IN THE SUPREME COURT OF FLORIDA

CASE NO. 85,682

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.

"PC-R3. ___" - Record on appeal from denial of the third 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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INTRODUCTION

Mr. Swafford was convicted of murder based on circumstantial evidence. The victim was abducted from a convenience store in Ormond Beach at 6:20 a.m. on Sunday, February 14, 1982 (the day of the Daytona 500). Her body was found the next day in a wooded area six miles away: she had been shot nine times. The State's case against Mr. Swafford was that he was in the Daytona Beach area that weekend. His whereabouts between 6:00 a.m. and 7:00 a.m. were unaccounted for by State witnesses, except for the fact that he was alone in an automobile. The State also presented evidence that on the evening of February 14, Mr. Swafford was in possession of a .38 hammerless revolver at a bar known as the Shingle Shack. When police were called to the bar, the gun was not found on Mr. Swafford, although a .38 hammerless revolver was found in a trash can in a rest room. Ballistics later matched the revolver found at the Shingle Shack to the homicide.

In Mr. Swafford's most recent Rule 3.850 motion, undersigned counsel presented the affidavit of Michael Lestz, a witness post-conviction counsel had previously been unable to locate despite diligent effort. This affidavit builds an equally compelling circumstantial evidence case against an individual named Michael Walsh. Mr. Lestz's affidavit provides:

> My name is Michael Eugene Lestz and I live in the state of Illinois. In 1982 I was in Daytona Beach, Florida during the Daytona 500. The Daytona 500 Auto Race took place on Sunday, February 14, 1982.
>
> While I was there, I was in the presence of two guys named Walter Levi and Michael

Walsh. Michael Walsh borrowed my van on several occasions and without telling me where he was going. I previously told the Daytona Beach sheriff's office about these occasions.

I remember, on the day of the Daytona 500, Michael Walsh had two 38 caliber handguns and was in a big hurry to get rid of them. One of these 38's was a hammerless revolver. He told me that the handguns had been used and he had to get rid of them. Walsh started going to different bars in order to get rid of the guns. One of the places Walsh went to get rid of these handguns was the Shingle Shack Topless bar. The three of us had been to this bar on several occasions and we were all very familiar with it. Also Michael was acting very nervous on this particular day. He said it was because he didn't want the guns in his possession.

A couple of days after the Daytona 500 and after Michael Walsh had gotten rid of the two guns, we were in the parking lot of a store and there were pamphlets about the Brenda Rucker homicide. Walsh became upset and began to snatch the pamphlets off the cars saying they shouldn't be looking for the suspect in Daytona Beach when she was not killed here. Walsh would never tell us what he meant by this.

Two sheriff's officers from the Volusia County Sheriff's department came to interview me when I was in the Marion Federal Prison in Illinois. I gave them detailed, truthful statements of what I could remember at that time. At some point at a later date I remembered some more details and I wrote them back to explain the details to them. They wrote me back and told me to "not worry about it."

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.

(Affidavit of Michael E. Lestz, PC-R3. 22-23)(emphasis added). Police reports undisclosed at Mr. Swafford's trial indicated that Mr. Walsh's whereabouts between 6:00 a.m. and 10:00 a.m. on February 14, 1982, could not be accounted for.

Even though the police had interviewed Mr. Lestz prior to Mr. Swafford's trial, neither his statement nor his name were disclosed to Mr. Swafford's defense attorney, Ray Cass. In light of Mr. Lestz's affidavit, Mr. Cass has stated in an affidavit:

> Upon being appointed to represent Mr. Swafford I filed a Request for Discovery. The purpose of this request was to obtain from the State of Florida all materials which would have been exculpatory and also those materials which would have provided impeachment material to aid the defense in presenting Mr. Swafford's case to the jury. In short, the materials which I requested were all materials which would have been discoverable under Brady v. Maryland, 83 S. Ct. 1194 (1963).
>
> When I asked for all discoverable materials in this case I certainly expected to be provided with all relevant police reports in the matter. In particular, I expected to be provided information implicating others in the homicide. This would have clearly been exculpatory as to Mr. Swafford. I was given a handful of police reports and it was represented to me that those were all of the police reports that existed. I was not provided any information about suspects by the names of Walsh, Levi, and/or Lestz. At no time prior to trial did I learn about the existence of other significant suspects. In fact, I was told by the prosecutor that any additional suspects had been ruled out.
>
> I have been recently been provided police reports regarding Walsh, Levi and Lestz. These police reports are attached to this affidavit (Attachments A-E). I never received any reports whatsoever which related

to an individual by the name of Michael Walsh, nor did I receive reports relating to Walsh's companions, Walter Levi or Michael Lestz. I have been shown copies of these police reports and I know that I would have used these reports at trial by way of impeachment of the detectives and to investigate present evidence that one or more of these three individuals committed the homicide if I had been given the opportunity. Instead, I was kept in the dark about the existence of these other prime suspects. Certainly there can be no doubt, if I had been provided with information relating to these suspects I would have investigated the same. This was precluded, however, because I knew nothing about them. In my opinion this information was discoverable and should have been provided to the defense well before trial.

Further, I have been shown the affidavit of Michael Lestz which implicates Walter Levi and Michael Walsh in the murder of Brenda Rucker. Mr. Lestz's affidavit is attached to this affidavit (Attachment F). Lestz's affidavit demonstrates that had I been advised regarding these suspects and investigated them (as no doubt I would have had I known of their existence) I would have been able to present evidence of their guilt and Mr. Swafford's resulting innocence. This affidavit is further proof of Mr. Swafford's innocence and I would have presented the testimony of Mr. Lestz as evidence at Mr. Swafford's trial. The testimony of Mr. Lestz would have undermined the State's erroneous theory in this case and would have led to the perpetrators of this crime being brought to justice. I am simply astounded by the State's non disclosure of this exculpatory evidence.

(Affidavit of Ray Cass, PC-R3. 182-87).

As a result of the Brady violation, Mr. Swafford, an innocent man, was convicted and sentenced to death. It is time that this injustice be corrected. At the very least, an evidentiary hearing must be finally ordered.

STATEMENT OF THE CASE

On February 14, 1982, at approximately 6:15 a.m., Brenda Rucker was abducted from a Fina station in Ormond Beach, Florida. A composite drawing of the assailant who abducted Ms. Rucker was subsequently prepared.

On February 15, 1982, Ms. Rucker's body was discovered by sheriff's deputies in a wooded area about six miles from the Fina station. Ms. Rucker had been sexually assaulted and shot nine times.

Mr. Swafford was arrested nearly seventeen months later. The State's case against Mr. Swafford was circumstantial. According to the State, Mr. Swafford had travelled to Daytona Beach that weekend for the Daytona 500 with a group of people. The group camped outside of town at a campground. Mr. Swafford was away from the campground in a vehicle until around 7:00 a.m. on February 14th. He was with a prostitute until about 6:00 a.m. on February 14th. Thus, the State contended that Mr. Swafford abducted Ms. Rucker, sexually assaulted her, and killed her in that one-hour window of opportunity.

The stolen gun which was identified by a ballistics expert as the murder weapon had been found in the Shingle Shack, a bar in Daytona Beach. Testimony was presented indicating Mr. Swafford had been in possession of such a weapon prior to the arrival of police at the Shingle Shack. Police found the gun in a trash can in a rest room.

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 (Fla. 1988).

On September 7, 1990, Governor Martinez signed a death warrant setting Mr. Swafford's execution for November 13, 1990. Until the signing of the warrant, Mr. Swafford was unrepresented in the post-conviction process. 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's 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 left, were burned out and in deteriorating health.[1] In fact, on October 24, 1990, this Court entered an Administrative Order recognizing the difficulties confronting CCR (PC-R1. 361).

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[1]On October 1, 1990, Jerome Nickerson, Assistant CCR, resigned effective November 1, 1990. October 8, 1990, Gail Anderson, Assistant CCR, resigned effective November 8, 1990. Billy Nolas and Julie Naylor resigned effective December 31, 1990. Tom Dunn was reactivated by the military and was sent to Saudi Arabia during the Gulf War.

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.

On October 15, 1990, Mr. Swafford initiated post-conviction proceedings in state court. Included in Mr. Swafford's motion was a claim premised upon a Brady violation. Mr. Swafford had discovered a wealth of exculpatory evidence in Chapter 119 disclosures which had not been disclosed to Mr. Swafford's trial attorney. The nondisclosure included the names of Michael Lestz, Walter Levi, and Michael Walsh and their numerous statements implicating each other in the Rucker homicide. Despite efforts to locate these individuals, they could not be found in the fall of 1990. On October 22, 1990, the State submitted its response.[2] In its Response, the State conceded the appropriateness of an evidentiary hearing (PC-R1. 367). 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 penalty phase (PC-R1. 7). Despite the State's concessions, no evidentiary hearing was held.

At an October 24, 1990, status 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). This material contained more previously undisclosed exculpatory

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

evidence. On October 30, 1990, the circuit court signed an order denying the motion to vacate (PC-R1 436-51).

On November 8, 1990, Mr. Swafford appealed to this Court. 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 (Fla. 1990).

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, continued to conduct further investigation into his case. This included additional efforts to locate Lestz, Levi and Walsh. While the federal appeal was held in abeyance, Mr. Swafford filed a second motion to vacate which was summarily denied. This Court again affirmed the summary denial. Swafford v. State, 636 So. 2d 1309 (Fla. 1994).

In April of 1994, Mr. Swafford's collateral counsel was finally able to locate one of the key witnesses who gave a statement to the Volusia County Sheriff's Office implicating other individuals in the murder of Brenda Rucker. This individual, Mr. Lestz, provided Mr. Swafford's collateral counsel with an affidavit which strongly corroborates the Brady material

that was not disclosed to Mr. Swafford's defense team, and provides new and additional evidence which is exculpatory to Mr. Swafford.

Despite efforts to locate Mr. Lestz previously, collateral counsel was unable to ascertain his whereabouts until April of 1994. Mr. Swafford immediately presented a new motion to vacate.

Based on information obtained from Mr. Lestz, Mr. Swafford filed a new Rule 3.850 motion on June 13, 1994. The State filed its response on September 19, 1994. The circuit court summarily denied all relief on January 10, 1995. Mr. Swafford filed a Motion for Rehearing on January 30, 1995. The State filed a Response to Mr. Swafford's Motion for Rehearing on February 10, 1995. The circuit court denied Mr. Swafford's Motion for Rehearing on April 3, 1995. This appeal follows.

SUMMARY OF ARGUMENT

1. Newly discovered evidence establishes a Brady violation and that Mr. Swafford is an innocent man. The circuit court's denial of an evidentiary hearing and Rule 3.850 relief was erroneous.

ARGUMENT I

MR. SWAFFORD WAS DEPRIVED OF HIS RIGHTS TO DUE PROCESS UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AS WELL AS HIS RIGHTS UNDER THE FIFTH, SIXTH, AND EIGHTH AMENDMENTS, BECAUSE THE STATE WITHHELD EVIDENCE WHICH WAS MATERIAL AND EXCULPATORY IN NATURE AND/OR PRESENTED MISLEADING EVIDENCE. SUCH OMISSIONS RENDERED DEFENSE COUNSEL'S REPRESENTATION INEFFECTIVE AND PREVENTED A FULL ADVERSARIAL TESTING. FURTHER, 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.

The United States Supreme Court recently recognized that, though a Brady violation may be comprised of individual instances of nondisclosure, proper constitutional analysis requires consideration of the cumulative effect of the individual nondisclosures. Kyles v. Whitley, 115 S. Ct. 1555 (1995). Thus, the proper Brady analysis cannot be conducted when suppression of exculpatory evidence continues or when, despite due diligence, the evidence of the prejudicial effect of the nondisclosure does not surface until later.

A Brady claim requires proof that: 1) the State possessed evidence favorable to the defense; 2) the defense did not possess the evidence in question; 3) the State did not disclose the evidence; and 4) the evidence was material, i.e., its nondisclosure undermines confidence in the outcome. See Duest v. Singletary, 967 F.2d 472 (11th Cir. 1992), rev. and remanded on other grounds, 113 S. Ct. 1940 (1993), adhered to on remand, 997 F.2d 1336. The circuit court in 1990 denied Mr. Swafford's

motion without an evidentiary hearing on the basis that as a matter of law, confidence was not undermined in the outcome. This Court affirmed on the same basis. Swafford v. Dugger, 569 So. 2d 1264, 1267 (Fla. 1990). These rulings were made without the benefit of Lestz' affidavit, since Mr. Lestz was unavailable until April of 1994.

Mr. Lestz' affidavit establishes that the State's suppression of evidence must undermine confidence in the outcome. In his affidavit, Mr. Lestz sticks by his statements to the police that Mr. Walsh had an even greater window of opportunity to murder the victim than did Mr. Swafford. According to Mr. Lestz's statement to police, Mr. Walsh was unaccounted for between 6:00 a.m. and 10:00 a.m. and that during that time he had Mr. Lestz's van. Mr. Lestz further indicates that Mr. Walsh possessed a stolen hammerless .38 revolver which he got rid of at the Shingle Shack on Sunday evening, February 14, 1982. Mr. Lestz also indicates that Walsh became so angry upon seeing the pamphlets containing the composite drawing of the suspect in the Rucker homicide that "[he] began to snatch the pamphlets off the cars." In fact, shortly thereafter, Mr. Walsh was arrested in Arkansas following an armed robbery. Police found the Rucker composite in his back pocket and immediately called Volusia County law enforcement because Walsh looked like the composite.

In light of Lestz's affidavit and in light of Kyles, an evidentiary hearing is required as to the entire Brady claim presented by Mr. Swafford.

A. MR. SWAFFORD IS AN INNOCENT MAN

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. Kyles v. Whitley, 115 S. Ct. at 1567.

In April of 1994, Mr. Swafford's collateral counsel was finally able to locate one of the key witnesses who gave a statement to the Volusia County Sheriff's Office implicating other individuals in the murder of Brenda Rucker (this statement was never disclosed to defense counsel). This individual, Mr. Lestz provided Mr. Swafford's collateral counsel with an affidavit which proves that, had the State complied with its discovery obligations, Mr. Swafford would have been acquitted:

> My name is Michael Eugene Lestz and I live in the state of Illinois. In 1982 I was in Daytona Beach, Florida during the Daytona 500. The Daytona 500 Auto Race took place on Sunday, February 14, 1982.
>
> While I was there, I was in the presence of two guys named Walter Levi and Michael Walsh. Michael Walsh borrowed my van on several occasions and without telling me where he was going. I previously told the Daytona Beach sheriff's office about these occasions.
>
> I remember, on the day of the Daytona 500, Michael Walsh had two 38 caliber handguns and was in a big hurry to get rid of them. One of these 38's was a hammerless

revolver.[3] He told me that the handguns had been used and he had to get rid of them. Walsh started going to different bars in order to get rid of the guns. One of the places Walsh went to get rid of these handguns was the Shingle Shack Topless bar. The three of us had been to this bar on several occasions and we were all very familiar with it. Also Michael was acting very nervous on this particular day. He said it was because he didn't want the guns in his possession.

A couple of days after the Daytona 500 and after Michael Walsh had gotten rid of the two guns, we were in the parking lot of a store and there were pamphlets about the Brenda Rucker homicide. Walsh became upset and began to snatch the pamphlets off the cars saying they shouldn't be looking for the suspect in Daytona Beach when she was not killed here. Walsh would never tell us what he meant by this.

Two sheriff's officers from the Volusia County Sheriff's department came to interview me when I was in the Marion Federal Prison in Illinois. I gave them detailed, truthful statements of what I could remember at that time. At some point at a later date I remembered some more details and I wrote them back to explain the details to them. They wrote me back and told me to "not worry about it."

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.[4]

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[3]The weapon used to kill the victim in this case was a .38 hammerless revolver.

[4]Despite diligent efforts by Mr. Swafford's collateral counsel to locate Mr. Lestz and other individuals implicated in the murder of Brenda Rucker, collateral counsel was not able to locate Mr. Lestz until Global Tracing Services Inc. reported finding an address in April, 1994.

(Affidavit of Michael E. Lestz, PC-R3. 22-23)(emphasis added) (footnotes added).

As noted above, Mr. Lestz's affidavit corroborates the exculpatory evidence the State possessed which was not disclosed to Mr. Swafford's defense team.[5] According to a July 20, 1982, Volusia County Sheriff's Report, Mr. Lestz revealed that an individual name Walsh had committed three murders in Florida, and that one of the victims was a white female in the Daytona Beach area (PC-R3. 189).

A January 31, 1983, Volusia County Sheriff's report indicated that Lestz had again been interviewed and that he 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 indicated that Walsh had on numerous occasions frequented the Fina station from which Rucker was abducted (PC-R3. 195-96).

A March 17, 1982, Volusia County Sheriff's 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" (PC-R3. 200). According to the Arkansas authorities, "Walsh strongly resembles the composite of Brenda Rucker's killer." (PC-R3. 200).

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[5]On Sunday, February 14, 1982, 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.

Further, a September 3, 1982, affidavit of Bernard Buscher, a Volusia County Deputy Sheriff 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" (PC-R3. 205). 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" (PC-R3. 204). 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" (PC-R3. 205). Deputy Buscher examined Lestz's burns and "noted that these burns on Lestz' body strongly resemble those burns found on the body of Brenda Rucker" (PC-R3. 205). According to Deputy Buscher's affidavit, Lestz told Deputy Buscher that 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" (PC-R3. 205-206).

Finally, according to a July 26, 1982, Volusia County Sheriff's 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" (PC-R3. 215). 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'" (PC-R3. 215).

Further, Mr. Swafford's original trial counsel, Ray Cass, has thoroughly examined all of the materials uncovered during Mr. Swafford's post-conviction investigation (including Mr. Lestz's affidavit) and made the following statement in an affidavit proffered to the lower court:

> Upon being appointed to represent Mr. Swafford I filed a Request for Discovery. The purpose of this request was to obtain from the State of Florida all materials which would have been exculpatory and also those materials which would have provided impeachment material to aid the defense in presenting Mr. Swafford's case to the jury. In short, the materials which I requested were all materials which would have been discoverable under Brady v. Maryland, 83 S. Ct. 1194 (1963).
>
> When I asked for all discoverable materials in this case I certainly expected to be provided with all relevant police reports in the matter. In particular, I expected to be provided information implicating others in the homicide. This would have clearly been exculpatory as to Mr. Swafford. I was given a handful of police reports and it was represented to me that those were all of the police reports that existed. I was not provided any information about suspects by the names of Walsh, Levi, and/or Lestz. At no time prior to trial did I learn about the existence of other significant suspects. In fact, I was told by the prosecutor that any additional suspects had been ruled out.
>
> I have been recently been provided police reports regarding Walsh, Levi and Lestz. These police reports are attached to this affidavit (Attachments A-E). I never received any reports whatsoever which related to an individual by the name of Michael Walsh, nor did I receive reports relating to Walsh's companions, Walter Levi or Michael Lestz. I have been shown copies of these police reports and I know that I would have used these reports at trial by way of

> impeachment of the detectives and to investigate present evidence that one or more of these three individuals committed the homicide if I had been given the opportunity. Instead, I was kept in the dark about the existence of these other prime suspects. Certainly there can be no doubt, if I had been provided with information relating to these suspects I would have investigated the same. This was precluded, however, because I knew nothing about them. In my opinion this information was discoverable and should have been provided to the defense well before trial.
>
> Further, I have been shown the affidavit of Michael Lestz which implicates Walter Levi and Michael Walsh in the murder of Brenda Rucker. Mr. Lestz's affidavit is attached to this affidavit (Attachment F). Lestz's affidavit demonstrates that had I been advised regarding these suspects and investigated them (as no doubt I would have had I known of their existence) I would have been able to present evidence of their guilt and Mr. Swafford's resulting innocence. This affidavit is further proof of Mr. Swafford's innocence and I would have presented the testimony of Mr. Lestz as evidence at Mr. Swafford's trial. The testimony of Mr. Lestz would have undermined the State's erroneous theory in this case and would have led to the perpetrators of this crime being brought to justice. I am simply astounded by the State's non disclosure of this exculpatory evidence.

(Affidavit of Ray Cass, PC-R3. 182-87).

B. MR. LESTZ'S AFFIDAVIT IS NEWLY DISCOVERED EVIDENCE

Despite due diligence, Mr. Swafford's collateral counsel was unable to locate Mr. Lestz until Global Tracing Services Inc. reported finding an address for Lestz in April of 1994.

On September 7, 1990, Governor Martinez signed a death warrant setting Mr. Swafford's execution for November 13, 1990. This action precipitated CCR's involvement in Mr. Swafford's

case. It required CCR to complete its investigation in Mr. Swafford's case in thirty days and file a 3.850 motion. 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. Assisting Mr. Nickerson was Mr. Harun Shabazz, who was then a new attorney who had just started at CCR.

CCR learned of the existence of Lestz, Levi and Walsh, suspects in the Rucker homicide. But despite efforts to locate the trio, CCR was unable to ascertain their whereabouts prior to or during the 3.850 proceedings in 1990.

After a stay was entered in Mr. Swafford's case, CCR's investigation continued and repeated attempts were made to locate the individuals implicated in the murder of the victim in Mr. Swafford's case. However, collateral counsel was not able to locate Mr. Lestz, Mr. Levi or Mr. Walsh. None of the 119 material disclosed by the State contained a current address or sufficient information to allow CCR to find an address through credit records and/or prison records. Finally in April of 1994, Global Tracing Services Inc. reported discovering an address for Mr. Lestz:

> My name is Harun Shabazz and I'm an attorney involved in Roy Swafford's postconviction litigation.
>
> I have been assigned to Mr. Swafford's case since September, 1990. Under Governor Martinez' death warrant policy, Mr. Swafford's entire defense team was overworked and stressed. However, efforts were undertaken to locate Mr. Lestz, Mr. Levi

> and Mr. Walsh because of the police reports listing them as suspects in the Rucker homicide. I personally sifted through those reports looking for an address and/or phone number that could be used to contact any one of the three. However, nothing panned out.
>
> After Governor Chiles was elected to office, I on behalf of Mr. Swafford's defense team made several attempts to locate the whereabouts of these three individuals who were implicated in the murder of Brenda Rucker, the victim in Mr. Swafford's case. Unfortunately, our computer access to credit records was of no assistance, nor was I able to locate any one of the three by continually contacting prison systems. I was shocked that I could not get an address. All attempts to obtain an address for these three individuals were to no avail until Global Tracing Services reported an address for Lestz in April of 1994.
>
> Global was able to locate Michael Lestz, who was named in the Volusia County Sheriff's reports as having information concerning the murder of Brenda Rucker.

(Affidavit of Harun Shabazz, PC-R3. 25-26).

C. THE CIRCUIT COURT'S DENIAL OF MR. SWAFFORD 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-R3. 167-169). The circuit court's denial of an evidentiary hearing and Rule 3.850 relief was erroneous. Further, the circuit court erred in applying a procedural bar to Mr. Swafford's claim. Mr. Swafford's current Rule 3.850 motion is premised upon Lestz's affidavit which was not previously available and was thus not considered by this Court in its rejection of Mr. Swafford's prior motions. This is very much like the situation in Scott v. State, 20 Fla. L. Weekly S132

(Fla. 1995). There, Mr. Scott, who previously raised a Brady violation, presented a successor Rule 3.850 motion asserting a Brady violation based upon evidence not previously available to post-conviction counsel. This Court found the new evidence of a Brady violation warranted an evidentiary hearing.

In its order denying Mr. Swafford relief the circuit court overlooked or misinterpreted points of law and fact pertinent to the resolution of the claim presented in his Motion to Vacate Judgment and Sentence. For example, in the order denying Mr. Swafford's Rule 3.850 motion, the circuit court erroneously relied on the United States Supreme Court decision in Herrera v. Collins, 113 S. Ct. 853 (U.S. 1993)[6]. In Herrera, the Court articulated the constitutional requirements that federal courts must adhere to when addressing a claim that the Eighth Amendment will be violated by executing an innocent man. Herrera presupposed that there was no other constitutional error at Mr. Herrera's trial. Herrera is not relevant to Mr. Swafford's claim of a Brady violation. Here, the evidence of innocence is being raised in state court and was not discovered at trial because the State violated Brady v. Maryland.[7]

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[6]On January 23, 1995, the United States Supreme Court issued its opinion in Schlup v. Delo, 115 S. Ct. 851 (1995), in which that Court explained that Herrera did not apply in cases in which Brady and ineffective assistance of counsel claims were presented. Schlup underscores the circuit court's error in applying Herrera to Mr. Swafford.

[7]Mr. Swafford does assert his innocence similar to the allegation in Jones v. State, 591 So. 2d 911 (Fla. 1991). In Jones, this Court discussed state law as to the procedure to follow in such circumstances. But Jones presupposes no Brady

Here, the State has not made any allegation that the trial court, defendant, or trial counsel were aware of the involvement of Walsh, Levi and Lestz in the murder of Brenda Rucker at the time of trial. In fact, the record is clear that only the State was aware of these three suspects and failed to inform Mr. Swafford's defense team. (See Affidavit of Ray Cass, PC-R3. 182-87).

As noted earlier, post-conviction investigation has uncovered the following information concerning Walsh, Levi and Lestz:

> Walsh had claimed that he committed three murders in Florida, and that one of the victims was a white female in the Daytona Beach area.
>
> Between 6:00 a.m. and 10:30 a.m. on the day of the Rucker homicide, Walsh and Levi left Lestz in a laundromat in Daytona Beach, a couple of blocks from the Fina station.
>
> Walsh had on numerous occasions frequented the Fina station from which Rucker was abducted.
>
> 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.
>
> Walsh strongly resembles the composite of Brenda Rucker's killer.
>
> Walsh was arrested in March of 1982, he had in his possession a composite bulletin concerning details of the Brenda Rucker homicide.

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violation. Here, the State knew of Lestz, Levi, and Walsh, but did not disclose those names or the statements those individuals made. Thus, Mr. Swafford's claim should be properly analyzed as a Brady claim. See Kyles v. Whitley.

> Arkansas police, upon seeing the BOLO, contacted Volusia County authorities because Walsh matched the composite drawing.
>
> Brenda Rucker's autopsy revealed two marks on the body of the victim possibly caused by the application of a lighted cigarette. Walsh subjected Lestz to homosexual attacks during which Lestz was burned with a cigarette. Lestz' body strongly resemble those burns found on the body of Brenda Rucker as the investigating officer who inspected the burns stated in an undisclosed affidavit.
>
> At 6:00 a.m. on February 14, 1982, Walsh and Levi had taken Lestz's van and disappeared. When Walsh returned, he disposed of two .38 caliber handguns in a Daytona Beach tavern. Walsh then dyed his hair black and forced Lestz to drive him to New Orleans.
>
> 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.
>
> 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."

D. AN EVIDENTIARY HEARING WAS REQUIRED

Mr. Swafford's allegations must be taken as true at this juncture. The affidavits of Michael Lestz and Ray Cass must be accepted as true. All other allegations submitted herein must be accepted as true under Lightbourne v. Dugger, 549 So. 2d 1364, 1365 (Fla. 1989), and Scott v. State, 20 Fla. L. Weekly at S134. Accepting them as true, it is clear that an evidentiary hearing is required for the same reasons set forth in Lightbourne and Scott.

The Supreme Court has explained:

> ... a fair trial is one which evidence subject to adversarial testing is presented to an impartial tribunal for resolution of issues defined in advance of the proceeding.

Strickland v. Washington, 466 U.S. 668, 685 (1984). In order to insure that an adversarial testing, and hence a fair trial, occur, certain obligations are imposed upon both the prosecutor and defense counsel. The prosecutor is required to disclose to the defense evidence "that is both favorable to the accused and 'material either to guilt or punishment'". United States v. Bagley, 473 U.S. 667, 674 (1985), quoting Brady v. Maryland, 373 U.S. 83, 87 (1963). Defense counsel is obligated "to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." Strickland, 466 U.S. at 685. Where either or both fail in their obligations, a new trial is required if confidence is undermined in the outcome. Smith v. Wainwright, 799 F.2d 1442 (11th Cir. 1986).

Here, Mr. Swafford was denied a reliable adversarial testing. The jury never heard the considerable and compelling evidence that would have shown that Walsh committed the murder, and that Mr. Swafford did not. Whether the prosecutor failed to disclose this significant and material evidence or whether the defense counsel failed to do his job, no one disputes the jury did not hear the evidence in question. In order "to ensure that a miscarriage of justice [did] not occur," Bagley, 473 U.S. at 675, it was essential for the jury to hear the evidence.

Confidence is undermined in the outcome since the jury did not hear the evidence. Garcia v. State, 622 So. 2d at 1331.

Exculpatory and material evidence is evidence of a favorable character for the defense which creates a reasonable probability that the outcome of the guilt and/or capital sentencing trial would have been different. Garcia v. State, 622 So. 2d at 1330-31. This standard is met and reversal is required once the reviewing court concludes that there exists a "reasonable probability that had the [unpresented] evidence been disclosed to the defense, the result of the proceeding would have been different." Bagley, 473 U.S. at 680.

In Mr. Swafford's case, the undisclosed exculpatory evidence was central to the theory of defense at the guilt phase. Mr. Swafford's defense was that someone else did it. The undisclosed evidence provided an indication who that person was. It demonstrates that Mr. Walsh had the opportunity and subsequently behaved in a fashion consistent with guilt. It demonstrates that Mr. Walsh was the person to leave the murder weapon in the Shingle Shack.

Confidence in the outcome of Mr. Swafford's trial is undermined because the unpresented evidence was relevant and material to Mr. Swafford's guilt of first degree murder and to whether a death sentence was warranted. Here, exculpatory evidence did not reach the jury. Moreover, the prosecution interfered with defense counsel's ability to provide effective representation and insure an adversarial testing. The

prosecution denied the defense the information necessary to alert counsel to the avenues worthy of investigation and presentation to the jury. As a result, no constitutionally adequate adversarial testing occurred. Confidence is undermined in the outcome. There is a reasonable probability of a different outcome. Mr. Swafford was convicted and sentenced without a constitutionally adequate adversarial testing. Accordingly, an evidentiary hearing must be held, and thereafter, Mr. Swafford's conviction and sentence must be vacated and a new trial and/or new penalty phase ordered.

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).

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 a claim premised upon Brady v. Maryland, 373 U.S. 83 (1963). This is the type of claim which has been traditionally recognized as properly presented in Rule 3.850

motions and which has been traditionally recognized as requiring an evidentiary hearing for its proper resolution. See, e.g., Scott v. State; 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).

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; Scott v. State. 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.

E. CONCLUSION

The Eighth Amendment mandates this Court not dismiss this newly discovered evidence of a further Brady violation committed by the State of Florida in this case. Scott v. State; Kyles v. Whitley. 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 Mr. Swafford's conviction cannot withstand the requirements of the Eighth and Fourteenth Amendments. Kyles. An evidentiary hearing is required. Scott v. State.

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. Garcia v. State, 622 So. 2d 1325 (Fla. 1993). Under Smith v. Wainwright, 799 F.2d 1442 (11th Cir. 1986), post-conviction relief is required.

Mr. Swafford further maintains that Scott v. State, 20 Fla. Weekly S133 (Fla. 1995), and Lightbourne v. Dugger, 549 So. 2d 1364, 1365 (1989), dictate 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 exculpatory evidence, 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 wrongdoing. Accordingly, Mr. Swafford requests that he be given

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

I HEREBY CERTIFY that a true copy of the foregoing Initial Brief of Appellant has been furnished by United States Mail, first class postage prepaid, to all counsel of record on July 31, 1995.

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