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

REPLY BRIEF OF APPELLANT

MARTIN J. MCCLAIN
Chief Assistant CCR
Florida Bar No. 0754773
OFFICE OF THE CAPITAL
COLLATERAL REPRESENTATIVE
1533 South Monroe Street
Tallahassee, FL 32301
(904) 487-4376

COUNSEL FOR APPELLANT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

REPLY TO APPELLEE'S STATEMENT OF THE CASE

In its Answer, the State relies heavily on the gun which was recovered on February 14, 1982 and which allegedly belonged to Ms. Swafford. The State's reliance on this gun is not surprising given the fact that no scientific evidence in any way linked Mr. Swafford to the victim in this case. There was no hair, fiber, finger prints, blood or any other forensic evidence linking Mr. Swafford to the crime.

Despite the fact that the gun was the centerpiece of the prosecutor's case, there are serious problems in connecting Mr. Swafford to the gun and connecting the gun to the murder of Brenda Rucker. The State, in order to "prove" that Mr. Swafford possessed this weapon, used an informant, Roger Harper, to allegedly link the gun to Mr. Swafford. Mr. Harper stated that the gun was "the exact type as [Mr. Swafford] had with the hammer like this" (R. 810). Undisclosed Brady material regarding Mr. Harper was presented in Mr. Swafford's previous Rule 3.850 motion. Indeed, Harper lied about getting a deal in exchange for his testimony (R. 836). Furthermore, Harper's identification of the gun was clearly suspect given the fact that on May 21, 1984 in deposition he had been shown another gun by Mr. Swafford's attorney, Howard Pearl, and identified that gun as being Roy Swafford's. He admitted in that deposition that he could not tell one gun from the other and, at trial, admitted this as well (R. 826).

The other "family members" from Nashville who testified on behalf of the State did not link this gun to Mr. Swafford. Carl Johnson testified that he never saw a gun during this trip (R. 848). Chan Hirtle stated that he did not really know whether or not the gun which was entered as Exhibit I was Roy Swafford's (R. 859). Ricky Johnson, the only other remaining family member who testified stated that he never saw the gun (R. 885). In fact he didn't see the gun until he was taken to jail on February 14, 1982 and at that time the police did not know to whom the gun belonged (R. 894). Therefore, no one but Roger Harper, whose testimony was essentially bought with a deal, testified that this particular weapon belonged to Roy Swafford.

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

ladies room and seized the weapon (R. 1098). The testimony of these two witnesses was mutually exclusive.

Further, the State could not have proven a chain of custody on the gun and the bullets fired from it. Mr. Swafford's trial attorney, Raymond Cass, requested that he be provided with all materials which were discoverable (R. 1513). What was not known by defense counsel at any time prior to or during the trial was that the State tampered with the chain of custody of the gun and the bullets. Documents released to CCR pursuant to CCR's request under Chapter 119.01, Florida Statutes et seq., which included, inter alia, copies of evidence and property receipts for the gun and the bullets, proves this allegation (PC-R2. 448-535).

Analysis of the sheets evidence and property demonstrates that the sheets themselves are internally contradictory. It is apparent that individuals have gone back over the sheets and whited-out information while at the same time substituting new information on them. Furthermore, evidence logs indicate that on June 10, 1983 Detective Hudson checked out the gun from the Sheriff's Department. The gun was at that time labeled Q-1. Also checked out was a set of Mr. Swafford's fingerprints, the same being labeled Q-2. On the same day both the gun and the fingerprints were turned over to Debbie Fisher at FDLE.

Additionally, Detective Hudson filed with the FDLE a request for analysis on the gun and the prints. This, again, was done on June 10, 1983. The problem with this particular submission is that one copy of the submission simply indicates that the gun and

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

Mr. Swafford has submitted these property receipts to Lonnie Hardin, the expert who originally analyzed the gun and the bullets that were submitted to him. Mr. Hardin did not have the benefit of reviewing these evidence logs or property receipts at the time that he conducted his pre-trial analysis. It is Mr. Hardin's opinion as a firearms/ballistics expert with substantial experience in law enforcement, that the chain of custody was not intact.

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.

In its Answer, the State fails to distinguish Scott v. State, 20 Fla. L. Weekly S132 (Fla. 1995), from Mr. Swafford's case. In fact, the State fails to address the Scott decision. As noted in Mr. Swafford's initial brief, this case is very similar to situation in Scott. There, Mr. Scott had previously raised a Brady violation maintaining the State withheld evidence that tended to show that the actual killer was Mr. Scott's co-defendant. Subsequently, Mr. Scott presented a successor Rule 3.850 motion asserting a Brady violation based upon evidence not previously available to post-conviction counsel which also tended to prove that Mr. Scott's co-defendant was the actual killer. The new evidence consisted of two affidavits and a photograph.

The State argued that Mr. Scott's Brady claim was procedurally barred because the newly discovered evidence only corroborated the Brady claim previously presented and rejected by the Court. However, Mr. Scott argued that in light of the newly discovered evidence, this Court should revisit its previous

ruling rejecting Mr. Scott's Brady claim. This Court found the new evidence of a Brady violation warranted an evidentiary hearing. Scott v. State, 20 Fla. L. Weekly S132 (Fla. 1995) (Slip Op. at 8).

Here, Mr. Swafford previously raised a Brady violation maintaining other individuals were responsible for the death of Brenda Rucker, the victim in this case. Subsequently, Mr. Swafford presented a successor Rule 3.850 motion asserting a Brady violation based upon evidence not previously available to post-conviction counsel which tended to prove that other individuals were responsible for the death of Brenda Rucker.

Just as in Scott, this Court did not have the benefit of the newly discovered evidence when it made its previous ruling concerning the Brady violation. Here, Mr. Lestz's affidavit proves (in conjunction with Ray Cass, the trial attorney's affidavit) that if the State had disclosed the Brady material implicating Walsh, Levi and Lestz in the murder of Brenda Rucker, the defense would have had a creditable defense that Mr. Swafford is innocent. Mr. Lestz's affidavit 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. 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).

In its Answer, the State argues that Mr. Swafford's newly discovered evidence fails to meet the requirements of Jones v. State, 591 So. 2d 911 (Fla. 1991), in which the "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" (Answer at 16). As noted below, the information uncovered concerning Walsh, Levi and Lestz easily meets the requirements in Jones.

However, the State's reliance on Jones is misplaced. This Court was faced with a similar situation in Scott where newly discovered evidence established a Brady violation. The Court in Scott maintained that the central issue was whether Mr. Scott was entitled to an evidentiary hearing. Despite this Court's previous ruling in Scott rejecting the Brady claim, this Court, citing Lightbourne v. Dugger, 549 So. 2d 1364, 1365 (Fla. 1989), remanded the case back to the lower court for an evidentiary hearing on the Brady issue. Scott v. State, 20 Fla. L. Weekly S132 (Fla. 1995).

In Lightbourne, this Court held that for the purposes of appeal the Court must accept defendant's allegations as true when determining if an evidentiary hearing is required. Here, Mr. Swafford's allegations clearly established that an evidentiary hearing is necessary:

> 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.

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."

Further, this Court in Scott looked at the totality of the case in making its determination of whether an evidentiary hearing should be granted. Here, the allegations taken in the context of the totality of Mr. Swafford's case demand that an evidentiary hearing be granted. 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 he explained what impact Mr. Lestz's statement could have made on the outcome of this case:

> 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).

Again, the procedural posture of Mr. Swafford's claim is no different than that in Scott. In Scott, the Court rejected the State's argument that Mr. Scott's Brady claim was procedurally barred because in light of the new evidence Mr. Scott's Brady claim has merit. Here, in light of Mr. Lestz's and Mr. Cass's affidavits, it is clear that Mr. Swafford is entitled to an evidentiary hearing.

Also, the State has not presented any evidence that Mr. Swafford failed to exercise due diligence in obtaining the affidavit of Mr. Lestz and the lower court has not ruled that Mr. Swafford has failed to exercise due diligence. Thus, Mr. Swafford is entitled to an evidentiary hearing.

Further, the lower court never ruled on the merits of Mr. Swafford's claim. It wholly relied on a procedural bar in summarily denying Mr. Swafford relief. While the lower court noted that this Court had previously rejected Mr. Swafford's Brady claim that other individuals were responsible for the death of the victim, it did not make an independent assessment of the merits of Mr. Swafford's claim.

The lower court never made an independent determination regarding the need for an evidentiary hearing. Nor did the lower court make a determination that the record conclusively showed that Mr. Swafford was not entitled to relief. This Court has held that it will not rule upon the merits of a claim where the lower court failed to reach the merits. Parker v. Dugger, Nos.

74,978 and 78,700 (Fla. Oct. 5, 1995). In Parker, this Court specifically held:

> In addition, the State argues that, even if the claims are not waived, the record conclusively shows that no relief is warranted. Thus, the State contends, the trial court did not err in denying these claims without an evidentiary hearing in this case, the court never made a determination regarding the need for such a hearing. Nor did the court make a determination that the record conclusively showed that Parker was not entitled to relief. The court never looked beyond the procedural bar to consider the merits of Parker's claims. The trial court is the appropriate place for the initial evaluation of the merits of Parker's claims. We will not rule upon the merits of those claims when the trial court never reached the merits below.
>
> Accordingly, we reverse the trial court's denial of postconviction relief and remand this cause for reconsideration by the trial court.

Parker v. State, Nos. 74,978 and 78,700 (Fla. Oct. 5, 1995) (Slip Op. at 6, 7) (emphasis added). Likewise here, the Court should remand this cause for consideration by the trial court.

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, 115 S. Ct. 1555 (1995). 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 S132 (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 Reply Brief of Appellant has been furnished by United States Mail, first class postage prepaid, to all counsel of record on October 9, 1995.

Harun Shabazz #0967701

MARTIN J. MCCLAIN
Florida Bar No. 0754773
Chief Assistant CCR
Post Office Drawer 5498
Tallahassee, Florida 32314-5498
(904) 487-4376
Attorney for Appellant

Copies furnished to:

Margene Roper
Assistant Attorney General
Office of the Attorney General
444 Seabreeze Boulevard, 5th Floor
Daytona Beach, FL 32118