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

REPLY BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

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

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

Mr. Swafford was denied the opportunity to present evidence on matters other than whether ex parte communication occurred and whether Ray Cass was a special deputy sheriff. Mr. Swafford's request for supplementary briefing was granted by this Court. Both Mr. Swafford and the State have submitted supplemental briefs addressing the limited proceedings below. This reply brief addresses the State's original answer brief and the supplemental answer brief.

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

Citations in this brief to designate references to the records, followed by the appropriate page number, are as follows: "R. ___" - Record on appeal to this Court in first direct appeal; "PC-R1. ___" - Record on appeal from denial of the first Motion to Vacate Judgment and Sentence; "PC-R2. ___" - Record on appeal from denial of the second Motion to Vacate Judgment and Sentence. All other citations will be self-explanatory or will otherwise be explained.

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REPLY TO STATE'S STATEMENT OF THE CASE AND FACTS

In the State's Statement of the Case and Facts contained in the Answer Brief served on December 3, 1992, record citations were not included in violation of the Rules of Appellate Procedure. As a result, that Statement of the Case and Facts should be disregarded.

Moreover, the State completely overlooks the unrebutted factual allegations contained in Mr. Swafford's Motion to Vacate and presented in circuit court. The State does not address the exculpatory evidence the State possessed which Mr. Swafford's jury did not hear.[1]

The State does not address the July 20, 1982, Volusia County Sheriff's Report which was not disclosed to Ray Cass, Mr. Swafford's trial attorney. According to that report an individual named, Lestz, revealed that he and two other individuals Walsh had committed three murders, that Walsh had committed three murders in Florida, and that one of the victims was a white female in the Daytona Beach area (PC-R2 1686-87, Composite Exh. O).

The State does not address the August 30, 1982, Volusia County Sheriff's Report which was not disclosed to Ray Cass. According to that report law enforcement interviewed Levi and he indicated that Lestz and Walsh left him at approximately 6:00

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[1]On Sunday, February 14, 1992, Brenda Rucker disappeared from a Fina station in Daytona Beach between 6:15 a.m. and 6:20 a.m. Sheriff personnel recovered her body on February 15, 1982; she had died from injuries resulting from numerous gunshots. Mr. Swafford was convicted of committing that homicide.

a.m., February 14, 1982, the date of the Rucker homicide, within several blocks of the Fina station in Daytona Beach where Ms. Rucker disappeared shortly after 6:15 a.m. (PC-R2 1686-87, Composite Exh. O).

The State does not address the January 31, 1983, Volusia County Sheriff's report which was also not provided to Ray Cass. That report indicated that Levi had again been interviewed and that he stated that Walsh and Lestz left Levi in a Daytona Beach motel room at 6:00 a.m. on the day of the Rucker homicide saying they had a job to do (PC-R2 1686-87, Composite Exh. O). This report also indicated that Lestz stated that, between 6:00 a.m. and 10:30 a.m. on the day of the Rucker homicide, Walsh and Levi left him in a laundromat in Daytona Beach, a couple of blocks from the Fina station. Lestz further indicate that Walsh had on numerous occasions frequented the Fina station from which Rucker was abducted (Composite Exh. O).

The State does not address the March 17, 1982 Volusia County Sheriff's report which was also not provided to Ray Cass. This report indicated that Walsh was arrested in Arkansas following an armed robbery in which he told the victim that "he had 'killed' three persons' in the State of Florida" (Composite Exh. O). According to the Arkansas authorities, "Walsh strongly resembles the composite of Brenda Rucker's killer." (Composite Exh. O).

The State does not address the September 3, 1982, affidavit of Bernard Buscher, a Volusia County Deputy Sheriff. This affidavit was not provided to Ray Cass. Deputy Buscher stated

that, when Walsh was arrested in March of 1982, he had in his possession "a composite bulletin concerning details of the Brenda Rucker homicide" (Composite Exh. O). Deputy Buscher also indicated that Brenda Rucker's autopsy "revealed two marks on the body of the victim possibly caused by the application of a lighted cigarette" (Composite Exh. O). Deputy Buscher revealed in the affidavit that Lestz had stated that Walsh subjected Lestz to homosexual attacks during which "Lestz was burned with a cigarette" (Composite Exh. O). Deputy Buscher examined Lestz' burns and "noted that these burns on Lestz' body strongly resemble those burns found on the body of Brenda Rucker" (Composite Exh. O). According to Deputy Buscher's affidavit, Levi had indicated Walsh and Lestz left him in a Daytona Beach motel room "a half of an hour before Brenda Rucker was abducted." Walsh and Lestz left "saying they had something that they were going to; that they were not going to take Levi; and that he could not be trusted" (Composite Exh. O). Lestz, on the hand, told Deputy Buscher that at 6:00 a.m. on February 14, 1982, Walsh and Levi had taken his van and disappeared. When Walsh returned, he sold two .38 caliber handguns in a Daytona Beach tavern. Walsh "then dyed his hair black and forced Lestz to drive him to New Orleans" (Composite Exh. O).

The State does not address the July 26, 1982, Volusia County Sheriff's Report which was disclosed to Ray Cass. According to this report, Walsh was interviewed and "allowed to view several photographs of the Rucker homicide at which time it was observed

that Walsh became extremely upset, disorganized, nervous and unsure of his statements" (Composite Exh. O). Thereafter, "Walsh stated that he would not relate what he was doing or his whereabouts during the period of February 14 - February 15, 1982, stating 'that he would rather not say'" (Composite Exh. O).

The State also chooses not to address the correspondence between Roger Harper, a State's witness at Mr. Swafford's trial, and Gene White, Mr. Swafford's prosecutor. These letters were not disclosed to Ray Cass. These letters contradict Mr. Harper's trial testimony and show that he did have an expectation of benefit for testifying against Mr. Swafford and a motive to fabricate. Mr. Harper indicated he had influence over other witnesses that State wished to call: "Believe me, I can be very instrumental in weather [sic] or not my family in Tennessee make it to the trial" (Composite Exh. O). "I'll keep my end of the deal if you will" Id.). "You indicated that my testimony would be more tainted if you helped me before the trial. That may be true, but if I say you did it for my safety I don't think it would hurt matters" (Id.). "But I'm entitled to relief and I want it now, not next year!" (Id.). "I wrote and asked Dave Hudson about the reward that was supposed to be offered but he never answered. I'm interest [sic] in that, can the reward be collected" (Id.). All of this contradicted Harper's trial testimony, yet the State chooses not to address it in its brief.

Mr. Swafford has repeatedly sought to present Ray Cass' testimony in order to establish that this exculpatory evidence

and much more was not disclosed to him (PC-R2 1699-1700). Mr. Cass is ready, willing, and able to testify that this evidence was critical evidence he would have investigated and presented on behalf of an innocent Mr. Swafford (Id.). However, the State objected to the presentation of Mr. Cass' testimony on anything but whether he was a special deputy sheriff (PC-R2 1700-01). And now, in its Answer Brief the State does not address this proffered testimony. The State chooses to ignore the facts that are essential to resolve the issues before this Court -- whether Mr. Swafford's allegations and proffered testimony warrant an evidentiary hearing.

The State instead wishes to rely on orders obtained from Judge Hammond through ex parte communication to procedurally bar consideration of the merits of Mr. Swafford's claims. To that end, the State misrepresents the record and ignores the factual determination by Judge Hutcheson that ex parte communication occurred between Judge Hammond and the State.

At the beginning of the March 29, 1993, hearing, the State argued that it was for Judge Hutcheson to decide whether ex parte contact occurred:

> MS. ROPER: I would like to respond to the newest argument. If the Court is not here to decide whether ex parte contact occurred, I would like to know what we are doing here, then. It just doesn't make sense what Mr. McClain is saying and I think the Court should make a ruling on that and determine if, in fact, there was ex parte contact whether such contact could be harmless.

> The Court if fully empowered to make such factual findings. Under Rose, if you look at that opinion, which is basically the reason we're here today, there was ex parte contact between the Judge and a party and it was remanded back to the same Judge again for determination. In this case, I think the finding of harmlessness would be appropriate, should Mr. McClain be able to prove his claim.

(PC-R2 1440).

Ultimately, Judge Hutcheson agreed with the State that he should decide the factual question of whether ex parte contact occurred ("I'm probably going to make just basically findings of fact, and then pretty well leave it at that without making any [legal] conclusions, draw any conclusions of the law or rulings of the law" PC-R2 1771). Judge Hutcheson then found that ex parte communication occurred between Judge Hammond and the Assistant Attorney General assigned to Mr. Swafford's case (PC-R2 1778). Specifically, Judge Hutcheson found:

> I'll make a finding of fact that the Judge did direct his law clerk to call the Attorney General's office to have the proposed order to be prepared, and ultimately it looks like it might have been prepared by the State Attorney's office after the Attorney General's contacted them. But I'll find that Judge Hammond did direct his clerk to call the State Attorney -- or the Attorney General's office and that to request and prepare a proposed order.
>
> And that I'll also find that though Mr. Rowe attempted to also call the CCR office, he did that after hours. He apparently talked to a male voice. Did not ask the man's name. Did not ask the man's position, other than Mr. Rowe said it was someone that seemed to know what was going on. So, he did not ascertain the man's name or whether or not he was talking to a lawyer, an

> investigator, a paralegal, maybe a secretary or, as pointed out, maybe the janitor in there.
>
> I find that that was after hours and, frankly, I'll make a finding that it was ineffectual as far as at least even putting CCR on notice that the Judge had directed that this clerk call the Attorney General's office and get a proposed order.
>
> I'll further find that before it was signed by Judge Hammond or ultimately an order prepared by the Attorney General or the State Attorney's office was signed, there was no attempt to get a copy to the CCR so that it had an opportunity to review it and an opportunity to file any objections to the proposed order, as pointed out in the Rose case.
>
> I should make a further findings of fact as far as the contact of the Attorney Genera's office, there was no attempt at the time by Judge Hammond's law clerk. He did not attempt to either, one, set up a conference call so at the time he was talking to the Attorney General's office he could talk to, you know, either attorney or at least a representative of the CCR office. Nor, was it done by way of written communication, where at least maybe through the mail they would have had basically the same amount of opportunity to know what was going on. So, those are the findings of fact I'm going to make and, frankly, at this point I'm going to do nothing further.

(PC-R2 1778-79).

Not once in its Supplemental Answer Brief does the State address Judge Hutcheson's factual findings. In fact, the State argues, from evidence that Judge Hutcheson rejected as not convincing, that Barbara Davis, Assistant Attorney General, advised Mr. Swafford's collateral counsel of ex parte

communication (Supplemental Answer Brief at 6).[2] Judge

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[2]The State's brief contains many references to evidence which Judge Hutcheson did not accept as fact. Further, the State completely overlooks one important factual dispute that Judge Hutcheson did not believe was necessary to resolve. Barbara Davis and Judge Hammond's law clerk did not agree as to the content of the ex parte communication. Barbara Davis testified:

> Q Now, you state that you revised an order at the request of Judge Hammond's law clerk, Randy Rowe. At the time you did that, did you discuss the merits of the case with Mr. Rowe at all?
>
> A No. He just read the changes and I just typed them in.
>
> Q And he told you exactly what to type?
>
> A Yes.
>
> Q And did you type exactly as he dictated to you?
>
> A I think so.
>
> Q You didn't make any changes on your own, did you?
>
> A I don't think so. I recall one incident that when I was reviewing the order that he had asked me to cite Strickland. When there was -- he had asked me to cite Strickland in each instance of the ineffectiveness because that was not done and he wanted Strickland in each of the ineffectiveness ones.
>
> So, I recall that one specifically; but most of them would read exactly like, "Put this in. Take this out. Put that in. Take that out." And then there was the one request that he said, "Now, every time that you see this, put that in."
>
> Q But you didn't make any changes that he was not aware about on your own initiative?

(continued...)

[2](...continued)

A No.

(PC-R2 1583-84). Judge Hammond's law clerk testified:

Q Would it then be fair to say you don't recall whether you discussed the merits of the case?

A I don't think I did.

Q Well, can I ask, would the Judge's position on the evidentiary hearing, whether or not to be held then, would that be the merits of the case?

A You mean whether he decided to have a hearing? I would not consider that to be the merits of the case.

Q What would you consider --

A I don't remember if I asked -- or if I asked her to find that there would not be a hearing. I don't think he wanted the hearing. I remember that. I don't know if I told her to put that in the order or if she just did it on her own. I don't remember.

Q Well, in terms of when you say you don't believe you talked about the merits with her, what do you mean by merits?

A I guess the various allegations claimed: Claims I, Claim II, whatever. The various claims, the allegations therein, cases cited, I don't remember any discussions with her on that.

Q You don't recall discussing cases cites, for example?

A I don't think I did.

Q Do you recall that the 3850, itself, requested an evidentiary hearing? That is one of the claims.

(continued...)

Hutcheson found that CCR was not put on notice of the ex parte communication.

The State also improperly relies upon evidence that it stipulated to striking from the record. In its brief, the State asserts Judge Hammond "is satisfied that he ruled according to the law" (Supplemental Answer Brief at 8. However, when Mr. Swafford sought to examine Judge Hammond on this after the State introduced it, the following occurred:

> Q My next question is: The July 20, 1982, Volusia County Sheriff's Office report

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[2](...continued)

> A I think so, yeah.
>
> Q But you may have discussed with her whether or not an evidentiary hearing would be held?
>
> A I may have.
>
> Q Do you have any recollection discussing with her, for example, the ineffective assistance of counsel?
>
> A Not really, no. Other than just denying the claim or denying the motion, I don't think I discussed anything in detail about the ineffective assistance of counsel.
>
> Q Do you have any recollection dictating passages on ineffective assistance of counsel to her?
>
> A No, I don't have any recollection.
>
> Q Do you think that you would not have done that or you would have?
>
> A I don't think I would have done that. I don't remember the Judge asking me to ask her to do that.

(PC-R2 1657-59)(emphasis added).

indicating that a person by the name of Lestz gave information to the police that Walsh had committed three murders in Florida, including a white female. And Lestz further implicated Walsh in the Daytona Beach murder of a white female?

MS. ROPER: Objection, Your Honor. Unless the witness has said he has reviewed all the materials in front of him, I do not know what was in front of him.

MR. McCLAIN: Your Honor, I think -- and that's what I'm doing and I'm doing redirect. She's asked the question. She's established that he's comfortable with his decision. I think I'm entitled, then, to go through specific things and ask him about those since she opened the door, she asked the question.

(PC-R2 1520-21). Ultimately, Judge Hutcheson ruled:

THE COURT: The State may have asked the question. You may not have objected to the relevancy. That doesn't mean I feel it's relevant. Frankly, I feel it's irrelevant. Had you objected to her question, I might have sustained that.

And it strikes me, rather than litigate any ex parte communication, if any between Judge Hammond and the State, that it sounds like now do we really litigate why he reached the decision back then as far as what he reviewed, rather than any ex parte communications he might have had.

MR. McCLAIN: In light of that and in light of the State's objection, then I would make a motion to strike the prior testimony regarding whether this Judge would still reach the same conclusion today that he reached then and whether he's satisfied and comfortable with the decision he made to deny the 3850 back in 1990, and again in 1992.

THE COURT: Any response to that, Miss Roper?

MS. ROPER: We'll stipulate to that and just go on.

THE COURT: So accepted. And that will be stricken.

(PC-R2 1523-24).

During summation the State again try to rely upon Judge Hammond's alleged satisfaction on which Mr. Swafford had been denied cross-examination. Thereupon, Mr. Swafford's counsel objected:

> MR. McCLAIN: Your Honor, let me note something for the record. I believe that testimony was objected to and stricken with regard to what Judge Hammond would have ruled either now or later. If I'm mistaken, I can be corrected; but I thought that I attempted to get into factual matters and that everybody agreed to withdraw on that testimony.
>
> MS. ROPER: I think Judge Hammond testified, if I remember, that he would have ruled on it the same had it been entitled --
>
> MR. McCLAIN: And that was my objection. I objected to that, and you withdrew it.
>
> MS. ROPER: He also ruled later --
>
> MR. McCLAIN: You withdrew that evidence because I wanted to ask him about what he had considered, and you withdrew that so I would not be able to ask that question.
>
> MS. ROPER: I don't recall that.
>
> MR. McCLAIN: Well, Your Honor, I think we need to have a ruling on that because if that's the testimony, you know, I want to object because I didn't get to ask Judge Hammond the questions that needed to be asked then.
>
> If she's going to say he would still rule on it the same way, because I didn't get to go through all of these documents we wanted to go through with him.

> MS. ROPER: I will rely on the Court's ruling. I need a ruling too, though, because the Florida Supreme Court is going to want to know why the State submitted this evidence.
>
> We can rely on the record for that argument. I think I'd like to be able to finish my argument without being interrupted.
>
> THE COURT: The rule on that, my recollection is the same as Mr. McClain's, that I did rule on that and either barred the testimony or the question was withdrawn.

(PC-R2 1758-59).

Since evidence of Judge Hammond's satisfaction with his rulings was not subject to cross-examination and was in fact stricken from the record, it is highly improper for the State to submit such evidence in its statement of the case and rely on such evidence as establishing harmless error.

The State also makes the false assertion that Ray Cass "voluntarily told CCR he had such a card prior to 1990. He was present in an interview and 'Well, I have one, too'" (Supplemental Answer Brief at 13). Ray Cass testified as follows:

> Q Now, in terms of talking to CCR about this status as a special deputy sheriff, do you have any specific recollection that prior to that deposition -- and I believe the date of that deposition was December 7th 1992 -- and I believe there was attorneys for Mr. Herring and a Judy Dougherty from CCR that were present?
>
> A Yes.
>
> Q Do you have any specific recollection that prior to that deposition you ever told CCR that you had such a card?

A I thought I was in the presence of Mr. Pearl when he was being asked some questions, or it was after he had been interviewed by CCR and we were just talking to the person from CCR. I can't remember who it was.

Q Can I ask you this: Mr. Pearl was involved in cases that were non-CCR cases but also Duff cases. Do you know whether it was an attorney for CCR or an attorney for one of the Defendants that may not have been a CCR client? Do you have a recollection?

MS. ROPER: Objection. Asked and answered.

THE COURT: It will be overruled.

THE WITNESS: Would you say that again, please, sir? I'm sorry.

CONTINUED REDIRECT EXAMINATION

BY MR. McCLAIN:

Q I'm just trying to ascertain how sure you are that it would have been a CCR attorney. Could it have been a lawyer for a capital client that did not work for CCR? It was a volunteer lawyer, like Mr. Herring, was represented to Mr. Harich by non-CCR lawyers?

A It might have been.

Q Do you recall Jay Nickerson?

A Yes. With CCR?

Q I don't remember who it was that I did. It was a spontaneous statement on my part.

Q Do you recall if it was in connection with the Swafford case?

A No, I don't think it was.

Q Do, to the best of your recollection, you didn't tell anybody in

connection with the Swafford case about your status as a special deputy sheriff?

A Not until I was interviewed by CCR. I think it was one of your investigators.

Q And when would that have been?

A Last fall or winter.

Q About the time of the deposition with Judy Dougherty?

A Yes, sir.

* * *

Q To clarify, you don't recall ever telling Mr. Swafford that you had the card?

A No, sir, I don't think I ever did.

Q And you don't recall telling his attorney, Mr. Nickerson, that you had the card in connection with the Swafford case?

A I don't think so.

(PC-R2 1724-26)(emphasis added).

With reference to the special deputy sheriff issue, the State again chooses to ignore the factfindings that Judge Hutcheson made. Judge Hutcheson noted that "Mr. Cass said the card said he was a special deputy sheriff" (PC-R2 1774). However, Judge Hutcheson found that Mr. Cass was issued a card which stated "Regular Constituted Deputy Sheriff, to serve and execute all legal papers and processes in Volusia County, Florida, with full power to act as deputy sheriff of Volusia County until my term expires or this appointment is revoked" (PC-R2 1775).

However, Judge Hutcheson ruled at the State's urging that Mr. Swafford could not present evidence of how Mr. Cass' status affected Mr. Swafford's case. Mr. Swafford sought to introduce evidence to link Mr. Cass' status and its affect on the State's decision not to disclose exculpatory evidence and Mr. Cass' failure to pursue the exculpatory evidence. The State objected, and Judge Hutcheson ruled evidence of how Mr. Cass' status affected Mr. Swafford's trial would not be admitted:

> MS. ROPER: In lieu of Mr. Cass taking the stand, that's -- I understood that's what we did on Mr. Pearl in Lieu of Mr. Pearl on proffer taking the stand and saying the same thing. Mr. McClain just put on the record where he understood Mr. Pearl would testify to had he been called to give testimony on proffer, since I already said he could not, as evidence in chief on those issues.
>
> THE COURT: So, the States agrees, at least as far as just adopting for Mr. Cass, what Mr. McClain has already put on the record for Mr. Pearl and in that respect?
>
> MS. ROPER: We would agree to that, Your Honor. We wanted to hear from Mr. Cass as a witness as to the circumstances of the status.
>
> THE COURT: That's what I am getting to: and then we can just call Mr. Cass maybe regarding, you know, what if anything he had gotten from the Sheriff's Department or Volusia County and, you know, the extent you-all wanted to whatever privileges or rights that grants him. That sounds okay to both of you?
>
> MR. McCLAIN: At some point in time it seems to me there would be a questions to Your Honor as to exactly where the line is drawn in terms of the status, because I don't see those two separate issues. Obviously the State sees it as two separate issues.

> I don't see how you can separate it, but there will be a question for Your Honor at some point in time of where one issue ends and the other issue begins if you believe there are two different issues.
>
> THE COURT: You mean as if he had status as a special deputy sheriff, how that affected his performance?
>
> MR. McCLAIN: Yes, Your Honor.
>
> THE COURT: I thought I had already ruled that I'm not going to get into that, that I don't see the Supreme Court sending that to me. So, I think the record is protected for any further Appellate Court review of that. That over your objections, I'm not going to allow you to get into that area of argument.

(PC-R2 1701-02)(emphasis added). Thus, the evidentiary hearing was limited by Judge Hutcheson solely to whether Ray Cass was a special deputy sheriff. Mr. Swafford was precluded from pursuing these matters upon which this Court has ordered evidentiary hearings in other similarly situated cases. Herring v. State, 580 So. 2d 135, 139 (Fla. 1991)("an evidentiary hearing [is necessary] to determine whether Herring's public defender's service as a special deputy sheriff affected his ability to provide effective legal service"). Wright v. State, 581 So. 2d 882, 887 (Fla. 1991)("We find that we must remand for an evidentiary hearing on whether Wright's public defender's service as a special deputy sheriff affected his ability to provide legal assistance").

ARGUMENT I

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

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

In its Supplemental Answer Brief, the State has made several inaccurate assertions. Initially, the State suggest the Mr. Swafford is complaining for the first time in his supplemental brief about the two incidents of ex parte communication (Supplemental Answer at 18). The State makes this meritless assertion in the face of the fact that Mr. Swafford has requested Rose relief concerning the incidents of ex parte communication in Argument I of his initial brief presently pending before this court. Mr. Swafford described in detail the factual circumstances surrounding both incidents of ex parte communication (See Initial Brief of Appellant (1992) at 20-21, 25-27). In Argument I, Mr. Swafford argued that orders which are the product of ex parte communication are tainted and subject to reversal because of the due process violation which results when orders are obtained in an ex parte fashion. See Huff v. State, 18 Fla. L. Weekly S396 (Fla. July 1, 1993).

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[3]In the State's supplemental answer it has combined arguments I and II. The State's failure to recognize that these arguments are separate and distinct may explain the State's failure to address Mr. Swafford's Argument I that the orders obtained through ex parte communication must be nullified.

As noted in the preliminary statement, Mr. Swafford does not waive any claims previously discussed and relies upon the presentations in his initial and supplemental briefs regarding any claims not specifically addressed herein.

This Court granted Mr. Swafford motion to relinquish jurisdiction "for the purpose of getting the facts regarding...ex parte communication between the State and the trial judge" and also granted Mr. Swafford's motion to supplement his brief based on the record developed at the limited evidentiary hearing below. Based upon the fact findings made by Judge Hutcheson at the State's urging, it is clear that the prior orders summarily denying Rule 3.850 relief were the product of ex parte communications. Accordingly Rose and Huff require that those orders be vacated.

Next, the State suggests that Mr. Swafford's "theory" of case is that the circuit court's denial of the motion to disqualify is the primary issue (Supplemental Answer at 18, 19). This assertion is highly inaccurate. Mr. Swafford's has always maintained that the two incidents of ex parte communication created a situation where he was denied an opportunity to object to the State's proposed orders (Rose) and also constituted legally sufficient grounds for disqualification.

As noted above, Mr. Swafford described in his initial brief both the 1990 and 1992 incidents of ex parte communication. He requested relief in accordance with the dictates of Rose:

> 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.

(Initial Brief of Appellant (1992) at 27). Further, Mr. Swafford argued that the State and the judge engaged in ex parte communication and that "[t]his 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)" (Initial Brief of Appellant (1992) at 20, 21).

In advancing its argument that Mr. Swafford has somehow shifted his position, the State "takes out of context" an argument Mr. Swafford's counsel made at the limited hearing below (Supplemental Answer at 18, 19). The State completely ignores the vigorous argument that Mr. Swafford's counsel made at the limited hearing maintaining that Mr. Swafford's case was directly on point with Rose (PC-R2. 1741-48). In fact, the presiding judge concluded that the factual circumstances in Mr. Swafford case was "very similar" to the factual circumstances in Rose. Further, it may be said that Mr. Swafford's case is even stronger than Rose in that ex parte communication need not be assumed because the trial court made a factual finding that ex parte communication in fact took place (PC-R2. 1777-79).

All the controlling facts in Rose were also found in Mr. Swafford's case. At the limited evidentiary hearing, it was established that the State filed a response to Mr. Swafford's 1990 3.850 motion agreeing that an evidentiary hearing was required (PR-R2. 1570-71, 1574) (Also see PC-R1. 367). The court found that subsequently to the State filing it's response, Judge

Hammond "had directed that his clerk call the Attorney's General's office and get a proposed order" (PC-R2. 1778-79). The court also found that Judge Hammond's law clerk contacted the Attorney General's office and in an ex parte communication requested that the State prepare a proposed order (PC-R2 1778). The court further found that the State submitted this proposed order which was adopted in it's entirety by the trial judge denying all relief without giving Mr. Swafford's an opportunity to review and make objections (PC-R2 1777-79).

While conceding that there was ex parte communication during Mr. Swafford's 1990 3.850 proceedings and that these communications were not disclosed by either the judge or the State (Supplemental Answer at 19-20), the State nonetheless argues that Mr. Swafford is not entitled to relief because there was no "intent" to keep Mr. Swafford's counsel in the dark. However, neither Rose nor Huff support this strange argument the in order to be improper ex parte communication must be intentional.[4] This Court has addressed the issue of the "intent" of the party who engages ex parte communication in Rose:

> No matter how pure the intent of the party who engages in such contacts, without the benefit of a reply, a judge is placed in the position of possibly receiving inaccurate information or being unduly swayed by unrebutted remarks about the other side's case. The other party should not have to bear the risk of factual oversights or inadvertent negative impressions that might

[4]Even stranger is the notion that two people engaging in an ex parte communication would not know and intend that Mr. Swafford's counsel was not included in the conversation.

> easily be corrected by the chance to present counter arguments.

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

Specifically, the State has created a "pass the buck" argument in which it maintains that the State did not informed Mr. Swafford's counsel because it assumed that Judge Hammond's law clerk would and "Judge Hammond had no reason to disclose the contact because he was unaware [that] CCR was not in the information loop" (Supplemental Answer at 19).

In advancing this argument, the State completely ignores the court's factual finding that Judge Hammond had directed his law clerk to contact "the Attorney General's office and get a proposed order" (PC-R2. 1779). The court also determined that before the order was signed by Judge Hammond "there was no attempt to get a copy to [] CCR so that it had an opportunity to review it and an opportunity to file any objections to the proposed order, as pointed out in the Rose case" (PC-R2. 1779). Further, the court found:

> [Judge Hammond's law clerk] did not attempt to either, one, set up a conference call so at the same time he was talking to the Attorney General's office he could talk to, you know, either attorney or at least a representative of the CCR office. Nor, was it done by way of written communication, where at least maybe through the mail they would have had basically the same amount of opportunity to know what was going on.

(PC-R2. 1779).

Next, the State erroneously argues that Mr. Swafford had an opportunity to object to the State's proposed order at the status

hearing held on October 24, 1990 (Supplemental Answer at 20). However, the order that the State refers to here was the proposed order in which the State agreed to an evidentiary hearing on the Brady and ineffective assistance of counsel claims (PR-R2. 1570-71, 1574). It was not until after the October 24, 1990 status hearing did the ex parte communication take place between the trial court and State. It was only then that the decision was made not to hold an evidentiary hearing. Thereafter, the State agreed to prepare an order denying Mr. Swafford all relief. Further, the trial court's factual findings completely rejects the State's current explanation of Mr. Swafford's 1990 3.850 proceedings (See PC-R2. 1777-79).

Next, the State argues that the ex parte communication consisted of "administrative matters" and thus was harmless (Supplemental Answer at 21). It can hardly be said that an undisclosed agreement between the State and the trial court that the State would submit a proposed order changing its position from granting Mr. Swafford an evidentiary hearing on Mr. Swafford's Brady and ineffective assistance of counsel claims is an administrative matter. Judge Hammond's law clerk admitted that he may have discussed with the Assistant Attorney General during the ex parte communication "whether or not an evidentiary hearing would be held" (PC-R2 1658). Even though the law clerk did not believe a discussion about whether an evidentiary hearing was to be held was a discussion about the merits (PC-R2 1657), certainly such a discussion is a merits discussion. This Court

specifically found in Rose that whether an evidentiary hearing should be held on the defendant's Brady claim alleging that there were five witnesses who saw the victim alive after the defendant, under the State's theory at trial, committed the murder was a merits issue, Rose v. State, 601 So. 2d at 1183, 1184 (Fla. 1992).

Mr. Swafford initial brief contains a strong Brady claim where previously undisclosed Volusia County Sheriff's reports rendered strong and credible evidence that three other individuals committed the murder of the victim in Mr. Swafford's case. Additionally, the Brady claim revealed that there was an undisclosed deal between the State and its key witness to have this witness release from prison in exchange for his cooperation and testimony (See Initial Brief of Appellant (1990) Claim II) (Also see Supplemental Brief at 31-27). The question of whether to hold an evidentiary hearing on such claims is question involving the merits of the case. The State's contrary argument is ludicrous.

Further, the State misses point in Rose and Huff on why there was a violation of the defendants' right to due process. The due process issue was not contingent on ex parte communication on the merits. Instead, this Court maintained:

> Rose was denied due process of law because his counsel was never served a copy of the proposed order; thereby depriving Rose of the opportunity to review the order and to object to its contents. In the instant case, CCR received a copy of the proposed order on Friday before the court signed it on Monday. This did not afford Huff a sufficient

> opportunity to review the order, much less to object to its contents.

Huff v. State, 18 Fla. L. Weekly S396 (Fla. July 1, 1993). This Court explained in Rose that the ex parte communication created a situation where the defendant was not given "notice of receipt of the order, a chance to review the order, or an opportunity to object to its contents" Rose v. State, 601 So. 2d at 1182 (Fla. 1992). Here, Mr. Swafford, as Judge Hutcheson found, was never given notice and opportunity to be heard.

Next, the State argues that Mr. Swafford's motion for rehearing had "cured any due process error" (Supplemental Answer at 21, 22). In constructing this argument, the State completely ignores the circuit court's factual finding that as a result of ex parte communication Mr. Swafford was denied an opportunity to review and file any objections to the State's proposed order (PC-R2. 1777-79). Essentially, the State is arguing that a defendant can be denied his right to be heard during the course of his trial but a motion for retrial would cure the violation of the defendant's due process rights. But here, Mr. Swafford did not even know that there ex parte communication, so he had no chance to respond to it. Moreover, we still do not know exactly what the ex parte communication was since the two participants do not agree as to what was said.

This Court was confronted with a similar situation in Rose and Huff where in both cases motions for rehearing were filed following the summary denial of Rule 3.850 motions. In Huff this Court held that due process demands that "Huff should have been

afforded an opportunity to raise objections and make alternative suggestions to the order before the judge signed it" Huff v. State, 18 Fla. L. Weekly S396 (Fla. July 1, 1993). This Court went on to quote "'[T]he essence of due process is that fair notice and a reasonable opportunity to be heard must be given to interested parties before judgment is rendered.' Scull v. State, 569 So. 2d 1251, 1252 (Fla. 1990)." Id.

Next, the State argues that in "the post conviction arena a decision should not be reversed on the basis of mere" appearance of impartiality (Supplemental Answer at 22). Once again the State ignores the fact that the presiding judge at the limited evidentiary hearing found that the conduct of the State and trial court went far beyond the mere appearance of impartiality in that an ex parte communication took place where the State changed its position from one agreeing to Mr. Swafford's request for evidentiary to one of opposing Mr. Swafford's request. This agreement went undisclosed denying Mr. Swafford any opportunity to respond. Moreover, the judge's law clerk testified he may have discussed this very issue in the ex parte communication, and he further believed such a discussion during ex parte communication was not inappropriate (PC-R2 1657-59).

The State's position violates the very spirit of Rose:

> We are not here concerned with whether an ex parte communication actually prejudices one party at the expense of the other. The most insidious result of ex parte communications is their effect on the appearance of the impartiality of the tribunal. The impartiality of the trial judge must be beyond question.

Rose v. State, 601 So. 2d at 1183 (emphasis added).

Turning to the second (1992) incident of ex parte communication, the State argues that there was no contact between State (Ms. Davis, Assistant Attorney General) and the trial court (Mr. Rowe, Judge Hammond's clerk). Here, the State makes the dubious distinction between a telephone conversation and leaving a message. The vehicle in which ex parte communication is transported does not minimize it destructive impact:

> Nothing is more dangerous and destructive of the impartiality of the judiciary than a one-sided communication between a judge and a single litigant.

Rose v. State, 601 So. 2d at 1183.

The State does not challenge the fact that Mr. Swafford was never given the opportunity to review or object to the State's 1992 proposed order before it was signed. Instead, the State argues Mr. Swafford could have objected to this order before it was actual filed with the clerk's office or could have objected to the order in a motion for rehearing. The first half of this argument assumes that Mr. Swafford's would have known that the order denying him relief was not filed in the clerk's until a later date. As noted above, this Court has held the due demands that a party be "afforded an opportunity to raise objections and make alternative suggestions to the order before the judge signed it." Huff v. State, 18 Fla. L. Weekly S396 (Fla. July 1, 1993).

Finally, the State request that this Court recede from its decision in Huff (Supplemental Answer at 23, 24). The State maintains that due process does not require that a party be given

an opportunity to voice objections to his opponent's proposed order. This argument completely ignores the factual circumstances of this case. As noted above, in both incidents of ex parte communication, it was the trial court not the State that initiated the ex parte communication and requested that the State prepare a proposed order, and both trial court and the State were responsible for not providing Mr. Swafford's counsel a copy of State's proposed order (PC-R2. 1777-79). But what is worse, Mr. Swafford's counsel was not advised that there was ex parte communication and thus was not given notice and opportunity to be heard at the precise moment he most needed that opportunity.

The State further suggests that this Court should abandoned its requirement that in death penalty postconviction cases "the judge allow the attorneys the opportunity to appear before the court and be heard on an initial 3.850." Huff v. State, 18 Fla. L. Weekly S396 (Fla. July 1, 1993). The State suggest that the practice of parties presenting proposed orders be done away with all together and this Court "mandate that the judge prepare his or her own order" (Supplemental Answer at 24). However, such a mandate would not remedy the damage that has already taken place in Mr. Swafford's case. Here, there was ex parte communication.

This Court instituted the new procedure in Huff because of the "severity of punishment at issue in death penalty postconviction cases" and the stringent demands for due process. Huff v. State, 18 Fla. L. Weekly S396 (Fla. July 1, 1993). "[T]he penalty of death is qualitatively different from a

sentence of imprisonment, however long. Death, in its finality, differs more than life imprisonment than a 100-year prison term differs from one of only a year or two." Woodson v. North Carolina, 428 U.S. 280, 305 (1976). Because death is different -- is so absolutely final -- as well as because we are in post-conviction, the courts must accommodate a defendant's desire to be heard.

The State seeks to dismiss the procedure announce in Huff as if it applies to a routine petty criminal offense instead of the final stages of a death penalty case. However, it is a capital case and because death is different, Woodson v. North Carolina, 428 U.S. 280, 305 (1976), all concerns must be subject to a heightened level of judicial scrutiny as compared to a non-capital matter. As indicated in Beck v. Alabama, 447 U.S. 625 (1980), special procedural rules are mandated in death penalty cases in order to insure the reliability of the sentencing determination. "In a capital case, the finality of the sentence imposed warrants protections that may or may not be required in other cases." Ake v. Oklahoma, 470 U.S. 68, 87 (1985)(Burger, C.J., concurring). Thus, in a capital cases such as Mr. Swafford's, the Eighth Amendment imposes additional safeguards over and above those required by the Fourteenth Amendment. In Caldwell v. Mississippi, 472 U.S. 320 (1985), for example, a prosecutor's closing argument in the penalty phase was found to violate the Eighth Amendment's heightened scrutiny even though a successful challenge could not be mounted under the Fourteenth

Amendment. Caldwell, 472 U.S. at 347-52 (Rehnquist, J., dissenting); Adams v. Dugger, 816 F.2d 1493, 1496 n.2 (11th Cir. 1987).

Mr. Swafford was entitled to all that due process allows -- a full and fair hearing by the court on his claims. Huff; Rose. These rights were abrogated by the circuit court's adoption of both the State's 1990 and 1992 proposed orders. Both orders were factually and legally erroneous. The prior proceedings should be voided and this case should be remanded for proceedings consistent with relief granted in Rose and Huff.

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.

The State argues that ex parte communication between the judge and the State "would not prompt a reasonably prudent person to fear that he or she could not get a fair trial" (Supplemental Answer Brief at 19). The only authority cited for this proposition is In Re Colony Square Co., 819 F.2d 272 (11th Cir. 1987). Contrary to the State contention that Colony Square was controlled by "analogous federal law,," the federal courts are not governed by Rule 3.230, Fla. R. Cr. Pro., nor the case law construing it.

The State cites to not one Florida case discussing Rule 3.230. The State does not even attempt to distinguish Love v.

State, 569 So. 2d 807 (Fla. 1st DCA 1990), wherein ex parte communication was found to be cause where the judge is sitting as trier of fact. See Rogers v. State, 18 Fla. L. Weekly S413 (Fla. 1993).

ARGUMENT III

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

Mr. Swafford has learned through subsequent Chapter 119 requests that the State failed to comply with Chapter 119 in 1990 and that it is still refusing to comply. This fact was previously not known because Mr. Swafford's prior collateral counsel accepted the Assistant Attorney General's false assurance that the one thousand pages turned over in court constituted full compliance.

Under well settled law, Mr. Swafford's allegations must be accepted even in a successor motion to vacate unless the files and records conclusively refute and allegations. Lightbourne v. Dugger, 549 So. 2d 1364 (Fla. 1989). Here, the record supports Mr. Swafford's allegations. New police reports and other documents are now available which was previously held back. Moreover, the State is now refusing to state whether full disclosure has occurred or whether exemptions as being invokes. A hearing must be held on Mr. Swafford's Chapter 119 claim. Walton v. Dugger, 18 Fla. L. Weekly S309 (Fla. 1993); Muehleman v. Dugger, 18 Fla. L. Weekly S447 (Fla. 1993).

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.

In 1990, the State conceded an evidentiary hearing was warranted on this claims. Specifically, the State noted that the law required an evidentiary hearing: "We are asking for a hearing only on the limited issue which needed hearing. Those issues being one, see the Brady claim on Mr. Walsh" (Transcript of October 24, 1990, at 7).

Mr. Swafford did not get that hearing because of ex parte communication between the Assistant Attorney General and the judge's law clerk. Mr. Swafford had no representative there when the ex parte communication occurred and they "may have" discussed "whether or not an evidentiary hearing would be held" (PC-R2 1658-59). Since the State had conceded an evidentiary hearing was necessary under the law, Mr. Swafford was never given notice that this evidentiary hearing was at issue.

Additional material previously withheld from Chapter 119 disclosure further demonstrates the need for an evidentiary hearing. Moreover, Mr. Swafford's trial counsel is prepared to testify that exculpatory evidence, that he would have presented to the jury if he had had it, was not disclosed by the State. Such evidence will require Rule 3.850 relief. Garcia v. State, 18 Fla. L. Weekly S382 (Fla. 1993).

ARGUMENT IX

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

The State argues that Mr. Cass disclosed his status as a special deputy sheriff to CCR "prior to 1990" (Supplemental Answer Brief). Of course, this is a false assertion. Mr. Cass testified he did not disclose to anyone connected with Mr. Swafford his status as a special deputy sheriff (PC-R2 1724-26). In fact, he had no recollection of telling any CCR attorney until he was deposed in December of 1992.

Further, Judge Hutcheson refused to make any factual determination in this regard ("I'm not going to rule as far as any procedurally barred or ont" PC-R2 1776).

The State further falsely asserts that as to this claim "an evidentiary hearing was, in fact, held below" (Supplemental Answer Brief at 28). The State convinced Judge Hutcheson that evidence concerning how Mr. Cass' status as a special deputy sheriff "affected his performance" could not be presented by Mr. Swafford (PC-R2 1701). However, that is the very question this Court ordered in evidentiary hearings on in Herring v. State, 580 So. 2d at 139, and Wright v. State, 581 So. 2d at 887. Thus, the hearing merely established that in fact Mr. Cass was a special deputy sheriff. A hearing is now required under Herring and

Wright on how that status affected his performance in Mr. Swafford's case.

CONCLUSIONS

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

I HEREBY CERTIFY that a true copy of the foregoing notice has been furnished by United States Mail, first class postage prepaid, to all counsel of record on October 5th, 1993.

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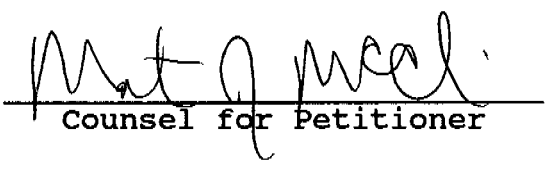
By: 
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