investigative files on Mr. Swafford, it was and remains impossible to fully plead all claims in the Rule 3.850 motion, or to know whether other claims exist. The State has unlawfully and expressly refused to comply with what the law requires and several state agencies continue to pursue a course of illegal

[10]Obviously, ex parte contact occurred. The State printed a revised draft order which the judge signed. Mr. Swafford's counsel was not privy to this "arrangement."

conduct by withholding records despite repeated requests, in direct violation of Fla. Stat. 119.07 subsections (1)(a) and 2(a)(1989)("Chapter 119"). Despite repeated Chapter 119 record requests dating back over two years the Volusia County Sheriff's Department ("VCSO") did not release almost 1600 pages of documents and 96 pages of photos until November 8, 1991. This was over a year after Mr. Swafford initially requested the public records. Furthermore, as shown below, the non-disclosure continues.[11]

This Court has held that capital post-conviction defendants are entitled to Chapter 119 records disclosure. State v. Kokal, 562 So. 2d 324 (Fla. 1990). Furthermore, this Court extended the time period for filing 3.850 motions where public records have not been properly disclosed afforded sixty (60) days to litigants to amend 3.850 motions in light of newly disclosed Chapter 119 materials. Jennings v. State, 583 So. 2d 316 (Fla. 1991). However, Mr. Swafford not only was denied full access, he was forced to litigate without the materials necessary to present his claims.

I. STATE AGENCIES THAT HAVE FAILED TO COMPLY WITH PUBLIC RECORDS REQUESTS

[11]The circuit court denied Mr. Swafford's claim that he was entitled to additional materials by refusing to accept his factual proffers as true. This violated this Court's rulings requiring the circuit court to accept as true factual allegations contained in a motion to vacate. Lightbourne v. Dugger, 549 So. 2d 1364 (Fla. 1989).

The following agencies have failed to provide counsel with public records under the Florida Public Records Act, Fla. Stat. sec. 119.01 et seq. (1981).[12]

A. VOLUSIA COUNTY SHERIFF'S OFFICE

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 Volusia County Sheriff. A public records request was mailed to the Volusia County Sheriff's Office (VCSO) August 13, 1991. (PC-R2. 146-52). A letter dated September 9, 1991 was received by CCR from VCSO agreeing to allow CCR access to VCSO's records (PC-R2. 154). On October 15, 1991, two CCR representatives met with Bobbie Sheets, Records Supervisor at the VCSO, for the purpose of reviewing all records of the VCSO maintained in connection with this case. As a result, additional materials not heretofore produced were discovered (PC-R2. 156-8). With the exception of two lead sheets, none of those records outlined in the public records request dated August 13, 1991 were located in the VCSO files on October 15, 1991. However, 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. Ms. Sheets further agreed that the documents sought were discoverable under Chapter 119.

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[12]The State's failure to comply with Chapter 119 constitutes an external impediment denying Mr. Swafford effective legal representation.

Additionally, Ms. Sheets informed CCR that Nancy Jones, Assistant Volusia County Attorney instructed her not to allow CCR access to review the evidence held in connection with this case. Ms. Jones said that the evidence was not discoverable under Chapter 119, Florida Statutes (1989). The circuit court in denying the motion to vacate did not address this.

On October 17, 1991, CCR representatives met with Lieutenant Hess and Detective Buscher of VCSO for the purpose of reviewing records held by the detectives. A substantial number of documents, audio tapes and photographs were located which had not been previously provided to CCR. At that time the records were sealed under the agreement that the records would not be unsealed until both parties were present (PC-R2. 133-7). This arrangement was made so there would not be any questions regarding further noncompliance with Chapter 119 (PC-R2. 133-7). However, on November 8, 1991 when CCR met with Detective Buscher for the purpose of copying the file the seal had been broken (PC-R2. 139-44). At that time, CCR copied what it was allowed to. Other documents that CCR was not provided access to were sealed. A requested in camera inspection to determine whether the Chapter 119 requests had been fully complied with was denied by the circuit court.[13]

B. STATE ATTORNEY'S OFFICE FOR THE FOURTEENTH JUDICIAL CIRCUIT IN AND FOR BAY COUNTY.

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[13]Less than a third of the audio tapes and few additional documents itemized in the Chapter 119 request dated August 13, 1991, have been produced from the VCSO files (PC-R2. 160-2)

On October 3, 1990, a CCR representative hand delivered a public records request to the State Attorney for the Fourteenth Judicial Circuit.[14] Terri Mullins, the secretary for State Attorney Appleman, informed CCR that the file on Mr. Swafford was thicker than originally anticipated, gesturing to an approximate thickness of 6-8 inches (1,500 - 2,000 pages). When the records were finally received it was less than 350 pages. CCR has received a letter dated November 18, 1991, from State Attorney Appleman maintaining that CCR's 119 request has been complied with (PC-R2. 167-79). An in camera inspection to determine whether the 119 request has been fully complied with was also refused.

C. STATE ATTORNEY'S OFFICE FOR THE SEVENTH JUDICIAL CIRCUIT IN AND FOR VOLUSIA COUNTY.

Two public record 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 informed CCR that access would not be allowed, claiming that the public records request copying bill had not been paid. That same day, CCR telefaxed proof of payment to the State Attorney's Office showing the bill to have been paid since October 1990 (PC-R2. 176-9). CCR has yet to receive a reply authorizing review.

D. ORMOND BEACH POLICE DEPARTMENT

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[14]This request was made because Roger Harper received favorable treatment from this State Attorney's Office in exchange for his testimony against Mr. Swafford.

Sergeant Mason, Records Officer of the Ormond Beach Police Department, 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 (PC-R2. 181-2).

II. CHAPTER 119 LAW

The people of Florida have long been committed to open government, and to an open judicial process.

> Unlike other states where reform of the judicial system has sometimes lagged, Florida has developed a modern court system with procedures for merit appointment of judges and for attorney discipline. We have no need to hide our bench and bar under a bushel. Ventililating the judicial process, we submit, will enhance the image of the Florida bench and bar and thereby elevate public confidence in the system.
>
> In re Petition of Post-Newsweek Stations, 370 So. 2d 764, 780 (Fla. 1979).

Throughout this state's history, Floridians have required that their government function in full view of the citizenry. E.g., Davis v. McMillian, 38 So. 666 (Fla. 1905). Although recognizing that open government may have certain disadvantages, Floridians have consistently determined that the costs are inconsequential compared to the benefits. Open Gov't Law Manual, p. 5 (1984). This determination underlies the Florida Public Records Act which gives effect to the policy that "all state, county, and municipal records shall at all times be open for a personal inspection by any person." Section 119.01, Fla. Stat. (1983).

Florida's courts have repeatedly held that the Public Records Act is to be liberally construed in favor of open government. Bludworth v. Palm Beach Newspapers, Inc., 476 So. 2d 775 (Fla. App. 4 Dist. 1985). Furthermore, in State v. Kokal, 562 So. 2d 325 (Fla. 1990) this Court ruled that a public agency must comply with a public records request filed by a death-sentenced petitioner in a post-conviction proceeding.

III. CONCLUSION AND RELIEF

The State's failure to provide the requested records has delayed Mr. Swafford's 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 which he seeks. The failure to comply with Chapter 119 law constitutes external impediments which have thwarted Mr. Swafford's efforts to establish he is entitled to post-conviction relief.

Pursuant to Provenzano v. State, 561 So. 2d 541, 547 (Fla. 1990), Mr. Swafford seeks that this Court compel production of the requested records, remand this case back to the trial court before a newly assigned judge, and grant an additional sixty (60) 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.

ARGUMENT IV

THE STATE'S WITHHOLDING OF MATERIAL AND EXCULPATORY EVIDENCE AND THE KNOWING PRESENTATION OF FALSE AND PERJURED TESTIMONY VIOLATED MR. SWAFFORD'S RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

The prosecution's deliberate suppression of material exculpatory evidence violates due process. Brady v. Maryland, 373 U.S. 83 (1967). In Mr. Swafford's case the State failed to disclose critical evidence which was both useful to impeach witnesses and which was directly exculpatory. These non-disclosures undermine confidence in the reliability of the jury verdict convicting Mr. Swafford. Gorham v. State, 597 So. 2d 782 (Fla. 1992). In his initial motion to vacate, Mr. Swafford pled Brady violations. However, this court found insufficient prejudice was shown to warrant a hearing. Mr. Swafford has now presented additional Brady violations. The clear cumulative effect undermines confidence in the outcome and warrants a hearing.[15]

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[15]The State continues to withhold evidence which would directly exonerate Mr. Swafford. Mr. Swafford filed a Rule 3.850 motion on October 15, 1990. At that time he was under a death warrant with a scheduled execution of November 13, 1990. When CCR began working this case requests were filed with the State Attorney's Office, the Volusia County Sheriff's Department, the Ormond Beach Police Department, the Daytona Beach Police Department and the Florida Department of Law Enforcement (FDLE). Mr. Swafford, through CCR, specifically requested any and all documents relating to his case which was discoverable under Chapter 119.01, Florida Statutes. As a result, some documents were produced by the State. Because additional documents continued to be held by the State, a motion to compel was filed with the trial court on October 18, 1990 (PC-R2. 300-304). On October 24, 1990, the court held a hearing in this case. After this hearing, the State produced additional documents. These

Mr. Swafford outlines below the documents which were withheld from the defense. The nondisclosures undermine confidence in the reliability of the jury verdicts returned in ignorance of this evidence.

A. THE STATE WITHHELD EVIDENCE RELATING TO THE TIME OF DEATH

As the prosecutor advised the jury in his closing argument, the State's theory was that Roy Swafford had left a woman at six o'clock a.m. on the morning of February 14, 1982 (R. 1334) only to arrive at the campsite around daybreak (R. 1335). Mr. Swafford allegedly abducted Brenda Rucker at 6:15 to 6:17 a.m. (R. 1265). The prosecutor reminded the jury in his closing argument the testimony of the State's witnesses indicated that Mr. Swafford arrived at the campsite no later than 6:30 a.m. (R. 1397). In other words, he abducted Ms. Rucker at 6:17 a.m., raped her twice, put her clothes back on her, shot her five times, reloaded and shot her four more times, and then returned to the campsite. This entire criminal episode took, according to the State, no more than thirteen minutes.

The State's theory necessarily required that the body have been located at the scene on the morning of February 14, 1982. This was because all of the State's witnesses who testified to Mr. Swafford's whereabouts testified that he was back at the campsite early that morning. Carl Johnson testified that he

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documents exceeded one thousand (1000) pages in number. No time was provided for Mr. Swafford to review these documents and amend the 3.850 motion. Analysis of these documents established Brady violations. Additionally, the documents provided new leads.

returned between 6:30 and 7:00 (R. 849). Chan Hirtle believed it was between 6:00 and 6:30 (R. 863). Ricky Johnson's recollection was that Mr. Swafford returned between 6:00 and 6:30 a.m. (R. 876, 878). None of the State's witnesses testified that he was out of their presence the remainder of the day.

Brady required the State to disclose to the defense any and all evidence which was exculpatory in nature. Yet the State withheld from the defense a police report which described the fact that a witness was at the very site where the body was found on the morning of February 14, 1982. The police report read, in pertinent part:

> On this date and time this deputy picked up a roll of exposed film (undeveloped) from Charles Jackson. Mr. Jackson lives at 806 Buena Vista in Orm. Bch. and took the photos at the area near and about Ormond's Tomb on 2/14/82 at 0945 hrs.
>
> Mr. Jackson says that he has no idea what the film contains. Evidence receipt #2979 was used to show a chain of custody.
>
> * * *
>
> At this time the film was forwarded to Investigator Burnsed (unintelligible).

(PC-R2. 263).

This report was never provided to the defense. Likewise, the name Charles Jackson was never disclosed to the defense. Indeed, Mr. Jackson's identity was never known to Mr. Swafford until CCR obtained this document during post-conviction discovery. Mr. Jackson has now stated that at no time when he was at the Ruins on February 14, 1982 did he see the victim's

body. Mr. Jackson was present at the crime scene on the morning of February 14, 1982 at approximately 9:45 a.m. This was at least two hours after Mr. Swafford had allegedly raped, shot the victim and left her body.

Further investigation by CCR, however, has indicated that the State withheld even more evidence in this matter. Mr. Jackson, an amateur photographer, was not alone when he was at the crime scene. Rather, he was joined by his friend, Tom Connelly, who is also an amateur photographer. Mr. Connelly also took photographs of the area and he, like Mr. Jackson did not see a body at the scene. Mr. Connelly who actually arrived at the scene first that morning and that he was not alone when he did arrive. He was accompanied by Paul Garrett, a deputy sheriff of the Volusia County Sheriff's Department. Indeed, the evidence receipts showing that Mr. Jackson had turned in his film to the Volusia County Sheriff's Department indicate that it was first turned over to Deputy Garrett. Both Mr. Connelly and Deputy Garrett were present at the crime scene while Mr. Connelly photographed the same. Neither Mr. Connelly nor Deputy Garrett saw a body at that site. This was over two hours after Mr. Swafford allegedly committed this murder. Indeed, at the time that Mr. Connelly, Deputy Garrett, and Mr. Jackson were at the ruins taking photographs, Mr. Swafford was with Roger Harper, Carl Johnson, Ricky Johnson, and Chan Hirtle.[16]

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[16]Not only did the State fail to provide the defense with this information but it also withheld from the defense, and continues to withhold from the defense, the photographs which

If the body was not left at the crime scene by 9:45 a.m., February 14, 1982, Mr. Swafford did not commit the crime. Confidence must be undermined in the outcome where the jury did not know this important piece of evidence.

B. THE STATE WITHHELD EVIDENCE THAT THE CRIME SCENE WAS NOT PROMPTLY SECURED AND THAT THE BODY WAS NOT PROMPTLY RECOVERED AFTER NOTIFICATION

Brenda Rucker's body was actually discovered on February 14, 1982 at the Sugar Mill ruins. It was discovered at approximately 2:30 p.m. on said date. (PC-R2. 267, 273). The individuals who discovered the body reported the body to the local park ranger, who did nothing to follow up on the fact. The State failed to disclose this evidence to defense counsel and therefore the jury knew nothing about it.

Testimony at trial indicated that the victim's body was discovered on February 15, 1982, at approximately 2:38 p.m. (R. 746). Detective J. D. Bushdid also testified that he processed the crime scene (R. 752). Dr. Arthur J. Botting also testified that he was present at the crime scene on February 15, 1982, where he examined the body (R. 761).

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were taken by Mr. Jackson. With no body at that time, the State's case against Mr. Swafford dramatically fails. CCR has made repeated requests for any and all photographs taken by law enforcement or any other individuals relevant to this crime. The State has repeatedly assured CCR, and this court, that all materials have been turned over; however, the same could not be further from the truth. With respect to Mr. Jackson, the State had turned over only two photographs allegedly taken by him. The property receipt clearly shows that in fact the roll of film contained thirty-six exposures, thus leaving thirty-four exposures outstanding.

Documents provided to CCR further indicated that law enforcement officials did not secure the crime scene prior until February 16, 1982 (PC-R2. 733, 735-5). Not only did the jury hear nothing about the fact that the victim's body had actually been discovered on Sunday afternoon, February 14, 1982, but defense counsel was prevented from discovering the fact that the crime scene itself was not actually secured until February 16, 1982. The original file at FDLE disclosed that what had been done was to place one document over the next to cover up the fact that the crime scene in this case was not secured until February 16, 1982 (PC-R2. 733, 735-36).

Indeed, when the statements of the witnesses are analyzed it can be readily seen that the description of the location of the body given by Kevin Stanton is markedly different from the description given by Darrell Edward Ellis, who discovered the body on February 14, 1982. It can be readily seen that (1) the body when it was located by witnesses on February 15, 1982 was not in the same location as it had been on February 14, 1982 and (2) valuable evidence relating to the crime may well have been lost in the twenty-four hour period prior to the actual securing of the crime scene.

What is also clear is that Detective Bushdid told less than the complete story on the stand when he testified that the body was actually discovered on Monday, February 15, 1982 (R. 746). In fact, he left out the fact that the body had been discovered the day before. The State, however, did not want the jury to

find out that in fact law enforcement had allowed the body to lay in the park for twenty-four hours before actually arriving at the same to process the crime. This fact, had it been known to the jury, would have certainly caused any reasonable jury to question the accuracy of the State's findings. Mr. Swafford's jury was deprived of this information because the State affirmatively covered up evidence which would have revealed its true performance in investigating the case.

C. THE STATE'S DOUBTS ABOUT THE IDENTITY OF BRENDA RUCKER'S ASSAILANT

The State indeed had serious but undisclosed doubts about Mr. Swafford's guilt.[17] In fact, a Volusia County Sheriff's Department report dated June 12, 1984 indicate that other unrelated suspects were still being investigated (PC-R2. 424). It is readily apparent therefore that the State did not consider this case cleared some ten months after Mr. Swafford had been indicted by the grand jury.

Further 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, apparently to FDLE, for retesting. This was done on evidence numbers B1849-1857, 1858-1861 and 21 through 26 (PC-R2. 435-36). The significance of this, however, is that on November 11, 1983,

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[17]The State has conceded the fact that its case against Mr. Swafford was circumstantial and nothing more. ("Considering the fact that this case was tried three and one-half years after the murder and was a circumstantial evidence case counsel's "all or nothing" defense was reasonable.") (State's 11th Circuit Answer Brief at 34-35).

just one month prior, FDLE had again cleared Roy Swafford through its physical testing (PC-R2. 441-43).[18]

D. THE STATE COULD NOT HAVE PROVEN A CHAIN OF CUSTODY ON THE GUN AND THE BULLETS ALLEGEDLY FIRED FROM IT

Mr. Swafford's trial attorney, Raymond Cass, requested that he be provided with all materials which were discoverable (R. 1513).[19] What was not known by defense counsel at any time

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[18]Mr. Swafford previously presented to this Court the fact that the State failed to disclose evidence implicating James Walsh in the murder and evidence of a secret deal with Roger Harper in order to secure his testimony. In evaluating the prejudice from non-disclosure consideration must be given to the cumulative effect. Derden v. McNeel, 938 F.2d 605 (5th Cir. 1991).

[19]Given the fact that no scientific evidence in any way linked Mr. Swafford to the victim in this case the State necessarily was faced with relying on a gun which was recovered on February 14, 1982 and which allegedly belonged to Mr. Swafford. Indeed, this gun was the centerpiece of the prosecutor's opening statement (R. 691-696). The State, in order to "prove" that Mr. Swafford possessed this weapon used an informant, Roger Harper, to allegedly link the gun to Mr. Swafford. Mr. Harper stated that the gun was "the exact type as [Mr. Swafford] had with the hammer like this" (R. 810). Undisclosed Brady material regarding Mr. Harper was presented in Mr. Swafford's previous Rule 3.850 motion. Indeed, Harper lied about getting a deal in exchange for his testimony (R. 836). Furthermore, Harper's identification of the gun was clearly suspect given the fact that on May 21, 1984 in deposition he had been shown another gun by Mr. Swafford's attorney, Howard Pearl, and identified that gun as being Roy Swafford's. He admitted in that deposition that he could not tell one gun from the other and, at trial, admitted this as well (R. 826).

The other "family members" from Nashville who testified on behalf of the State did not link this gun to Mr. Swafford. Carl Johnson testified that he never saw a gun during this trip (R. 848). Chan Hirtle stated that he did not really know whether or not the gun which was entered as Exhibit I was Roy Swafford's (R. 859). Ricky Johnson, the only other remaining family member who testified stated that he never saw the gun (R. 885). In fact he didn't see 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 (R. 894). Therefore, no one but Roger Harper, whose testimony was essentially bought with a deal, testified that this

prior to or during the trial was that the State tampered with the chain of custody of the gun and the bullets. Documents released to CCR pursuant to CCR's request under Chapter 119.01, Florida Statutes et seq. included, inter alia, copies of evidence and property receipts for the gun and the bullets. These sheets are all appended hereto under appendix 18 (PC-R2. 448-535). Analysis of the sheets demonstrates that the sheets themselves are internally contradictory. It is apparent that individuals have gone back over the sheets and whited-out information while at the same time substituting new information on them. Furthermore, evidence logs indicate that on June 10, 1983 Detective Hudson checked out the gun from the Sheriff's Department. The gun was at that time labeled Q-1. Also checked out was a set of Mr. Swafford's fingerprints, the same being labeled Q-2. On the same day both the gun and the fingerprints were turned over to Debbie Fisher at FDLE. Additionally, Detective Hudson filed with the FDLE a request for analysis on the gun and the prints. This,

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particular weapon belonged to Roy Swafford.

Even the manner in which this particular gun was found was highly suspect. Two other State's witnesses, Clark Bernard Griswold and Karen Sarniak, gave two totally different versions as to how this weapon was seized. Indeed, Mr. Griswold said that even though he didn't see this gun on Mr. Swafford (R. 1051) that he somehow knew that Mr. Swafford hid this gun in the trash can in the men's room (R. 1045). Mr. Griswold further related that Mr. Swafford, at the time of his arrest, was wearing only jeans and a black t-shirt (R. 1052). He was not wearing a leather jacket, as Mr. Harper testified to on cross-examination (R. 825). The other State's witness, Karen Sarniak, stated that Mr. Swafford put the gun in a wastepaper basket in the ladies room (R. 1093-1094). She also testified that the police came into the ladies room and seized the weapon (R. 1098). The testimony of these two witnesses was mutually exclusive.

again, was done on June 10, 1983. The problem with this particular submission is that one copy of the submission simply indicates that the gun and fingerprints were turned over to FDLE (PC-R2. 717). However, another copy (PC-R2. 719) has added to it in handwriting the fact that Detective Hudson also submitted four bullets with the gun. This does not coincide with Charles Meyers' initial report of February 19, 1982 wherein Mr. Meyers, firearms examiner at FDLE, indicates that the bullets would be kept in FDLE's "open shooting file" (PC-R2. 721). In other words, there is a very real question as to where the bullets that were submitted by Detective Hudson actually originated. Since FDLE's own internal documents indicate the bullets did not leave that facility, a serious question arises as to the authenticity of the bullets that were eventually allegedly linked to the "murder weapon".

It is very clear at this juncture why these evidence logs and property receipts were withheld from the defense prior to trial. Had they been produced Mr. Swafford's trial attorney would certainly have objected to the same and thus their admission into evidence would likely have been prevented. Trial counsel would so testify at an evidentiary hearing.

Mr. Swafford has submitted these property receipts to Lonnie Hardin, the expert who originally analyzed the gun and the bullets that were submitted to him. Mr. Hardin did not have the benefit of reviewing these evidence logs or property receipts at the time that he conducted his pre-trial analysis. It is Mr.

Hardin's opinion as a firearms/ballistics expert with substantial experience in law enforcement, that the chain of custody was not intact. Had he been provided with these documents prior to trial, he would have likewise been prepared to testify in like manner at trial.[20]

It also appears as though the State is continuing to withhold documents relating to the analysis of the murder weapon and test bullets by officials at FDLE. What has been turned over to CCR is the test chart completed by Mr. Meyers on February 18, 1982 (PC-R2. 724). Another worksheet should have been completed by Mr. Rathman on June 15, 1983. Yet no worksheet has been provided.

E. THE STATE PRESENTED FALSE EVIDENCE THAT THE VICTIM WAS SHOT TWICE IN THE HEAD.

The medical examiner testified that in fact Brenda Rucker had been shot twice in the head. The entrance wounds were behind the right ear (R. 765) and on the left back side of the head (R. 766). Specifically, Dr. Botting testified:

> Behind the right ear we found a bullet entrance wound. There appeared to be a faint imprint of the muzzle of a weapon around the wound.

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[20]To the extent that the State maintains that these evidence receipts and/or logs were discoverable but that defense counsel did not properly request the same, Mr. Swafford maintains that the same constitutes ineffectiveness of counsel under Strickland v. Washington, 466 U.S. 668 (1984). The fact remains that the jury was never told about this significant weakness in the State's case. Accordingly, under Smith v. Wainwright, 799 F.2d 1442 (11th Cir. 1986), this flaw constitutes reversible error of constitutional magnitude.

Q Doctor, let me just stop you there. What would that indicate to you as a medical examiner, the observations that you have just made?

A That could be a contact type wound or a close contact type wound.

Q You're talking about the --

A The muzzle of the gun. The end that the bullet comes out would be in contact with the skin at that point.

Q Or close contact?

A Or close contact; that's correct.

Q Thank you, Doctor.

Proceed.

A 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, the vertex. This didn't have the -- the imprint on the skin.

(R. 765-766). This testimony of Dr. Botting was partially consistent with the death certificate which he completed and which stated that in fact the victim died from two gunshot wounds to the head (PC-R2. 738).

The problem with Dr. Botting's testimony is that it is false. The prosecutor, in direct violation of Giglio v. United States, 405 U.S. 150 (1972) and Napue v. Illinois, 360 U.S. 264 (1959) sat and listened to the perjured testimony and did nothing to correct it.

While the autopsy protocol was provided to the defense, the consultation report from the Department of Radiology at Halifax Hospital Medical Center was not disclosed. This report, which

has now been obtained by CCR, states that on February 16, 1982, the victim's body was X-rayed. The X-ray included the victim's skull and the findings are as follows:

> The skull shows a wound of entrance in the right temple with fragmented bullet crossing the cranial cavity and impacting against a jagged fracture of the calvarium.

(See Appendix 31)(emphasis added). In other words, when the victim was X-rayed prior to the actual autopsy, the X-ray showed only one bullet and a fragment in the victim's head. This directly contradicts the autopsy protocol and the trial testimony of Dr. Botting.[21]

The jury was not only lied to about the number of bullets retrieved from the victim's head, however. The jury heard false testimony about where each individual bullet came from. This was important in light of the testimony linking certain bullets to the gun allegedly from Mr. Swafford.

It is abundantly clear from the documents which have been uncovered by CCR that the documents which were withheld from the defense in this case would have been exculpatory to Mr. Swafford.

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[21]The State's theory against Mr. Swafford included the fact that his modus operandi was to rape his victims and then to leave his "mark" by shooting them twice in the head. This testimony was premised upon the false testimony of the medical examiner. This testimony was brought to the jury by way of Earnest Wade Johnson.

Ernest Johnson's testimony was crucial to Mr. 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 Ernest Johnson's testimony to be presented to the jury. See Swafford v. State, 533 So. 2d 270, 273 (Fla. 1988). Of course, if Ernest Johnson lied about this episode, or if the medical examiner lied, it directly calls into question this Court's ruling.

If the defense had been allowed to know that in reality the State had no idea whatsoever from where the bullets were taken the credibility of the State's medical examiner as well as its detectives and, indeed, its ballistics experts would have been decimated.

F. THE DEFENSE WAS PROVIDED WITH A FABRICATED TRANSCRIPT OF A KEY WITNESS' STATEMENT

One of those documents provided to the defense by the State was two transcribed statements of Paul Seiler, the witness to the victim's abduction (PC-R2. 842-48, 863-65). These statements were taken on February 15 and February 22, 1982.

During postconviction discovery CCR was provided with three (3) statements, two of which were, at first glance, identical transcriptions of the statement taken from Mr. Seiler at 3:52 p.m. on February 15, 1982. The third statement was not provided to the defense at trial (PC-R2. 850-56).

A closer inspection of these two statements, however, has revealed that Mr. Seiler's answers were altered and that sections of Mr. Seiler's statement were altogether removed before providing the same to trial counsel. Therefore, trial counsel did not know that Mr. Seiler had alleged that the vehicle he saw was not a two tone vehicle. Since the defense knew that Mr. Swafford and his "friends" traveled from Nashville to Daytona in a car which was a two tone it was prejudicial to the defense to not provide the defense with information that the true vehicle being driven by the abductor was a single color vehicle. Since the case against Mr. Swafford was circumstantial at best this

evidence was even more critical than it might otherwise have been.

G. ADDITIONAL DOCUMENTS STILL REMAIN WHICH HAVE NOT BEEN PRODUCED TO THE DEFENSE

The defense is aware of the fact that additional documents exist in this case which have not yet been presented to the defense. It is unknown at this time what, if any, effect these documents will have on the present claims brought by Mr. Swafford and what, if any, additional claims exist that have not yet been brought. This situation is exclusively the result of the State's withholding of evidence from the defense.

H. CONCLUSION

Mr. Swafford adamantly maintains that critical Brady documents were withheld from the defense. Additionally, the State failed to correct the perjured testimony that went to the jury. Mr. Swafford maintains that he was denied an adversarial testing. Under Smith v. Wainwright, 799 F.2d 1442 (11th Cir. 1986), postconviction relief is required.

Mr. Swafford further maintains that Lightbourne v. Dugger, 549 So. 2d 1364, 1365 (1989) dictates the necessity of an evidentiary hearing in this case, even though this is a successive Rule 3.850 motion. The manner in which the State has disclosed, i.e., in piecemeal fashion, has affirmatively prevented a detailed, thorough analysis of this case by Mr. Swafford's counsel. The State should not be allowed to profit from its own wrongdoings. Accordingly, Mr. Swafford requests

that he be given an evidentiary hearing on this issue and that the requested relief be granted.

ARGUMENT V

ROY 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.

In Strickland v. Washington, 466 U.S. 668, 688 (1984), the Supreme Court held that counsel has a "duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process."[22] A defendant must plead and demonstrate: 1) unreasonable attorney performance, and 2) prejudice. In his original Rule 3.850 motion, and in this current proceeding, Mr. Swafford pled each. Given a full and fair evidentiary hearing, he can prove each. He is entitled to an adequate evidentiary hearing on these claims.

A. FAILURE TO PROPERLY ARGUE THE ADMISSIBILITY OF THE BOLO

At the time of Mr. Swafford's trial, counsel knew that the eyewitness to the abduction, Paul Seiler, had furnished the police with a composite of the person who abducted Ms. Rucker. Furthermore, defense counsel had obtained a mug shot taken of Roy Swafford at the time of his arrest for the incident at the Shingle Shack, which shows his physical appearance contemporaneously with the time of the abduction (PC-R. 858-9).

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[22]Under sixth amendment principles, it matters not whether counsel's failing is the result of his own deficient performance or the product of external forces which tie counsel's hands and constrain his performance. United States v. Cronic, 466 U.S. 648 (1984). Where an adversarial testing does not occur and confidence is undermined in the outcome, relief is appropriate.

It would have been a simple matter and good trial strategy to enter the mug shot into evidence. Counsel could then have adopted the prosecution's sketches which were identified at R. 1269 and R. 1272, and enter them into evidence. There is no resemblance between the man Seiler witnessed abducting the victim and Roy Swafford then, or now. The abductor passed within five feet of Mr. Seiler (R. 1287), and he testified that the sketch looks like the abductor (R. 1269) yet could not say that Roy Swafford is the same man (R. 1287). The witness' testimony was in stark contradiction to the statements he gave to the police (PC-R. 842-8, 863-5) wherein he described the abductor as having a full bushy beard.[23] And yet defense counsel never asked Mr. Seiler on the stand at trial whether or not the person he saw abduct Brenda Rucker wore a beard (R. 1263-1287). Had counsel asked the witness' response would necessarily have shown that Roy Swafford was not the man he saw. The witness was never asked about the abductor's hairline (R. 1263-1287). Mr. Swafford's noticeable receding hairline markedly distinguished him from the assailant (PC-R. 858-9, 861). Mr. Swafford has never worn a beard in his life, a fact which counsel could have found out had he investigated or asked family members (Affidavit of Gary Swafford, PC-R. 820). He clearly wasn't wearing a bread on the day of the crime (PC-R. 859). Had trial counsel shown the

[23]Of course as was pled in the previous Rule 3.850 motion, counsel did not know (state failed to disclose and counsel failed to learn) that Seiler had criminal charges pending against him which gave him a motive to curry favor with the State and hence change his story at trial.

photographs to the jury they would have seen the obvious difference. (PC-R. 858-9, 861).

B. FAILURE TO PROPERLY EXAMINE THE KEY DEFENSE WITNESS

Counsel failed to learn and present to the jury, the fact that witness Paul Seiler who saw the abductor, was facing criminal charges at the time of the trial. It was unreasonable for counsel to fail to investigate or even ask the witness questions relating to possible coercion by the State or whether he was ever shown a photo line up by the police.[24]

Mr. Seiler's testimony was that he was not sure if Roy Swafford could be the man he saw abduct the victim (R. 1287). But for the pending charges he would have said he was positive Mr. Swafford was not the abductor. Indeed, prior to his deposition he had told Mr. Swafford's trial counsel that there was no way that Mr. Swafford was the man that he saw abduct Brenda Rucker. To the extent that Mr. Seiler's demeanor changed he could have been called as a court witness, allowing counsel to shed light upon the reason for his recalcitrant position. The jury should have been told of the pending charges so that they could have considered whether Mr. Seiler's testimony had been tainted by prosecutorial misconduct. They would realize that it was in his best interest to have memory problems and be uncertain.

C. FAILURE TO IMPEACH STATE'S WITNESSES

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[24]Of course, the State should have disclosed this information.

In this case the conviction rests mainly on the testimony of Roger Harper and members of the Johnson family. No direct physical evidence was presented to substantiate the state's weak circumstantial case against Mr. Swafford. Roger Harper's credibility was a major issue in the case and effective impeachment was critical. In the context of this tenuous evidence, a failure to adequately investigate or effectively litigate key state's witnesses was prejudicial. Nixon v. Newsome, 888 F.2d 112 (11th Cir. 1989).

Roger Harper not only had a "deal" to testify, he was negotiating directly with the prosecutor for the reward before the trial. Letters from Harper to his attorney and to the prosecutor, Eugene White, evidence this fact (PC-R. 873-86). Harper testified to a deal, but not to the extent, nor to the reward (R. 836, 837).

Counsel did not investigate Roger Harper's background, not even to the extent of getting his criminal record in Florida, Tennessee or elsewhere. Trial counsel deposed only Harper, of all the Tennessee witnesses, and without doing any background investigation. Therefore, during trial, counsel was unable to properly cross-examine Roger Harper as to bias, reasons he would lie, and the likelihood of untruthfulness.

The jury should have been appraised 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. Even Florida's Assistant Attorney

General, Mark Menser, has expressed a negative opinion on this issue, "The prisons are a boundless source of unreliable people who are motivated to help themselves, even at the expense of other inmates" (PC-R. 888). These are good reasons to distrust his testimony, but there was no evidence given, and no adversarial testing of these facts. Counsel's failure to investigate was unreasonable.[25] Roger Harper's testimony as to events alleged to have happened on the day of the murder was the foundation of the State's case. Failing to impeach Harper, because of a lack of investigation and preparation, was unreasonable.

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 15th (R. 819-20). It was ineffective not to point out that Roy Swafford was in jail the morning of the 15th, and could not have read the paper at a restaurant. Moreover, he could have and should have established that there was no such article. This would be damning impeachment against Harper.

Harper's trial testimony was that it was after daylight when Mr. Swafford returned to camp, yet he also says he was asleep (R. 803-4). In Harper's statement (PC-R. 890-914), he states it was 6 a.m. when Mr. Swafford returned (PC-R. 895). Because the time

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[25]That this evidence was not disclosed, even after repeated requests, until very recently, shows a substantial Brady violation and misconduct on behalf of the State which "set up" trial counsel.

of the return is critical, this should have been pointed out to the jury. It should have been investigated. Carl Johnson, who also testified at trial, has since stated it was before 6:30 a.m., and that it was dark when Mr. Swafford arrived at the camp (PC-R. 916-7). Had counsel properly investigated, this would have been brought out at trial. It would have impeached Roger Harper and established Roy Swafford's alibi. He could not be the person who committed this crime.

In Mr. Harper's deposition he stated he only had two felonies and a couple of misdemeanors in his criminal record (PC-R. 940). Counsel failed to prepare in order to impeach Mr. Harper on this matter. Had counsel done so he would have found that Mr. Harper had been convicted prior to Mr. Swafford's trial of the following:

Date	Offense	Court or Docket
9/76	Strong Armed Robbery	H66216
12/76	Breaking and Entering	St.Petersburg, FL
10/77	Flight to Avoid Arrest	Unknown
7/79	Resisting Arrest	Unknown
8/80	Petty Larceny and Conspiracy to Conceal	C-723811

(PC-R. 954-9).

These offenses are in addition to those Mr. Harper acknowledged under oath, including the 1982 felony for which he was incarcerated at the time. He stated under oath that there were no other criminal convictions and that he had never had been convicted of a felony in Tennessee (PC-R. 940-1). Counsel failed to investigate Mr. Harper's Tennessee record, thus he failed to

find several felonies. Not only was Harper untruthful about his prior convictions, he was hiding the fact that he had been convicted of a crime relating to his veracity -- conspiracy. This was critical impeachment evidence.

Finally, counsel failed to point out the discrepancy between Roger Harper's recollection of seeing Mr. Swafford with the gun in his coat pocket at the Shingle Shack (R. 812) and Clark Griswald's testimony that Mr. Swafford wasn't wearing a jacket (R. 1052). Harper's testimony was the keystone of the State's case. There were inconsistencies between his own trial testimony, deposition testimony, and statements, and between him and the other witnesses. Had his propensity to lie been pointed out in detail there is a reasonable probability that the jury would not have believed him, and that the results of the proceedings would have been different.[26]

Counsel was also ineffective in failing to investigate and gain knowledge of the criminal background of other witnesses. Counsel failed to adequately prepare for Chan Hirtle, Kenneth Johnson, Ricky Johnson, and Earnest Johnson.

Counsel had at his disposal police reports which could have been used to impeach Mr. Hirtle's testimony. One of the most important documents would have been the transcript of the tape recorded interview which took place in Nashville, Tennessee, on June 22, 1983, at 8:48 p.m. One of his responses alluded to what

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[26]Again the State kept much of this impeachment evidence from the defense in violation of Brady and in essence "set up" trial counsel.

time Roy Swafford returned to the camp at Tomoka State Park. While Mr. Hirtle testified it was 6:00 to 6:30 a.m. (R. 876), he was more certain of the time in his interview; "It was early 6:00, 6:30...real early" (PC-R. 1036). It would have also been important for counsel to ask him about his knowledge of Mr. Swafford's possession of the alleged murder weapon. On page 8 of Mr. Hirtle's interview he says he has never seen the weapon in Mr. Swafford's possession, a position he repeats on page 12 of the interview. On page 11 of Mr. Hirtle's interview, he discussed the fact that the whole group generally drank Miller beer (PC-R. 1041). The police reports indicated empty Michelob bottles at the scene of the crime (PC-R. 265)(see also PC-R. 250-353).

Failure to impeach these State witnesses with their respective records and prior statements was deficient performance. This would have been powerful evidence, especially in light of Patricia Atwell's testimony that these State witnesses had discussed pinning the crime on Roy Swafford (R. 1105-12).

If counsel had gone to Tennessee to investigate, he would have found that Roger Harper and Kenneth Johnson had reason to want revenge against Roy Swafford. Roy had been involved in affairs with Terry Johnson, when she was Roger Harper's wife, and with Margaret Johnson, when she was Kenneth Johnson's wife. Both men believed Paul Swafford was responsible for destroying their respective marriages. This evidence of bias should have been

brought to the attention of the jury, for it brings into question the testimony of not only Roger Harper, but of Kenneth Johnson, Carl Johnson (Kenneth and Terry Johnson's father) and Earnest Johnson (their uncle). It would also raise a question about the testimony of Chan Hirtle, who is a close friend of the Johnson family.

Counsel could have talked to family members concerning the feud that exists between the Swaffords and the Johnsons. Evidence of this can be found in the Swaffords' affidavits:

> The reason why I wanted Mr. Cass to talk to the Johnsons is that they were not telling the truth. Even though I am related to them by marriage (Carl Johnson is Dorothy's brother-in-law), Dorothy and I have tried to keep our family away from them. We have always considered Carl Johnson to be very dangerous. He is the type of person who will commit serious crimes and let others take the fall for him. Roger Harper was Carl's son-in-law in 1982 and frequently was involved in criminal activities with Carl. Chan Hirtle is one of a number of boys that Carl uses to steal for him. It is usually Chan who goes to jail, thus protecting Carl. I know less about Ricky Johnson, except to say that I believe that Roy somehow got to be friends with Ricky and that is how he got messed up with that group. Roy has always been the outsider of that group. They knew that Dorothy and I did not approve of Roy's being around them. In fact, Dorothy basically has had nothing to do with her sister, Gracie, who is Carl's wife, since the day she married him. This is something that Mr. Cass needed to know but to the extent I and Dorothy tried to tell him he did not seem to care.

(PC-R. 1053-4).

> When Carl Johnson and Ricky Johnson and Ernest (Bobe) Johnson got on the stand and told lies, I was not surprised. Those Johnson boys will lie to you in a minute. Unfortunately, Roy's lawyer never asked us anything about them so we couldn't tell him all we knew about their reputations for not telling the truth and for hurting people.

Even during the trial, we kept trying to get Mr. Cass to listen to us or just to sit down and talk with us. He would just say "We don't have a thing to worry about" and then walk away.

One day during the trial I was outside with my husband during break. Standing around this car with the hood up were Roger Harper, Chan Hirtle, Carl Johnson, Ernest Johnson and Ricky Johnson. They were all drinking beer. Roger Harper, who was in jail at the time, did not have any handcuffs on and there were no guards around. My husband told Mr. Cass about this, but he didn't do anything.

(PC-R. 1069-70).

There also came a point in time when Roy began hanging around relatives on my mother's side of the family. This is something that we had always been told not to do because the Johnsons were people that were rough and whom no one trusted. In spite of Mom and Dad's warnings, Roy began hanging around these people and then they started coming down to my boat dock at the marina to fish. I repeatedly told Roy that they were not welcome there, but the people still kept coming around. I remember one time that I saw Roy with Roger Harper when Roy really appeared as though he was out of it. I don't know what he was on but it was evident that he had been drinking and that he had probably been mixing alcohol with some sort of drugs. Harper had track marks on his arms so I knew that Harper was into some heavy sort of drugs. Eventually I got to the point that I just refused to allow the Johnsons to come anywhere near my marina and I also lost more control over Roy's actions.

(PC-R. 1076-7).

I know firsthand of the way that Carl Johnson, Ricky Johnson, Chan Hirtle, Roger Harper, and Ernest Johnson act. We have never trusted them because it is well-known that they all are engaged in committing thefts and other crimes in the Nashville area. Carl Johnson, however, seems to escape arrest from any of these crimes because he uses boys like Chan Hirtle to commit the actual crime, sell the goods and then bring the money to him. We have had our house broken into by these people and have repeatedly had to tell them to stay away from us. I sat and listened to the state tell the jury in essence that the Johnsons and the Swaffords were close and that could not have been further from the truth. I believe that Roy never was given an opportunity to present his side of the case

through witnesses who could have testified about the manner in which the Johnsons acted and the fact that they were attempting to use Roy as a scapegoat in order to get Roger Harper out of jail.

(PC-R. 1086).

When Leroy got into his early 20's, he started hanging out with some relatives of ours named Johnson. Carl Johnson is married to my Mom's sister Gracie. No one else in our family ever had anything to do with them because we knew there were trouble. Our mother never let us associate with them when we were growing up and it was always bad news to see them coming. It was always "Oh God, here they come."

There was always a big gang of boys hanging around at Carl Johnson's. Leroy said that Carl was just getting people to go out thieving for him. It seemed like whatever Carl said to do, someone would do it, kind of like a bunch of baby ducks following the big duck. I don't know why Leroy ever started hanging around with them but I think it was because he liked Carl's son, Ricky. Leroy and Ricky were like two peas in a pod. We all knew that it was bad news for Leroy to hang with these guys, but there was nothing we could do about it. Every time I saw him before they made the trip to Florida that started all of this trouble, Leroy was with Roger Harper or Ricky.

When Leroy got in this trouble, everyone in my family wanted to help. Not once did Leroy's lawyer ever call me and ask me anything about Leroy or the Johnson's or anything else. I could have told him that the Johnson's all had reputations for being thieves and liars. . . .

(PC-R. 869-70).

Roy Swafford became a victim. If counsel had gone to Tennessee, he would have found evidence that there was bias on the part of the State witnesses from Tennessee, and that bias should have been pointed out to the jury. Failure to investigate and prepare for these witnesses was ineffective. Given the circumstantial nature of the State's case, failure to show this bias brought extreme prejudice.

A reasonable investigation would have entailed going to Tennessee to talk to witnesses and family members. The State sent both prosecution and police personnel, but the defense did not go to Tennessee, nor did they question or depose anyone involved other than those that happened to be available in Florida. This was unreasonable because the witnesses from Tennessee were the key witnesses.

D. FAILURE TO DEPOSE STATE WITNESSES

Counsel likewise did not depose either Clark Bernard Griswald or Karen Sarniak, even though their testimony was critical to the prosecution. These two witnesses were the only connection between the purported murder weapon and Roy Swafford. Had counsel deposed these witnesses, he could have used them to impeach one another. Their testimony at trial was contradictory. Mr. Griswald said the gun was in a trashcan in the men's room (R. 1045) and he found it. Ms. Sarniak swore the gun was in the trash in the ladies room (R. 1093-94) and that a police officer found it (R. 1100).

Counsel's failure to investigate or prepare for these two witnesses was unreasonable. But for counsel's error, either the weapon would not have been entered into evidence or the jury would have been made aware of the problems with the testimony of these individuals and therefore question the "finding" of the pistol.[27] Either way, there is a reasonable probability that

[27]Also note that the State withheld property receipts relating to this evidence, because those receipts established a major flaw in chain of custody. Therefore, coupling the

the result of the proceeding would have been different, undermining confidence in the outcome.

E. FAILURE TO IMPEACH PATHOLOGIST

The State presented evidence that the victim had been shot twice in the head. It appears from records which have finally been made available that this was not true. Yet, counsel failed to know this and point out to the jury the x-rays which contradicted this testimony.

Ernest Johnson's testimony was introduced as "Williams Rule" evidence to allege Mr. Swafford killed women by shooting them twice in the head (R. 961-970). Counsel could have shown that the victim was only shot in the head once and that only one bullet was removed from the head. X-rays existed which demonstrated this.

F. COUNSEL WRONGLY CONCEDED SEXUAL BATTERY

Counsel was ineffective when he conceded that a robbery and sexual assault occurred (R. 303, 592, 611, 635). Mr. Swafford was found innocent of the robbery charge (despite counsel's concessions). Had counsel investigated, prepared and defended against the sexual assault charge, Mr. Swafford may not have been convicted of, nor had his sentence aggravated by the sexual battery. There was no evidence, hair or semen, to link Mr. Swafford to the victim, yet counsel conceded a rape had occurred in his closing argument (R. 1356) and as Mr. Swafford was the

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inconsistent testimony of Griswald and Sarniak with the internal problems at the law enforcement agencies would have significantly undercut the State's efforts to enter these items into evidence.

only person charged with the alleged rape, counsel's concession that a rape had even occurred, amounted to a confession that his client was guilty of said rape. The State was relieved of the burden to even prove a sexual battery by counsel's concession. Mr. Swafford did not agree to such a concession. The rape which was conceded was used as aggravation to justify imposition of the death penalty, showing prejudice. This was ineffective assistance. Francis v. Spraggins, 720 F.2d 1190 (11th Cir. 1983).

G. FAILURE TO PRESENT AVAILABLE TESTIMONY

A further indication of ineffectiveness was counsel's handling of the incident where witness Patricia Atwell overheard members of the Johnson family and Chan Hirtle say they "might as well hang it on Roy as anybody" (as relayed to prosecutor White, R. 672). A short hearing was held out of presence of the jury where Ms. Atwell repeated her allegation (R. 1005-12). However, defense counsel knew there was at least one other witness who heard the statement. Said witness told counsel of the incident and was ready, willing and able to testify, but counsel failed to call him. The testimony would have bolstered Ms. Atwell's and would have raised doubt concerning the testimony of the state's witnesses. Had an investigation been done, more witnesses would have been located, but no investigation was done.

H. FAILURE TO POINT OUT JUROR MISCONDUCT

Family members repeatedly overheard or witnessed juror misconduct and noted the fact that Mr. Swafford was often in the

presence of the jury in handcuffs and/or shackles. The family brought these things to counsel's attention, yet the issue was never raised.

> I could not believe the behavior of the jurors during this case. While they were choosing the jury we heard a woman juror say to the others that Roy was clearly guilty so why don't they go on and get the trial over with. I told Mr. Cass about it and I understand the judge told the woman to leave. The same thing happened to a male juror. I also told Mr. Cass that the jurors were rushing to the newspaper racks everyday to read the papers. I can't say exactly what they were reading but it seemed obvious that they were reading about the trial. I told Mr. Cass about it, but he did nothing. The jurors also saw Roy brought in everyday in shackles because the window at the end of the hall overlooked the parking area where the prisoners were unloaded. Everyday the jurors would watch Roy being led in in shackles. I told Mr. Cass about it but to my knowledge he did nothing.

(PC-R. 1054-5).

> I also watched the jurors every day as they watched Roy being brought into the courthouse in shackles. The jurors were openly discussing the fact that Roy was a murderer and that they wished the trial would hurry up so they could go ahead, get it over with and go back to work or whatever. They clearly believed that he was guilty long before the trial ever reached an end.
>
> On one occasion I went into the ladies' restroom and overheard two jurors discussing the fact that Roy was clearly guilty of killing Brenda Rucker and that the crime was brutal. Both of the women said that electrocution was too good for him and that they wished they could go ahead and get this over with. Neither of the two women knew who I was. When I came out of the restroom I told my husband about the conversation and pointed the two women out. My husband then told Mr. Cass about it but to my knowledge nothing was done. I know that both women continued to sit on the jury until the trial was over.

(PC-R. 1083-4).

> When the trial began I distinctly remember that on the first day Roy was brought into the courtroom by way of the hallway directly in front of the jurors. I was

> standing around in the hall and listening to the jurors talk during the trial and I was absolutely amazed at what I heard. The jurors were freely calling Roy a murderer. Every morning they watched him brought into the courthouse from the prison vehicle and when that was being done Roy was cuffed and shackled. On one occasion my wife heard two women jurors in the ladies' room saying that this was a brutal murder and that electrocution was too good for Roy. These women were two of the twelve jurors on the case and the conversation took place during the trial. Amy told me about this and then I told Mr. Cass but I don't believe anything was done about it. In fact, I was repeatedly telling Mr. Cass what the jurors were saying but it looked to me like nothing ever got done. I was absolutely distraught with this trial attorney because it looked to me as though he really didn't care anything about Roy.
>
> The only thing that he kept saying in response to our attempts to get answers from him was, "I haven't yet begun to fight."

(PC-R. 1078-9).

The jury, like the evidence, was biased and tainted by their own prejudice, by their seeing Mr. Swafford in chains, and by counsel's inaction. But for the ineffectiveness of counsel on these items, there is a more than reasonable likelihood that the result of the proceedings would have been different.

I. CONCLUSION

The previous Rule 3.850 motion combined with the instant one alleges numerous errors in the context of ineffectiveness of counsel. While most of these, standing alone, would require relief, the cumulative effects totally undermine any belief in the reliability of the outcome of the prior proceedings.

In Strickland, 466 U.S. at 696 (emphasis added), the Supreme Court held:

> A number of practical considerations are important for the application of the standards we have outlined. Most important, in adjudicating a claim of actual ineffectiveness of counsel, a court should keep in mind that the principles we have stated do not establish mechanical rules. Although those principles should guide the process of decision, the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. In ever case the court should be concerned with whether, despite the strong presumption of reliability, the result of the particular proceeding is unreliable because of a breakdown in the adversarial process that our system counts on to produce just results.

Here the court and jury were left unaware or misled in regard to critical issues due to the ineffective assistance of counsel. Therefore, what evidence that was submitted was not subjected to proper adversarial testing. Confidence in the fundamental fairness of the guilt-innocence determination is severely undermined. Since the files and records do not conclusively establish that Mr. Swafford is entitled to no relief, an evidentiary hearing is required. Lightbourne v. Dugger, 549 So. 2d 1364 (Fla. 1989).

ARGUMENT VI

NEWLY DISCOVERED EVIDENCE ESTABLISHES THAT MR. SWAFFORD IS INNOCENT OF THE OFFENSE FOR WHICH HE WAS CONVICTED AND SENTENCED TO DEATH, AND THUS HIS CONVICTION AND DEATH SENTENCE VIOLATE THE EIGHTH AND FOURTEENTH AMENDMENTS.

Evidence uncovered since the time of Mr. Swafford's capital trial and initial post-conviction proceedings establishes that Mr. Swafford is innocent of the offense for which he was convicted and sentenced to death. Consideration of this evidence is required, for it establishes that Mr. Swafford's conviction

and death sentence violate the eighth and fourteenth amendments. Jones v. State, 591 So. 2d 911 (Fla. 1991).

The State's theory was that Roy Swafford had left a woman at six o'clock a.m. on the morning of February 14, 1982 (R. 1334); allegedly abducted Brenda Rucker at 6:15 to 6:17 a.m. (R. 1265); drove her to the crime scene, raped and sexually assaulted her, put her clothes back on her, shot her five times, reloaded a revolver and shot her four more times, and then returned to the campsite, around daybreak (R. 1335), but no later than 6:30 a.m. (R. 1397). This entire criminal episode, according to the State, took no more than thirteen minutes.

The State's theory requires that the body be left at the crime scene by 6:30 a.m. on February 14, 1982, since the State's witnesses who testified as to Mr. Swafford's whereabouts testified that he was back at the campsite by that time and none testified that he was out of their presence the remainder of the day. However, evidence now indicates that the body was not at the scene at 9:45 a.m., two hours after the crime allegedly occurred. If the body was not there at 9:45, Mr. Swafford could not have committed the crime, because, according to the State's witnesses, he was with them constantly after 6:30.

Charles Jackson joined a friend, Tom Connolly, who was an amateur photographer at the scene where the body was found several hours after the body was supposedly left there. Mr. Connolly took photographs of the area and he, like Mr. Jackson did not see a body at the scene. Both Mr. Connolly and Deputy

Garrett were present at the crime scene while Mr. Jackson photographed the area, yet neither report seeing a body there. This was over two hours after Mr. Swafford allegedly committed this murder and, at the time that Mr. Swafford was with Roger Harper, Carl Johnson, Ricky Johnson, and Chan Hirtle. Mr. Swafford arrived back at the campground between 6:00 and 6:30 a.m.[28] Carl Johnson, who originally said the time was between 6:30 and 7:00 a.m. (PC-R.849), has now advised counsel for Mr. Swafford that 1) Mr. Swafford returned between 6:00 a.m. and 6:30 a.m.; 2) that it was dark enough outside that Mr. Swafford had the car's headlights on; and 3) that it was no way Mr. Swafford could have committed the crime and gotten back to camp by the time he did (PC-R. 916-7).

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 the her body, it was found not to implicate Roy Swafford. (PC-R. 438-9, 442-3).

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 Roy 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

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[28] Chan Hirtle at PC-R.863; Ricky Johnson at PC-R. 876,878.

amount of time which the crime allegedly took, stretch one's concept of reality:

> JUSTICE MC DONALD: This was the first case that I've noticed that since I've been sitting on the Court the past seven years where you have a sexual battery and the person is clothed again...homicide has immediately followed the unclothing..I've never seen this before, I'm not saying it doesn't happen.
>
> COUNSEL FOR THE STATE: Very unusual I agree.
>
> (Oral argument video tape Swafford v. State, No. 68,009 at 3289-3319).

Roy Swafford had neither the time, opportunity, or motive to commit the crime, and is innocent. This newly discovered evidence supports what Mr. Swafford has contended all along -- that someone else committed the murder[29]. This evidence, if presented at the time of trial, would probably lead to an acquittal.

Mr. Swafford was denied a hearing under rule 3.850 by the Trial Court, even though fundamental fairness demanded his claim be heard and it was properly before said court. Moreland v. State, 582 So. 2d 618 (Fla. 1991), Richardson v. State, 546 So. 2d 1037 (Fla. 1989). He was denied a hearing, even though he provided this information which should have been taken "at face value" and accepted as true and thus was "sufficient to require an evidentiary hearing." Lightbourne v. Dugger, 549 So. 2d 1364 (Fla. 1989); Smith v. Dugger, 565 So. 2d 1293 (Fla. 1990).

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[29] Other suspects were identified in the previous Rule 3.850 motion.

The eighth amendment mandates this Court not dismiss this newly discovered evidence of innocence. Jones v. State. When viewed in conjunction with other evidence never presented because of the State's discovery violations and/or trial counsel's deficient performance, there can be no question that his conviction cannot withstand the requirements of the eighth amendment and fourteenth amendment due process. An evidentiary hearing is required. Jones v. State.

ARGUMENT VII

MR. SWAFFORD WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AT THE SENTENCING PHASE OF HIS TRIAL, IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

In Strickland v. Washington, 466 U.S. 668 (1984), the Supreme Court held that counsel has "a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." 466 U.S. at 688 (citation omitted). "An attorney has a duty to conduct a reasonable investigation." Middleton v. Dugger, 849 F.2d 491, 493 (11th Cir. 1988). See also Cunningham v. Zant, 928 F.2d 1006, 1016 (11th Cir. 1991). "[D]efense counsel must make a significant effort, based on reasonable investigation and logical argument, to ably present the defendant's fate to the jury and to focus the jury on any mitigating factors." Kubat v. Thieret, 867 F.2d 351, 369 (7th Cir. 1989). An attorney is charged with knowing the law and what constitutes relevant mitigation. Brewer v. Aiken, 935 F.2d 850 (7th Cir. 1991). Moreover, counsel has the duty to ensure that his or her client receives appropriate mental health

assistance. State v. Michael, 530 So. 2d 929 (Fla. 1988). Defense counsel's failure to investigate available mitigation constitutes deficient performance. State v. Lara, 581 So. 2d 1288 (Fla. 1991).

Mr. Swafford's defense counsel presented no mitigation on Mr. Swafford's behalf, except for stipulating to the fact that he had been an Eagle Scout (R. 1459). He did no investigation into penalty phase issues on Mr. Swafford's behalf. Defense counsel failed to investigate the ample evidence available. There exists a wealth of information about Mr. Swafford's childhood and young adulthood, available at the time of trial, which compellingly demonstrates substantial reasons why the death sentence is not appropriate in this case. Mr. Swafford was sentenced to death by a judge and jury who knew almost nothing about him.

Mr. Swafford was sentenced to die by a judge and jury who knew nothing about Mr. Swafford's childhood and home life, except for the fact that he was an Eagle Scout (R. 1459). Former Chief Justice McDonald expressed the confusion that this failure to present mitigation caused:

> Chief Justice McDonald: Was there evidence that this man was on drugs or something like that?
>
> Counsel for Mr. Swafford: No, there was not . . .
>
> Chief Justice McDonald: Kind of hard to figure out how an Eagle Scout goes this bad.

[Video tape of oral argument in Swafford v. State, 533 So. 2d 270 (Fla. 1988)]. However, substantial mitigation existed; it was not presented because counsel conducted no investigation.

Roy Clifton Swafford was born April 12, 1947. At the time of his birth, his father was serving in the U.S. Army. As a result of this, Roy did not see his father until Christmas 1947, 8 months after his birth. Roy's mother, Dorothy, was solely responsible for the task of caring for the young Roy for the first portion of his life, a task that was entirely new to her (PC-R. 1059-60).[30]

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[30]Roy's paternal grandparents were both full blooded Cherokee Indians. They are from the largest families of Cherokees in Nashville, who later became farmers in the area now known as Donelson (PC-R. 1045-6). Roy's compelling desire to understand his heritage led to his interest in American Indians and in particular the Cherokee Nation as he was growing up and as a result he joined the Boy Scouts. As a Boy Scout he studied the heritage of the Cherokees and hiked and camped in the Smokey Mountains that his ancestors lived in while being dispossessed of their land by the American government. While a Boy Scout, Roy graduated to the level of Eagle Scout. (PC-R. 1045, 1061). Roy's fascination with his heritage continued throughout his teen and adult years. He and his girlfriend, Linda McCloud, who was also a Cherokee, walked the complete Trail of Tears from Tennessee to Oklahoma, the same route taken by Roy's Cherokee ancestors to escape federal relocation in the 1830's (PC-R. 1046). That Roy's experience as a native American profoundly affected his character was noted by an examiner with the Volusia County Department of Corrections during a psychological evaluation on November 8, 1985:

> Repressed anger regarding family issues and anger towards US Government for 'taking the land' of his Indian family [].

(Volusia County Department of Corrections mental health summary, November 11, 1985).

The Swaffords were always strict with their children and kept them very close. The children were whipped by both parents when they misbehaved (PC-R. 1048-49, 1059, 1074), the severity of which would be considered child abuse today (PC-R. 1158).

Roy's childhood was marked by poverty and social unrest. Though Roy's father worked when Roy was growing up, the family still suffered through some serious economic hard times. Much of Roy's youth was spent in the largest housing project in all of Nashville, Settle Court. Roy's parents first thought this would be a decent place to raise a family, but soon crime and poverty had taken over the projects. In the late 1950's and early 1960's Nashville was feeling the effects of the racial problems being felt in the rest of the South, and much of this strife was centered in places such as Settle Court. The increasing tension between the blacks and the whites ultimately resulted in race wars and Roy was subjected to much of the unease and hate that accompanies such situations (PC-R. 1047-8, 1060, 1072).

As an adolescent, Roy began his experiment with drugs that would continue throughout his lifetime. As in any economically deprived areas during this period, drugs were a way of life for many. They were readily available for those who wished to try them and this was a common form of escape for many youths of this time. During this time, Roy "learned" to drink alcohol, smoke marijuana and sniff glue (PC-R. 1072-3).[31]

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[31] Even when he was abusing alcohol and drugs, Roy was always a hard worker. When he was young, he sold homemade sno-cones at the ballpark. He also worked as a lifeguard at the

As a result of the racial tension and poverty in Settle Court, the family decided to relocate to Dallas, Texas, around 1961. In November 1963, Roy and his brother Wayne had a job with the local newspaper delivering papers. They lived near the Texas Book Depository and delivered papers in that area and when they heard President Kennedy was going to be in town, they decided to go watch the parade. Roy Swafford was there when President Kennedy was assassinated. Because of the assassination and because of the serious allergy problems Roy was suffering from in Texas, Mr. and Mrs. Swafford decided to move their family back to Nashville (PC-R. 1047, 1062, 1073).

By the time of the family's return, east Nashville had become the crucible of fire. When the family moved back to Nashville they did not move into the old neighborhood in Settle Court. Nonetheless, Roy remained friends with many of the children he had grown up with in the housing projects. Roy was 16 at the time and was attending Highland Heights High School. Many of the boys Roy hung around with were older than he, and some were considered to be a bad influence by his family (PC-R. 1047-48, 1062-63, 1073-75). The housing projects were still an area of economic deprivation and racial strife and Roy's friends from that area were still caught up in that lifestyle. One

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YMCA, a counselor with the Salvation Army's Red Shield program for inner city children and was a summer camp counselor for poor children for three years. As an adult, he helped his brother Wayne build race cars, worked for his brother Ronnie at the Lakewood Marina, worked as a painter and worked as a laborer. There was very little time during Roy's life that he was unemployed (PC-R. 1046, 1061-62, 1076).

friend, a boy he knew as Fatso, had a particularly sad homelife and Roy often helped him out. Many times he would come to Roy's home and knock on the window and ask if he could stay the night. Roy would get his mother's permission and then they would arrange a pallet on the floor for him to sleep on. It was typical of Roy to help people out like this. Fatso later died of an overdose and was so poor that he had no clothes to be buried in (PC-R. 1063). Roy's family took some clothes to the funeral home for Fatso to be buried in.

It was during this period that Roy's drug use escalated. His drug of choice was Testor's glue and he and his friends missed no opportunity to imbibe. The harmful effects of glue sniffing are well documented (PC-R. 1144-55). The family was not aware of what exactly was going on, but Roy's brothers often noticed a dazed look in his eyes, indicating he was under the influence of some drug. His brother Ronnie knew that Roy was into glue sniffing and that his alcohol use had escalated. According to Ronnie, Roy would start his "buzz" on Thursday in anticipation of the weekend (PC-R. 1074).

Roy began coming home drunk three to four times a week during this time. His parents also became aware that he was sniffing from paper bags, but did not realize that this had anything to do with taking drugs. Though they had heard about some other boys sniffing glue up in the park, it did not occur to them that Roy could be involved. It was not until he and some of his friends were picked up by the police for glue sniffing that

his parents realized that Roy actually was involved, and by this time the damage was done (PC-R. 1065).[32] Roy was already deep in the clutches of addiction to glue sniffing.

In December 1965, Roy and some of his friends were out on the town on a Christmas shopping/drinking spree. As they were driving down the highway, the car in front of them braked without any brake lights and they ran into the rear end. Roy was thrown into the dash with such force that eight of his teeth were knocked back into his gums. Roy did not go directly home after this. Mrs. Swafford did not discover it until her son Wayne came in and told her what had happened. Wayne then left the house and returned shortly thereafter with Roy. Roy's mouth was in a complete mess and every time he opened it it filled with blood (PC-R. 1049, 1063-64).

An ambulance had taken Roy to a medical clinic, but the doctors there were unable to treat him because there was no oral surgeon on duty and the injuries were too extensive for the doctors to deal with. Roy departed this hospital against medical advice. His mother then took him to a dentist, but once again he was told that he needed to see an oral surgeon. The local hospital was also contacted and told Roy that he would have to

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[32]It is indicative of the harm and danger caused by glue sniffing that most of the boys Roy associated with during this period of his life are now dead as a result of violence. One of Roy's friends, Hugh Smith, was shot and killed. Roy also sniffed glue and partied with the Bolton brothers. One of these boys was killed in a bar fight and the other one was shot. Two other of Roy's East Nashville friends were murdered, one with a hammer (PC-R. 869, 1066). The addiction to glue sniffing was the beginning of the end for most of these boys.

see an oral surgeon and there was not one available. As this was a Friday evening and 1965, there was no chance of contacting an oral surgeon until the following Monday. Roy was left to suffer the pain for an entire weekend (PC-R. 868, 1049-50, 1064).

The dentist that Roy had visited had been able to prescribe a painkiller called Darvon. Unfortunately, the pain was too great for this medication to have any effect. Roy screamed in pain all weekend and was unable to sleep or eat. He had been told not to put any compresses on his mouth so there was nothing he could do to take down the swelling. By Monday morning his face was so swollen he looked like a pig (PC-R. 1064). His mouth was also infected because he had taken nothing but painkillers over the weekend.

Roy finally received treatment for his injuries from an oral surgeon on Monday morning, three days after the car accident (PC-R. 1064, 1168-71). At the oral surgeon's office, Roy was strapped to the chair and his mother was asked to leave the room. He was not given anything to deaden the pain. Roy's screams could be heard from the parking lot by his mother who was waiting there. After the surgery, he was released into her care to go home. The Swaffords were told by the oral surgeon that had the blow been two inches higher the accident probably would have killed him (PC-R. 868, 1050, 1064-65, 1075).

Roy's family noticed a marked change for the worse in his temperament after the accident (PC-R. 868, 1050, 1052, 1065, 1075). He complained of constant headaches and became very

sensitive to light. He became more withdrawn and his temper got shorter. He spent more time with the older boys he had been getting into trouble with and often stayed away all night (PC-R. 1050). He also started to get into trouble with the law around this time. It is clear that this accident marked a turning point in Roy Swafford's life. The problems that had previously been only minor and sporadic now became major and frequent (PC-R. 1050-51).

After the accident Roy started to drink more and take drugs more frequently. Roy's susceptibility to alcohol abuse is not surprising considering the fact that there are a number of alcoholics on both sides of his family. Many times his family members discovered him drunk and passed out in the streets of Nashville (PC-R. 1050).

Roy had his first brush with the law at age 17. He and some friends were stopped in their car and arrested for breaking into parking meters. In spite of his age, the police did not call his parents and tell them he had been arrested. The first his parents learned of the incident was from some of Roy's friends who were no longer in school. Roy was tried the day after he was arrested and sentenced to a workhouse where he was to serve on a chain gang. The authorities shaved his head and made him wear shackles and work outside in the blistering sun in a rock quarry. When his parents discovered what had happened they immediately went down to visit Roy. His scalp was covered with blisters and

he had cuts and sores on his ankles where the shackles had rubbed (PC-R. 1051, 1066).

On the third day of his confinement, Roy refused to go out and slave in the hot sun on the chain gang. To punish him for speaking out against this inhuman treatment, he was put in "the hole." (PC-R. 1051, 1067). "The hole" was literally a hole in the yard with a door on top. Roy was given one piece of bread and a glass of water for the entire twenty-four hours he spent in the hole (PC-R. 1067). Roy was seriously affected by this experience in the workhouse.[33] The shaved head was a source of embarrassment for him and as a result he did not return to school. He also had scars on his ankles from the shackling for at least a year after (PC-R. 1051-52, 1067, 1076).

When Roy was 24 years old, he began dating his girlfriend Linda McCloud. Though they never formally married, they lived together as man and wife for about 10 years. On August 10, 1981, Roy Clifton Swafford, Jr. was born. Roy was a very good father to his son, taking him around to visit his relatives every

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[33]Roy had another experience in the Nashville jails. He was in a cell with a boy named Larry Thaxton and a third boy when the third boy began having a seizure. When Roy and Larry yelled for the guards, they were just ignored, and as a result of the seizure the boy died. The warden then decided it would not look too good for someone to die in the jail, so he ordered Roy and Larry to carry the boy out to a car to transport him to the hospital. Roy and Larry had to ride to the hospital with the dead boy sitting between them to make it look as if 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 (PC-R. 1052, 1067-68).

weekend (PC-R. 1068). However, Linda also knew Roy was an alcoholic and that this created many problems for Roy.

Counsel did virtually no investigation for penalty phase and instead concentrated his efforts on the guilt phase of the trial. At no time did counsel or his investigator travel to Tennessee to speak with the family and friends of Roy Swafford, people who could have told the court of this substantial mitigation (PC-R. 871, 1053, 1069, 1078). Repeated efforts by members of Roy's family to speak with counsel were met with silence. Numerous phone calls were made to Florida, none of which were returned (PC-R. 1077, 1083). Roy's father, mother, brother Randy and his wife Amy all attended the trial expecting to be called as witnesses. Not only did counsel not sit down with them and explain what the penalty phase was about (PC-R. 870-71, 1054, 1070, 1078-79, 1083-85), he also failed to call them as witnesses (PC-R. 870-71, 1056, 1069, 1079-80, 1083-85). Therefore the only family members who testified at trial were called by the State. This left the judge and the jury with the impression that even those closest to Mr. Swafford felt he should die.

At the penalty phase hearing, defense counsel also failed to obtain and present psychological testing, although a memorandum from his file indicates he felt it was something which should be done:

> 12) Motion for mental examination seems indicated by prior criminal history Girl friend Linda says he is "an alcoholic" and when he gets into trouble it is because he has been drinking.

(PC-R. 1173). No such expert assistance, however, was forthcoming. The services of a qualified mental health expert have been obtained by collateral counsel, and a full evaluation of Mr. Swafford indicates a wealth of mitigation which was unknown to both the judge and the jury who decided Mr. Swafford's fate:

> A combination of deficits appear when a number of factors are examined in Mr. Swafford's history. Mr. Swafford had a stable childhood behaviorally despite the type of environment in which he was reared, a low socioeconomic status, and an alcoholic father. His life as a youth was exemplary considering the environment and background: Eagle Scout, lifeguard, work with handicapped, and a caring attitude with his elders. Two important factors intervened during his development that significantly changed the course of his life. First, he began using alcohol and experimenting with drugs. The most significant was the glue sniffing which began at 16 years through at least 19 years. The resulting damage from glue sniffing is well documented in research. During the period of Swafford's adolescence, glue sniffing was similar to the current crack epidemic. The result of consistent glue sniffing is neurological impairment, usually generalized. During this period, some school districts had special classrooms set up to manage students who had been damaged from glue sniffing. Other long term drug and alcohol use could have increased the damage, but the glue sniffing alone could have caused the neurological damage evident in his behavioral history and verified by test results.
>
> The second important interference was the car accident at 18 years of age. He left the hospital AMA and then had to return for treatment. The head injury was of the severity that his front teeth had to be removed after being forced into the gums. The records are scanty regarding this injury since he left the hospital impulsively.

Mr. Swafford's behavior history is typical. He repeated the same type of crime, usually burglary, despite severe consequences. The environment helped direct the outlets for the impulsivity, lack of judgment, and impaired behavioral control. The behavior of youngsters who are reared in neighborhoods where violence is common is given a label of criminality without consideration of the antecedents. In Mr. Swafford's case, there was ample evidence for emergence of uncontrolled behavior in a young man who previously had been the star of the neighborhood. Presently, Mr. Swafford has as little understanding of his behavior as those who are quick to blame and name.

His level of functioning resulted in a number of deficits that would be expected to influence Mr. Swafford's success in adjusting to a complex world with little structure. In addition, the environmental factors interacted with the deficits to result in a poorer overall adjustment than would be predicted on the basis of the test results alone.

A number of attempts have been made to establish the similarities and differences between brain-damaged and psychiatric subjects. There is increasing evidence that these attempts may be misleading and easily misunderstood. The studies indicate that the problem may not be that there are organic and nonorganic disorders, but that damage to the brain may result in a high risk of developing different types of behavioral and psychiatric disorders. For example, Mr. Swafford's glue sniffing and head injury may have caused chronically misfiring cortical cells that caused him 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.

In conclusion, Mr. Swafford has sufficient cerebral dysfunction to significantly disrupt his control, behavior, and thought processes.

Diagnostic Impressions

> Mr. Swafford meets the criteria for Organic Personality Syndrome as outlined in the Diagnostic and Statistical Manual of Mental Disorders - Revised (DSM III-R). Some of the essential features are affective instability, recurrent outbursts of aggression, markedly impaired social judgment, marked apathy and indifference or suspiciousness. Mr. Swafford's past history and present test results verify the instability, outbursts, and impaired social judgment.
>
> Mr. Swafford denies that he committed the murder that resulted in the death sentence. He does admit to the many other involvements with the legal system including the burglary with assault. He intellectually knows the requirements of the law, but is unable to utilize this knowledge on a consistent basis.
>
> Mr. Swafford functions well in a structured environment. At the time of trial, no psychological evaluation was completed. It is my professional judgment that if evidence of the 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.
>
> Mr. Swafford denies that he committed the crime with which he is charged, so no comments will be made regarding his mental status at the time of the crime. An aggravating factor presented during the trial for which he was convicted of First Degree Murder was that the crime was committed in a cold, calculated, and premeditated manner. This is inconsistent with Mr. Swafford's history and brain damage. The organic personality, resulting from brain damage, results in persistent disturbance including affective instability, recurrent outbursts, impaired social judgment. 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.

(Report of Dr. Pat Fleming)(PC-R. 1164-66).

There was no tactical or strategic reason for not presenting complete mental health mitigation. Counsel failed to make a timely, adequate investigation therefore no tactical motive can be ascribed for failure to present any mental health mitigation. Cave v. Singletary, 971 F.2d 1513 (11th Cir. 1992). This is a case of prejudicially deficient performance. Because of the failure to prepare in advance and to obtain and assist mental health experts, prejudicially ineffective assistance has been established in this case. Mitchell v. State, 595 So. 2d 938 (Fla. 1992).

Trial counsel's omissions in this case are overshadowed only by his affirmative errors which constitute nothing less than a breach of loyalty to Mr. Swafford and effectively amounted to an abandonment of all penalty phase "defenses." See United States v. Swanson, 943 F.2d 1070, 1075 (9th Cir. 1991); Osborn v. Shillinger, 861 F.2d 612, 629 (10th Cir. 1988) ("a defense attorney who abandons his duty of loyalty to his client and effectively joins the State in an effort to attain a conviction or death sentence suffers from an obvious conflict of interest.") In closing argument at guilt-innocence, 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.

(R. 1358)(emphasis added). Of course, only minutes later, Mr. Swafford's jury convicted him of precisely those crimes. This argument was itself surpassed by the following admission during the close of Mr. Swafford's 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)(emphasis added). Counsel not only stipulated that the "guilty party" (i.e. Mr. Swafford) should forfeit his life for this crime, he then proceeded to stipulate as to the basis for that sentence.

Counsel's complete concession of the principal issue at penalty phase denied Mr. Swafford the right to have the issue presented to the jury as an adversarial issue and therefore constitutes ineffective assistance. Francis v. Spraggins, 720 F.2d 1190 (11th Cir. 1983). The State was not held to its burden of persuading the jury that Mr. Swafford should die. Trial counsel failed to "subject the prosecution's case to meaningful adversarial testing." United States v. Cronic, 466 U.S. 648, 659 (1984). Prejudice is presumed in this case because of the "constructive absence of an attorney dedicated to the protection of his client's rights under our adversarial system of justice." United States v. Swanson at 1075. Mr. Swafford is entitled to a new sentencing proceeding because no reliable adversarial testing occurred.

ARGUMENT VIII

ESPINOSA V. FLORIDA ESTABLISHES THAT MR. SWAFFORD'S DEATH SENTENCE WAS THE PRODUCT OF CONSTITUTIONALLY INVALID JURY INSTRUCTIONS AND THE IMPROPER APPLICATION OF STATUTORY AGGRAVATING CIRCUMSTANCES.

Mr. Swafford's jury failed to receive complete and accurate instructions defining the aggravating circumstances in a constitutionally narrow fashion. The jury was given six jury instructions concerning aggravating factors.[34] The jury was not advised on the elements of the aggravating factors which the State had to prove beyond a reasonable doubt. As a result, the jury was given unbridled discretion to return a death recommendation. Specifically relying upon the tainted death recommendation, the judge sentenced Mr. Swafford to death.

A. THE JURY INSTRUCTIONS GIVEN

At the conclusion of his penalty phase Mr. Swafford's jury was instructed on six aggravating factors. Those instructions were:

> First one, the Defendant has been previously convicted of a felony involving the use or threat of violence to some person; second, the crime of burglary with assault is a felony involving the use of(sic) threat or(sic) 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

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[34]Two of the instructions given to the jury concerned the same aggravating factor: "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(sic) threat or(sic) violence to another person" (R. 1482-83). Essentially, the jury was asked to consider the same aggravating factor twice.

> 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). In imposing a death sentence the trial court found the presence of five aggravating factors (R. 1617-19). Although the judge considered the first and second aggravators as one in his sentencing order, the jury was never informed that they could not find six separate aggravating factors based on the jury instructions. In sentencing Mr. Swafford to death, the judge specifically considered and relied upon the jury's death recommendation.

B. ESPINOSA V. FLORIDA IS A CHANGE IN FLORIDA LAW

On June 8, 1992, the United States Supreme Court reversed this Court's longstanding jurisprudence and held Maynard v. Cartwright, 486 U.S. 356 (1988), is applicable in Florida. Sochor v. Florida, 112 S. Ct. 2119 (1992). On June 29, 1992, in Espinosa v. Florida, 112 S. Ct. 2926 (1992), the United States Supreme Court again reversed this Court and held that this Court had previously failed to correctly apply Maynard and Godfrey v. Georgia, 446 U.S. 420 (1980):

> Our examination of Florida case law indicates, however, that a Florida trial court is required to pay deference to a jury's sentencing recommendation, in that the trial court must give "great weight" to the jury's recommendation, whether that recommendation be

> life, see *Tedder v. State*, 322 So. 2d 908, 910 (Fla. 1975), or death, see *Smith v. State*, 515 So. 2d 182, 185 (Fla. 1987), cert. denied, 435 U.S. 971 (1988); *Grossman v. State*, 525 So. 2d 833, 839 n.1 (Fla. 1988), cert. denied, 489 U.S. 1071-1072 (1989). Thus, Florida has essentially split the weighing process in two. Initially, the jury weighs aggravating and mitigating circumstances, and the result of that weighing process is then in turn weighed within the trial court's process of weighing aggravating and mitigating circumstances.
>
> It is true that, in this case, the trial court did not directly weigh any invalid aggravating circumstances. But, we must presume that the jury did so, see *Mills v. Maryland*, 486 U.S. 367, 376-377 (1988), just as we must further presume that the trial court followed Florida law, cf. *Rogers v. Arizona*, 497 U.S. 639, 653 (1990), and gave "great weight" to the resultant recommendation. By giving "great weight" to the jury recommendation, the trial court indirectly weighed the invalid aggravating factor that we must presume the jury found. This kind of indirect weighing of an invalid aggravating factor creates the same potential for arbitrariness as the direct weighing of an invalid aggravating factor, cf. *Baldwin v. Alabama*, 472 U.S. 372, 382 (1985), and the result, therefore, was error.

112 S. Ct. at 2928. Under Espinosa, the jury instructions given to Mr. Swafford's jury regarding "heinous, atrocious or cruel" and "cold, calculated or premeditated" violate the Eighth Amendment. Moreover, instructions regarding other aggravating circumstances have to comport with the Eighth Amendment. Walton v. Arizona, 110 S.Ct. 3047 (1990). In light of Espinosa, the United States Supreme Court granted certiorari review and reversed seven other Florida Supreme Court decisions. See Beltran-Lopez v. Florida, 112 S. Ct. 3021 (1992); Davis v. Florida, 112 S. Ct. 3021 (1992); Gaskin v. Florida, 112 S. Ct. 3022 (1992); Henry v. Florida, 112 S. Ct. 3021 (1992); Hitchcock

v. Florida, 112 S. Ct. 3020 (1992); Hodges v. Florida, 52 Crim. L. Rep. 3015 (U.S. October 5, 1992); Ponticelli v. Florida, 52 Crim. L. Rep. 3015 (U.S. October 5, 1992). Espinosa represents a change in Florida law which must now be applied to Mr. Swafford's claims.

This Court recognized Hitchcock was a change in law because it declared the standard jury instruction given prior to Lockett to be in violation of the Eighth Amendment. In addition, it rejected the notion that mere presentation of the nonstatutory mitigation cured the instructional defect. After Hitchcock, this Court recognized the significance of this change, Thompson v. Dugger, 515 So. 2d 173 (Fla. 1987), and declared, "[w]e thus can think of no clearer rejection of the 'mere presentation' standard reflected in the prior opinions of this Court, and conclude that this standard can no longer be considered controlling law." Downs v. Dugger, 514 So. 2d 1069, 1071 (1987). So too here, Espinosa can be no clearer in its rejection of the standard jury instruction and the notion that the judge sentencing insulated the jury instructions regarding aggravating factors from compliance with eighth amendment jurisprudence.[35]

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[35]Moreover, counsel's ignorance of Godfrey and the objection arising therefrom as to the jury instructions was ineffective assistance. Harrison v. Jones, 880 F.2d 1279 (11th Cir. 1989).

C. HEINOUS, ATROCIOUS OR CRUEL

As to the fifth aggravating factor submitted for the jury's consideration, the jury was simply told "the crime . . . was specifically -- especially wicked, evil, atrocious, or cruel" (R. 1483). No additional words were given to the jury to explain what was necessary to establish the presence of this aggravator. In Espinosa, an identical jury instruction was held to violate the Eighth Amendment.

In Proffitt v. Florida, 428 U.S. 242 (1976), the Supreme Court approved the Florida Supreme Court's limiting construction of the "heinous, atrocious, or cruel" aggravating circumstance:

> [The Florida Supreme Court] has recognized that while it is arguable "that all killings are atrocious, . . . [s]till, we believe that the Legislature intended something 'especially' heinous, atrocious or cruel when it authorized the death penalty for first degree murder." Tedder v. State, 322 So. 2d, at 910. As a consequence, the court has indicated that the eighth statutory provision is directed only at "the conscienceless or pitiless crime which is unnecessarily torturous to the victim." State v. Dixon, 283 So. 2d, at 9. See also Alford v. State, 307 So. 2d 433, 445 (1975); Halliwell v. State, [323 So. 2d 557], at 561 [Fla. 1975]. We cannot say that the provision, as so construed, provides inadequate guidance to those charged with the duty of recommending or imposing sentences in capital cases.

Proffitt, 428 U.S. at 255-56 (footnote omitted)(emphasis added). The limitation approved in Proffitt was not utilized by the jury. The jury was simply instructed that it must consider as one of the aggravating circumstances whether "the crime for which the Defendant is to be sentenced was specifically -- especially wicked, evil, atrocious or cruel" (R. 1483).

In Mr. Swafford's case, the jury was never guided or channeled in its sentencing discretion. No constitutionally sufficient limiting construction, as construed in Dixon and approved in Proffitt, was ever applied to the "heinous, atrocious, or cruel" aggravating circumstance before this jury. Shell v. Mississippi, 111 S. Ct. 313 (1990). In Mr. Swafford's case, the jury did not receive an instruction regarding the limiting construction of this aggravating circumstance. Under Espinosa, 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 Mr. Swafford. As a result, an extra thumb was placed on the death side of the jury's scale. Espinosa. Accordingly, this instruction was erroneous and prejudicial to Mr. Swafford.

D. COLD, CALCULATED AND PREMEDITATED

As to the sixth aggravating factor submitted for the jury's consideration, the jury was told to consider that "the crime [] was committed in a cold, calculated and premeditated manner without any pretense or morals or legal justification" (R. 1483). The jury was not told that before the aggravating factor could be applied that it must find "a careful plan or prearranged design." As the record reflects, the jury was never given, and the sentencing court never applied the limiting construction of the cold, calculated and premeditated aggravating circumstance which this Court has adopted. It was also essential for the judge and

the jury to know of this limiting construction in order to avoid applying an invalid aggravating circumstance.

Aggravating circumstance (5)(i) of Section 921.141, Florida Statutes, is unconstitutionally vague, overbroad, arbitrary, and capricious on its face. Stringer v. Black, 112 S. Ct. 1130, 1139 (1992)("[o]ur precedents [ ] have not permitted a state in which aggravating factors are decisive to use factors of vague or imprecise content"). This circumstance is statutorily defined:

> The capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.

Section 921.141(5)(i), Fla. Stat. This Court has attempted to limit this overbroad aggravator by holding that it is reserved for murders "characterized as execution or contract murders or those involving the elimination of witnesses." Green v. State, 583 So. 2d 647, 652 (Fla. 1991); Bates v. State, 465 So. 2d 490, 493 (Fla. 1985). Moreover, "premeditation" requires a heightened form of premeditation: the simple form of premeditation sufficient to support a conviction of murder is insufficient to support this aggravator; greater evidence is required. Hamblen v. State, 527 So. 2d 800, 805 (Fla. 1988); Holton v. State, 573 So. 2d 284, 292 (Fla. 1991).

However, these limitations designed to narrow and limit the scope of this otherwise open-ended aggravator were not provided to Mr. Swafford' jury. Thus, the jury in Mr. Swafford' case had unbridled and uncontrolled discretion to apply the death penalty. The necessary limitations and definitions were not applied. This

violated Maynard v. Cartwright, Shell v. Mississippi, and Stringer v. Black. Mr. Swafford was denied his eighth and fourteenth amendment rights to have aggravating circumstances properly limited for the judge and the jury's consideration.

E. PRIOR VIOLENT FELONY

Mr. Swafford's jury was instructed: "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 [or] threat [of] violence to another person" (R. 1482). This instruction violated Espinosa v. Florida. Mr. Swafford's jury was instructed it could consider the same aggravating circumstance twice. The jury was told to place an extra thumb on the death side of the scale.

This type of "doubling" is unconstitutional; it renders a capital sentencing proceeding fundamentally unreliable and unfair. It also results in unconstitutionally overbroad application of aggravating circumstances.

F. THE AUTOMATIC AGGRAVATOR.

Mr. Swafford was charged with first-degree murder: "from a premeditated design to effect the death of" the victim in violation of Florida Statute 782.04 (R. 1509). An indictment such as this which "tracked the statute" charges both premeditated and felony murder. Lightbourne v. State, 438 So. 2d 380, 384 (Fla. 1983). In this case, Mr. Swafford was convicted on the basis of felony murder. Since felony murder was the basis

of Mr. Swafford's conviction, the use of the underlying felony as an aggravating factor violated the Eighth Amendment. State v. Middlebrooks, ___ S.W. 2d. ___, 1992 WL 236597, slip op. No. 01-S-01-9102-CR-00008 (Tenn. Sept. 8, 1992); Engberg v. Meyer, 820 F.2d 70 (Wyo. 1991). This is 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." Stringer v. Black, 112 S. Ct. 1130, 1138 (1992). In this case, 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), the narrowing function did not occur at the guilt phase. Thus, the use of this non-narrowing aggravating factor "create[d] the possibility not only of randomness but of bias in favor of the death penalty." Stringer, 112 S. Ct. at 1139.

G. FOR THE PURPOSE OF AVOIDING LAWFUL ARREST

This Court has consistently held that the finding of this aggravating factor requires clear proof beyond a reasonable doubt that the dominant or only motive for the murder was the elimination of a witness. Geralds v. State, 601 So. 2d 1157, 1163 (Fla. 1992); Perry v. State, 522 So. 2d 817, 820 (Fla. 1988); Rogers v. State, 511 So. 2d 526, 533 (Fla. 1987). "The mere fact that the victim [] could identify the defendant, without more, is insufficient to prove this aggravating factor

beyond a reasonable doubt." Geralds, 601 So. 2d at 1163; Perry, 522 So. 2d at 820. Mr. Swafford's jury, a "constituent" sentencer never received these limiting instructions. Thus, the instruction given to Mr. Swafford's jury violated Espinosa v. Florida. It failed to define the elements of the aggravating factor which the jury must find beyond a reasonable doubt.

H. PREJUDICE

In Mr. Swafford's case the jury received no adequate guidance as to the "elements" of the aggravating circumstances against which mitigation was to be balanced. Therefore, the sentencing jury was left with vague, illusory or improper aggravating circumstances. Yet, the pivotal role of a Florida jury in the capital sentencing process demands that the jury be informed of such limiting construction so their discretion is properly channeled. Failure to provide Mr. Swafford's sentencing jury with such limitations is constitutionally improper under the Eighth Amendment. The failure to instruct on the limitations left the jury free to ignore the limitations, and left no principled way to distinguish Mr. Swafford's case from a case in which the limitations were applied and death, as a result, was not imposed. Where improper aggravating circumstances are weighed by the jury, "the scale is more likely to tip in favor of a recommended sentence of death." Valle v. State, 502 So. 2d 1225 (Fla. 1987). "A vague aggravating factor used in the weighing process is in a sense worse, for it creates the risk that the jury will treat the defendant as more deserving of the

death penalty than he might otherwise be by relying upon the existence of an illusory circumstance." Stringer v. Black, 112 S. Ct. at 1139.

Here, Mr. Swafford' jury was instructed to consider "heinous, atrocious, and cruel," as an extra aggravating circumstance. The jury, without legal expertise, could not be expected to know that "heinous, atrocious, and cruel," did not apply. The jury was also told to consider cold, calculated and premeditated. The prosecutor urged the jury to find this aggravator. No guidance was given regarding the "heightened premeditation" necessary under the law. This circumstance was also "an extra thumb" on the death side of the scale. This Court must now conduct an harmless-error analysis which comports with the Eighth Amendment and Stringer v. Black. As a matter of law, there must be doubt that, had the jury been correctly instructed, sufficient aggravating factors would not have been found to warrant a death sentence. Hallman v. State, 560 So. 2d 223 (Fla. 1990).

This Court must now consider the error which resulted when the jury received six inadequate instructions on the aggravating circumstances and was thus permitted to weigh each of these invalid aggravating circumstances. Stringer v. Black explained:

> A vague aggravating factor employed for the purpose of determining whether a defendant is eligible for the death penalty fails to channel the sentencer's discretion. A vague aggravating factor used in the weighing process is in a sense worse, for it creates the risk that the jury will treat the defendant as more deserving of the death penalty than he might otherwise be by relying upon the existence of an illusory

> circumstance. Because the use of a vague aggravating factor in the weighing process creates the possibility not only of randomness but also of bias in favor of the death penalty, we cautioned in Zant that there might be a requirement that when the weighing process has been infected with a vague factor the death sentence must be invalidated.

Stringer v. Black, 112 S. Ct. at 1139.

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. Brown v. Dugger, 831 F.2d 1547 (11th Cir. 1987). 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".

This Court noted on direct appeal that the judge found mitigation present. Swafford v. State, 533 So. 2d 270, 278 (Fla. 1988). Moreover, the question is not what the judge found as to mitigation, but what the jury could have found, and whether a binding life recommendation could have been returned. Hall v. State, 541 So. 2d 1125, 1128 (Fla. 1989). Other mitigating evidence was present in the record that the jury could reasonably have found warranted a life sentence. Even with the six unconstitutionally vague instructions, the jury vote recommending death was split (R. 1493). Under Espinosa and Stringer, the error here was not harmless beyond a reasonable doubt.

Accordingly, Mr. Swafford's sentence of death must be vacated, and a new jury sentencing proceeding ordered.

CONCLUSION

Due process is guaranteed by the constitution:

> [Our] decisions underscore the truism that "[d]ue process," unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances.' Cafeteria Workers v. McElroy, 367 U.S. 886, 895 (1961). '[D]ue process is flexible and calls for such procedural protections as the particular situation demands.' Morrissey v. Brewer, 408 U.S. 471, 481 (1972).

Mathews v. Eldridge, 425 U.S. 319, 334-35 (1976)(emphasis added). A capital defendant has a constitutional right to a fair trial regardless of the nature of the crime. Heath v. Jones, 941 F.2d 1126 (11th Cir. 1991).

Mr. Swafford contends that he did not receive the fair trial to which he was entitled under the eighth and fourteenth amendments. See Derden v. McNeel, 938 F.2d 605 (5th Cir. 1991). The process has failed Mr. Swafford because the sheer number and types of errors, when considered as a whole, virtually dictated the sentence that he would receive.

Mr. Swafford has demonstrated that individual error have permeated this process. While there may be means for addressing each separately, the fact is that addressing these errors on an individual basis will not afford adequate safeguards against an improperly imposed death sentence -- safeguards which are required by the Constitution.

Mr. Swafford contends that numerous and varied violations occurred at all stages of his trial. These claims have been raised in direct appeal, his initial Rule 3.850 Motion, his State Habeas Petition, or are currently being raised. These claims should be considered in the aggregate, for when the separate infractions are viewed in their totality it is clear that Mr. Swafford did not receive the fundamentally fair process to which he was entitled under the Eighth and Fourteenth Amendments. Derden v. McNeel, 938 F.2d 605 (5th Cir. 1991). See Ray v. State, 403 So. 2d 956 (Fla. 1981). The numerous constitutional claims in this motion, together with those raised previously show that this case is fundamentally flawed.

Appellant, based on the foregoing (each argument individually and the cumulative effect of the errors), respectfully urges that the Court reverse and remand so that an evidentiary hearing can be held and once Mr. Swafford's counsel has proven his claims his conviction and death sentence should be vacated.

I HEREBY CERTIFY that a true copy of the foregoing motion has been furnished by United States Mail, first class postage prepaid, to all counsel of record on October 26, 1992.

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