IN THE SUPREME COURT OF FLORIDA

ROY CLIFTON SWAFFORD,
Appellant,

v.

STATE OF FLORIDA,
Appellee.

_____/

CASE NO. 85,682

ON APPEAL FROM THE SUMMARY DENIAL OF POST CONVICTION RELIEF IN THE CIRCUIT COURT OF THE SEVENTH JUDICIAL CIRCUIT IN AND FOR VOLUSIA COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

Margene A. Roper
Assistant Attorney General
Florida Bar # 0302015
Capital Appeals
State of Florida
Office of the Attorney General
444 Seabreeze Boulevard
5th Floor
Daytona Beach, Fl. 32118
(904)238-4990

ORAL ARGUMENT

A summary denial was properly entered in this case. There is no issue to air. The case will rise or fall upon a lengthy procedural history and a determination of the propriety of the application of procedural bars none of which topics would be better elucidated by oral advocacy.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES: PAGE:

OTHER AUTHORITIES:

STATEMENT OF THE CASE AND FACTS

. Roy Swafford is a prisoner on death row. A jury convicted Swafford of the first-degree murder and sexual battery of an employee he abducted from a Fina gas station and recommended that he be sentenced to death, which the trial court did. The Supreme Court of Florida affirmed the convictions and sentence. *Swafford v. State,* 533 So.2d 270 (Fla. 1988), *cert. denied,* 489 U.S. 1100 (1989)

The evidence at trial showed that on the morning of Sunday, February 14, 1982, the victim, Brenda Rucker, was at work at the FINA gas station and store on the corner of U.S. Highway No. 1 and Granada Avenue in Ormond Beach, Florida. Two witnesses saw her there at 5:40 and 6:17 a.m. A third witness, who said he arrived at the station at around 6:20, found no attendant on duty although the store was open and the lights were on. At 6:27 a.m., the police were called, and an officer arrived at the station a few minutes later. On February 15, 1982, the victim's body was found in a wooded area by a dirt road, about six miles from the FINA Station. She had been shot nine times, with two shots directly to the head. The cause of death was loss of blood from a shot to the chest. Based on trauma, lacerations, and seminal fluid in the victim's body, the medical examiner concluded that she had been sexually battered. Holes in the victim's clothing corresponding to the bullet wounds to her torso indicated that she was fully clothed when shot. The number of bullet wounds and the type of weapon used indicated that the killer had to stop and reload the gun at least once. Several bullets and fragments were recovered from the body.

Swafford and four companions drove from Nashville, Tennessee, to Daytona

Beach, Florida, departing Nashville at about midnight on Friday, February 12 and arriving in Daytona Beach at about noon the next day. After setting up camp in a state park, Swafford and some others went out for the evening, arriving back at the campground at about midnight. Then, according to the testimony at trial, Swafford took the car and went out again, not to return until early Sunday morning. Patricia Atwell, a dancer at the Shingle Shack bar testified that Swafford was there with his friends on Saturday night, that they left at around midnight, and that Swafford returned alone at about 1:00 a.m. Sunday. When Atwell finished working at 3:00 a.m., she left the Shingle Shack with Swafford. They spent the rest of the night together at the home of Swafford's friend. At about 6:00 a.m., he returned her to the Shingle Shack and left, driving north on U.S. 1, a course that would have taken him by the FINA station. In the light traffic conditions of early Sunday morning, the FINA station was about four minutes away from the Shingle Shack. According to Swafford's travelling companions, he returned to the campsite around daybreak. The court took judicial notice of the fact that sunrise took place on the date in question at 7:04 a.m. The body was found one and a half miles from the campsite in Tomoka State Park. (R 798;842;854)

On Sunday Swafford and his friends attended an auto race in Daytona Beach. That evening they went back to the Shingle Shack, where one of the party got into a dispute with some other people over money he had paid in expectation of receiving some drugs. Swafford displayed a gun and got the money back. Chan Hirtle and Roger Harper saw Swafford pull the gun on the black drug dealers then put it in his pants or jacket pocket. (R 807;859;812;960) This gun looked "exactly" like State's Exhibit 14. (R 810)

The police were called, and Swafford deposited the gun in a trash can in one of the restrooms. One witness testified that she actually saw Swafford place the gun in the bathroom trash can. (R 1094) Swafford was arrested, the police seized the gun, and ballistics tests performed later conclusively established that Swafford's gun was the gun used to kill the victim. The evidence also showed that Swafford had the gun for some time. (R 811) The gun was stolen from Nashville, Swafford's hometown, several months before the murder. (R 1026, 1028, 1158-1159) Swafford told his friends in the car on the return trip that he was mad the police had seized "his gun." (R 814; 848) Although the gun was not tested until more than a year after the murder, after authorities received a tip concerning Swafford's possible involvement, evidence established the chain of police custody and the identification of the gun.

The state also presented evidence that Swafford made statements from which an inference of his guilt of the crimes charged could be drawn. Two months after the murder Swafford suggested to Ernest Johnson that they "go get some women." They went in Swafford's car. They got a six-pack and started riding. Swafford indicated to Johnson he wouldn't have to worry about anything, the way he was going to get a girl. He indicated that they would get one, do anything they want, and not get caught because Swafford would get rid of her and shoot her in the head. Swafford said I'll shoot her in the head twice and I'll make damn good and sure that she's you know, she's dead. There won't be no witnesses." Johnson asked Swafford if that didn't bother him and Swafford replied "It does for a while, you know, you just get used to it." Johnson told the jury that he and Swafford went to a department store parking lot late at night, that

Swafford selected a victim, told Johnson to drive the car, directed him to a position beside the targeted victim's car, and drew a gun. Johnson at that point refused to participate further and demanded to be taken back to his truck. Prior to trial Swafford and another inmate managed to escape. They and a female accomplice holed up on the third floor of Fish Memorial Hospital. (R 1224) While there Swafford called a Daytona Beach News Journal reporter and tried to negotiate immunity for the female accomplice. He identified himself as "Roy" and twice during the conversation said "We're both murderers." (R 1228) He later confirmed the accuracy of the quote to the reporter. (R 1231-1232)

The defense called Paul Seiler who had told the police that he had seen the young lady behind the counter at the FINA station at 6:17 a.m. on the day of the crime, then noticed that she walked outside followed by a man in a flannel shirt. (R 1265) The man got in a 1975 Monte Carlo or 1971 Impala and headed north. (R 1266-1267; 1286) He could not even say whether the woman was with him. He remembered describing the man to the police as a white male, late twenties/early thirties, 160 to 170 pounds, 5'10" to 6' tall, with brown hair with a reddish tint, wearing a long sleeve blue or brown flannel shirt and bluejeans. (R 1269) Swafford was 34 years old, 165 pounds, 5'8"tall, is white and has brown hair. (R 1558) But Seiler said he only glanced at the individual at the Fina station and didn't know how close his description was to reality. (R 1271) When questioned about the very detailed description noted in police reports Seiler didn't recall giving much of the information and said "I really don't know where I could even come up with something like that because I didn't get that good of a look at him." (R 1280) The defense then sought to introduce the police bulletin and the testimony of the officer who

had prepared it, suggesting that the bulletin and testimony would provide a better description of the person seen than the witness's recollection over three years later. The court excluded the bulletin and the officer's testimony. The witness never made an identification of the person he had seen; he only gave a description.

At the conclusion of the penalty phase the jury recommended the death sentence by a vote of 10 to 2. Judge Hammond sentenced Swafford to death for the murder and to life in prison for the sexual battery. (R 1493; 1502-1507) The sentencing court found in aggravation that the murder (1) was committed for the purpose of avoiding or preventing a lawful arrest; (2) was especially heinous, atrocious or cruel, based on the abduction, fear, mental anguish, sexual abuse and the fact that the killing occurred in such a way as to show a wanton atrocity as Swafford fired nine bullets into the victim's body, most of them directed at the torso and extremities; (3) was cold, calculated and premeditated based on the fact that Swafford shot the victim nine times including two shots to the head at close range and that he had to stop and reload his gun to finish carrying out the shootings; (4) that Swafford committed the murder while engaged in, or in flight after, committing sexual battery; and (5) that Swafford was previously convicted of a felony involving the use of threat or violence to a person in that on January 10, 1983, he was convicted of burglary with assault and sentenced to 30 years. Testimony was heard that he had shot the burglary victim in the face and hip with a .38 revolver. The trial court found that one item of information adduced by the defense constituted a nonstatutory mitigating circumstance. Based on the parties' stipulation that Swafford's father, were he able, would have testified that Swafford had attained the rank of Eagle

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

On September 7, 1990, Governor Martinez signed a death warrant setting execution for November 13. On October 15, 1990, Swafford filed his first Florida Rule of Criminal Procedure 3.850 motion. Judge Hammond held a preliminary hearing on October 24, 1990, and on October 30th summarily denied the motion without an evidentiary hearing. Swafford had argued specifically that the state failed to correct perjured testimony and withheld documents relating to other suspects. See, also Swafford's initial brief on appeal from the denial of 3.850 relief in Case No. 76,884, pp 38-71; (R 52-90A) Swafford complained that the Volusia County Sheriff's Office did not turn over the name of James Michael Walsh, who was considered to have been the most likely individual to have committed the crime. Walsh was arrested in Daytona with the BOLO in his back pants pocket. Swafford alleged that Walsh so closely resembled the BOLO that when he was later apprehended in Arkansas for jumping his bond in Daytona the Arkansas State Police called the VCSO to advise them of the arrest. Further investigation by the police allegedly revealed that Walsh toldMichael Lestz that he killed three people while he was in Florida and one of them was a woman; he was present in Daytona at the time of the murder; was accompanied by two colleagues, Walter Levi and Lestz; normally committed breaking and entering crimes in early morning hours; had a

history of sadistic activities; normally carried a .38; had picked Lestz and Levi up or dropped them off at the intersection where the Fina station was located; was solicited by a "B.J." to kill the Dunn brothers for $10,000; and burned Lestz with a cigarette over fifty times. Police indicated in an affidavit that the burns closely resembled burns found on Brenda Rucker's body. Swafford further alleged that Levi told police that Walsh and Lestz left a motel room at 6:00 a.m. on 2/14/82 and Lestz told Walsh that Levi could not be trusted for the job. Lestz, however, said that it was Levi and Walsh who left together and Lestz did not know where they had gone. Investigators gave Lestz three different polygraphs which he failed on the issue of whether he was present during the Rucker murder and whether he had any knowledge regarding the murder. Swafford further alleged that Walsh had connections to Tennessee, the state from which the alleged murder weapon was stolen. A VCSO report dated 8/3/82 indicated Walsh's wife was known to travel to Tennessee. It was also suspected that Lestz' vehicle which was suspected of having carried the victim was in or around Knoxville or Clarksville. Swafford also alleged that Levi confirmed Lestz' statement they had been at a laundromat within blocks of the Fina station, which was also within one block of B.J. Arkansas police were said to have recovered numerous handguns upon searching Walsh's residence and various types of ammunition which was significant since the police recovered five different types of .38 bullets from the victim's body during autopsy. Swafford also alleged that the state failed to reveal it had interviewed Walsh, described in a July 1982 report of Detective Buscher, in which Walsh denied being contacted to kill anyone; viewed photos of the Rucker homicide and became upset, nervous and unsure of his statements; would

not relate his whereabouts from 2/14 - 2/15, 1982; and indicated he got the composite from a food store and retained it as a matter of curiosity. Swafford complained further that the state withheld evidence that less than forty-eight hours prior to the Rucker murder someone robbed a Majik Market in Holly Hill and a witness provided a composite drawing of the suspect which did not resemble Mr. Seiler's composite. The state is said to have further failed to reveal that on February 19, 1982, someone called and said two individuals matching the composites were seen together in the lounge at the Holiday Inn Surfside in Daytona Beach. Lestz had told Investigator Charles Brown that he met Walsh at the disco of the Holiday Inn. The state is further alleged to have withheld another taped statement of Levi on May 19, 1983, in which he stated Lestz always had a .38 on him and Walsh had one as well. When given a sample polygraph question "Do you know Brenda Rucker?" Levi replied "Yeah" then corrected himself claiming he didn't understand the question. The trial court found that no *Brady v. Maryland*, 373 U.S. 83 (1963), violation had occurred and that Swafford had not established the materiality of the information he claimed the state withheld. The court concluded: "There is no possibility that the result of the proceeding would have been different even if all this information were available." The Supreme Court of Florida entered a temporary stay and then affirmed the trial court and denied Swafford's petition for writ of habeas corpus, as well. *Swafford v. Dugger,* 569 So.2d 1 264 (Fla. 1990). The court stated " Swafford has shown no error in the court's ruling, and we hold that the court correctly refused to hold an evidentiary hearing on this claim." 569 So.2d at 1267.

Swafford subsequently filed a petition for writ of habeas corpus in the United

States District Court, Middle District of Florida, Orlando Division raising the same claim. All relief was denied by G. Kendall Sharp, United States District Judge on November 15, 1990. Judge Sharp rejected the claim that the prosecutor used false and misleading evidence. *Swafford v. Dugger,* No. 90-846-Civ-Orl-18 pp 9-12 (M.D.Fla. November 15, 1990); (R 96) From the record Judge Sharp also determined that defense counsel did learn of numerous suspects during the deposition of Lt. Bushdid. The district court further determined that the "other suspects" were not significant and any suppressed evidence would not have affected the outcome of the trial. The court also noted there was no general constitutional right to discovery. p 13.

Swafford then appealed the denial of habeas relief to the United States Court of Appeals for the Eleventh Circuit. He filed in that court a motion to hold proceedings in abeyance pending resubmission of *Brady* and related issues to the Florida State courts. Such motion was predicated on the premise that the state of Florida was *continuing* to withhold documents. On December 16, 1991, United States Circuit Judge Peter Fay granted Swafford's motion to hold proceedings in abeyance.

In May 1991, Swafford had filed a *second* habeas petition, arguing an alleged conflict of interest of his trial attorney, Howard Pearl, which the Supreme Court of Florida denied. *Swafford v. Singletary,* 584 So.2d 5 (Fla. 1991).

In November 1991, Swafford filed a *second* rule 3.850 motion. Judge Hammond summarily denied it without an evidentiary hearing in May 1992, as well as a motion for rehearing and disqualification. Swafford again appealed the denial of relief to the Supreme Court of Florida and also moved for relinquishment of jurisdiction, arguing the

need for an evidentiary hearing on whether Swafford's *other* trial counsel, Ray Cass, had a conflict of interest and whether Judge Hammond engaged in improper ex parte communication with the state. In January 1993, the Supreme Court of Florida granted Swafford's motion to relinquish jurisdiction. On March 29, 1993, Judge Hutcheson held an evidentiary hearing pursuant to the order of the Supreme Court of Florida. The Supreme Court of Florida affirmed the denial of relief finding that no improper ex parte communications occurred and that Cass had no conflict of interest due to his having been given an honorary deputy sheriff's card by a previous sheriff. *Swafford v. State,* 636 So.2d 1309 (Fla. 1994). The claims that Chapter 119 and other *Brady* violations occurred; counsel was ineffective in the guilt phase; newly discovered evidence establishes Swafford's innocence; counsel was ineffective at the penalty phase; and that there were constitutionally invalid penalty instructions and the improper application of aggravators were found to be *procedurally barred* because they were or could have been raised previously. In footnote 5, the court noted that at the October 1990 hearing CCR attorney Jay Nickerson said that everything he had requested under Chapter 119 had been disclosed except for some things from the Ormond Beach Police Department and the seventh circuit state attorney's office. Representatives of those offices were present with their records. Judge Hammond inspected them and turned over everything but the officer's personal notes. Nickerson then said that the fourteenth circuit state's attorney office had complied and that he was satisfied with the Chapter 119 disclosures. 636 So.2d at 1311 An *Espinosa v. Florida,* 112 S.Ct. 2926 (1992), claim was also found not to have been preserved. *Id.* On April 29, 1994, Swafford filed a motion for rehearing. On

May 9, 1994, Swafford filed a motion to relinquish jurisdiction and hold appeal in abeyance in light of newly discovered evidence. Swafford made the same allegations he now raises as a newly discovered evidence claim in the instant 3.850 motion and attached the same affidavit of Michael Eugene Lestz. On June 1, 1994, the Supreme Court of Florida entered an order denying the motions. Mandate issued on June 1, 1994.

On or about June 13, 1994, Swafford filed the instant *third* 3.850 motion. He again alleged in it that he is innocent and has newly discovered evidence. Collateral counsel claimed to have finally located Lestz, who signed an affidavit which counsel argues strongly corroborates the *Brady* material that was not disclosed to the defense. Lestz alleges in the affidavit that on the day of the Daytona 500 Walsh had two .38's, which he said had been used, and he was in a hurry to get rid of them. He was acting very nervous because he didn't want the guns in his possession. One was a hammerless revolver which was the type of weapon that killed the victim. He went to different bars. One of the places he went to get rid of the guns was the Shingle Shack, which all three had been to on several occasions and were familiar with. A couple of days later they were in the parking lot of a store and there were pamphlets about the Rucker homicide. Walsh became upset and snatched pamphlets off cars saying they shouldn't be looking for the suspect in Daytona Beach when she was not killed here. Lestz concluded "Because I was with Michael Walsh before and after the incident, I knew how he was acting and I think there is a good chance that he committed the murder of Brenda Rucker." Swafford refers also to (1) a July 20, 1982, VCSO report in which Lestz revealed that an individual named Walsh committed three murders in Florida and one of

the victims was a white female in the Daytona Beach area; (2) a January 31, 1983, VCSO report indicating Lestz stated that between 6:00 a.m. and 10:30 a.m. on the days of the Rucker homicide Walsh and Levi left him in a laundromat in Daytona Beach, a couple of blocks from the Fina station and that Walsh frequented the Fina station from which Rucker was abducted; (3) a March 17, 1982, VCSO report indicating Walsh was arrested in Arkansas for a armed robbery in which he told the victim he had killed three persons in the state of Florida and according to Arkansas authorities Walsh strongly resembled the composite of Brenda Rucker's killer; (4) a September 3, 1982, affidavit of Bernard Buscher, a VCSO deputy indicating that a} when Walsh was arrested in March 1982 he had a composite bulletin concerning the Rucker homicide b} Rucker's autopsy revealed two marks possibly caused by the application of a lighted cigarette c} Lestz stated that Walsh subjected him to homosexual attacks in which Lestz was burned with a cigarette d} the burns on Lestz body strongly resemble those burns found on the body of Brenda Rucker d} Lestz indicated that at 6:00 a.m. on February 14, 1982, Walsh and Levi took his van and disappeared. When Walsh returned he sold his two .38's in a Daytona Beach tavern. Walsh then dyed his hair black and forced Lestz to drive him to New Orleans; (5) a July 26, 1982, VCSO report indicating that when Walsh viewed several photos of the Rucker homicide he became extremely upset, nervous, and unsure of his statements. Walsh would not relate what he was doing or his whereabouts during the period of February 14-15, 1982, stating he would rather not say. CCR claimed due diligence but that it was unable to locate Lestz until a tracing service reported an address in April 1994. CCR cited the pressure of warrants and the deteriorating physical and

mental health and family life of former CCR attorney Jerome Nickerson and the fact of the late release of Chapter 119 documents by the state as the reason for an incomplete investigation, which reason was rejected previously by the Supreme Court of Florida. Swafford also alleged again the previously rejected claim that the state failed to correct perjured testimony.

SUMMARY OF ARGUMENT

The trial court properly summarily denied Swafford's successive Florida Rule of Criminal Procedure 3.850 motion as it merely rehashed a *Brady v. Maryland,* 373 U.S. 83 (1963), claim in a previous 3.850 motion which was rejected by state and federal courts.

ARGUMENT

I. THE CLAIM THAT SWAFFORD WAS DEPRIVED OF HIS RIGHTS TO DUE PROCESS AND RIGHTS UNDER THE FIFTH, SIXTH AND EIGHTH AMENDMENTS BECAUSE THE STATE WITHHELD EVIDENCE; THAT COUNSEL WAS THEREBY RENDERED INEFFECTIVE; AND THAT NEWLY DISCOVERED EVIDENCE ESTABLISHES SWAFFORD IS INNOCENT IS PROCEDURALLY BARRED.

The lower court properly summarily denied relief. The instant claim is procedurally barred. Pursuant to Florida Rule of Criminal Procedure 3.850(b) no motion shall be filed or considered if filed more than two (one) years after the judgment and sentence become final in a capital case in which a death sentence has been imposed. No fundamental constitutional right is being asserted which was not established within the period provided for in rule 3.850 and held to apply retroactively.

Pursuant to rule 3.850(f) a second or successive motion may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits. This instant ground for relief was raised in the first 3.850 motion as a *Brady v. Maryland*, 373 U.S. 83 (1963), claim and CCR still insists it has a valid *Brady* claim. Nothing new or noteworthy has been alleged, however, simply that Lestz has been found, he "thinks" there is a "possibility" Swafford may be innocent and that one of the places Walsh went to get rid of a handgun was the Shingle Shack. Lestz is evidently without personal knowledge as to whether Walsh actually did get rid of a gun there and in what manner. There is no getting around the fact, however, that it is *established* that Swafford did get rid of *his* gun there and his gun *was* the murder weapon. These allegations hardly constitute a new or different ground for relief and the motion was properly denied.. *Preston v. State*, 564 So.2d 120 (Fla. 1990; *Tafero v.*

State, 561 So.2d 557 (Fla. 1990).

There seems to be continuing confusion as to the parameters of viable *Brady* claims. Suffice to say that it is clear that the prosecution is not required to "make a complete and detailed accounting to the defense of all police investigatory work on a case. " *Moore v. Illinois*, 408 U.S. 786 (1972); *Spaziano v. State,* 570 So.2d 289 (Fla. 1990).

Pursuant to rule 3.850(f) a second or successive motion may be dismissed where the judge finds that the failure of the movant or the attorney to assert those grounds in a prior motion constituted as abuse of procedure. *Spaziano v. State*, 545 So.2d 843 (Fla. 1989). Alternatively, the above allegations could certainly have been included in the first 3.850 motion. CCR has had years to locate Lestz, who really has nothing of interest to say, and this court did not buy into the theory of warrant pressure, etc. in the last 3.850 appeal as an excuse for not timely raising claims.

To set aside a conviction or sentence because of newly discovered evidence, newly discovered evidence must be of such nature that it would probably produce an acquittal on retrial or result in a life sentence rather than the death penalty. *Jones v. State,* 591 So.2d 911 (Fla. 1991). The crux of the "newly discovered evidence" now proffered has been before the courts before and in the context of *Brady* was found not to even be material, no less outcome determinative so it can hardly be said that under a new evidence analysis such evidence would produce an acquittal on retrial or result in a life sentence or that lack of such evidence could have rendered counsel ineffective.

CONCLUSION

Based on the above and foregoing reasons and argument, the state respectfully submits that the order denying post conviction relief in the successive proceeding should be affirmed.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

MARGENE A. ROPER
Assistant Attorney General
Florida Bar # 0302015
Capital Appeals
Criminal Division
State of Florida
Office of the Attorney General
444 Seabreeze Boulevard
5th Floor
Daytona Beach, Florida 32118

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing answer brief of appellee has been furnished by United States Mail, first class postage prepaid to Martin J. McClain, Chief Assistant CCR, P.O. Drawer 5498, Tallahassee, Florida 32314-5498 this 11th day of August, 1995.

MARGENE A. ROPER
Assistant Attorney General