IN THE SUPREME COURT OF FLORIDA

ROY CLIFTON SWAFFORD,

Appellant,

v. CASE NO. 92,173

STATE OF FLORIDA,

Appellee.
_____/

ON APPEAL FROM THE SEVENTH JUDICIAL CIRCUIT
IN AND FOR VOLUSIA COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND THE FACTS

The State rejects, and moves to strike, the "Introduction" and "Statement of the Case" provided by the appellant, Roy Clifton Swafford. An "introduction" is not authorized by the appellate rules governing the content of briefs, and the alleged "statement of the case" contains argument and accusations which are not proper. *See* Fla. R. App. P. 9.210. Further, the arguments and accusations contained in the statement are not supported by the record evidence. The striking of Swafford's "Introduction" and "Statement of the Case" and the refusal to consider either, or both, of them in deciding the instant appeal would be an appropriate sanction for the violation of the appellate rules. The striking of the "Introduction" and "Statement of the Case" from the initial brief, and the refusal to consider either, is particularly appropriate as Swafford has previously demonstrated his disdain for the rules of this Honorable Court as shown by his untimely filing of his Motion for Rehearing of the Order Denying his Rule 3.850 motion and his Notice of Appeal in this case. *See* State's Motion to Dismiss dated November 24, 1998. Since Swafford's statement is wholly unacceptable, the State provides this Statement of the Case and the Facts:

Statement of the Case:

"The jury found Swafford guilty of first-degree murder and sexual battery and recommended a sentence of death." *Swafford v.*

State, 533 So. 2d 270, 273 (Fla. 1988), *cert. denied,* 489 U.S. 1100 (1989). The trial court found five aggravating and one non-statutory mitigating circumstance. *Id.* at 276-278. Swafford raised four issues on direct appeal, all of which were rejected. *Id.* at 278. His convictions and sentences were affirmed by this Honorable Court. *Id.*

A death warrant was signed and execution was set for November 13, 1990. *Swafford v. State,* 679 So. 2d 736 (Fla. 1996). Swafford filed his first Florida Rules of Criminal Procedure 3.850 motion, raising sixteen claims, which

> included a *Brady* claim which alleged in part that the State had withheld material exculpatory evidence obtained during the investigation of various suspects including the suspect James Michael Walsh.

Id. at 737. The trial court summarily denied the motion, and Swafford appealed. *Id.* Swafford claimed that the State intentionally used false and misleading testimony and withheld material exculpatory evidence and trial counsel was ineffective at the guilt (and penalty) phase of the trial. *Swafford v. Dugger,* 569 So. 2d 1264, 1266 (Fla. 1990). This Court affirmed the summary denial. *Id.*

Swafford also filed a Petition for Writ of Habeas Corpus in the state court, alleging ineffective appellate counsel. *Id.* at 1266. He complained that counsel did not prove that Swafford's admissions were inadmissible. *Id.* The petition was denied, and he filed a habeas corpus petition in the federal district court.

Appendix A, Order at 1.

The district court found seven of the twenty-four claims procedurally barred, and most were also found meritless. *Id.* at 4-7. The remainder of the issues were rejected with the district court finding that "the facts as alleged do not entitle Petitioner to relief." *Id.* at 3-4. The issues before the district court included Swafford's claim that key impeachment evidence bearing on Roger Harper's credibility was withheld. This consisted of correspondence between the prosecutor and Mr. Harper regarding assistance in gaining early release, a $10,000 reward, and "three other alleged improper motives of Harper to testify against Petitioner." *Id.* at 10. The district court noted that testimony regarding early release was presented at trial, and defense counsel knew well before trial that the prosecutor was trying to assist Mr. Harper with an early release. *Id.* "[B]ecause it was more than evident to the Petitioner's jury that Harper was primarily motivated by this self-interest to testify, the Court finds that there is no possibility that the result of the proceeding would have been different." *Id.*

Regarding the reward, the district court found that the information was "equally accessible to defense counsel," and counsel "in fact, was aware of such a reward." *Id.* at 11. Further, "this information was not material." *Id.*

Swafford complained that Mr. Harper told Swafford's jury that

his release date was sixty days away, when it was five years away. *Id.* at 14. He claimed that the State knew the testimony was false, and failed to correct it. *Id.* The district court said that even were this true, there was no reasonable possibility that the outcome would have been different. *Id.*

Further, "the prosecutor did reveal to the jury his efforts on behalf of Harper in exchange for Harper's truthful testimony." *Id.* at 20. Additionally, at deposition, defense counsel explored Mr. Harper's motivation for testifying. *Id.* at 21. The district court concluded that even if the reward information had been revealed to the jury, the result would not have been different. *Id.*

The district court rejected Swafford's claim that "all of the possible suspects in the murder" were not disclosed "despite the appropriate requests." *Id.* at 12. The court found "counsel did learn of numerous suspects during the deposition of . . . Lt. Bushdid." *Id.* at 13. The court concluded that "the 'other suspects' were not significant," and would not have affected the outcome of Swafford's trial. *Id.*

This Honorable Court issued a stay of execution. In May, 1991, Swafford filed a second Petition for Writ of Habeas Corpus in this Court. *Swafford v. Singletary,* 584 So. 2d 5 (Fla. 1991). This petition was also denied. *Id.* at 5. In November, 1991, he filed a second Rule 3.850 motion in the state trial court. *Swafford v. State,* 636 So. 2d 1309, 1310 (Fla. 1994). Thereafter,

on December 16, 1991, after briefing had been completed, the Eleventh Circuit Court of Appeals issued an order holding the appeal from the district court's denial of the habeas corpus petition in abeyance pending exhaustion of state court remedies.

Swafford appealed the trial court's denial of his second 3.850 motion to the Florida Supreme Court. *Id.* at 1311. He also filed "a motion to relinquish jurisdiction and hold appeal in abeyance." *Id.* at 1310. He claimed to have new information indicating that trial counsel Ray Cass was a special deputy sheriff and alleged impermissible *ex parte* communications between the State and the trial judge. *Id.* This Court relinquished the case to the lower court for hearing. *Id.* After the hearing, the trial court again denied relief, and this Court affirmed. *Id.* at 1310-1311. During the pendency of Swafford's motion for rehearing, he filed an alleged affidavit of Michael Lestz, dated April 30, 1994, which he "claimed corroborated other evidence the State failed to disclose in violation of *Brady*." *Swafford,* 679 So. 2d at 738. This Court denied rehearing and refused to relinquish the case for a hearing. *Id.* at 739.

On June 13, 1994, Swafford filed a third 3.850 motion in the state trial court. *Id.* The sole basis of this motion was "that Lestz's affidavit constituted newly discovered evidence which, in conjunction with the evidence previously withheld by the State, proved a *Brady* violation and . . . Swafford's innocence." *Id.* The

trial court summarily denied the motion. *Id.*

On appeal, this Court again rejected Swafford's *Brady* claim, emphasizing that "the State was not required to provide defense counsel every piece of information regarding other suspects." *Id.* However, since the alleged affidavit of Mr. Lestz placed Mr. Walsh in possession of a gun the same type as the murder weapon at the place and "at or near the time that the murder weapon was discovered" an evidentiary hearing was deemed appropriate. *Id.*

> We specifically hold, however, that our acceptance of Swafford's claim in this regard does not mean Lestz's statement is newly discovered evidence as a matter of law. Rather, Swafford's newly discovered evidence claim remains to be factually tested at the evidentiary hearing. Accordingly, we direct the trial court on remand to determine whether Swafford has demonstrated as a threshold requirement that his untimely and successive motion for postconviction relief was filed within two years of the time when Lestz's statement could have been discovered through the exercise of due diligence. . . . If the trial court determines that Lestz's statement is newly discovered evidence, it must then determine whether the statement, in conjunction with the evidence introduced in Swafford's first rule 3.850 motion and the evidence introduced at trial, would have probably produced an acquittal.

Id.

The evidentiary hearing was held before the Honorable R. Michael Hutcheson on February 6-7, 1997. (T 6).[1] Judge Hutcheson

[1]"T" refers to the transcript of the evidentiary hearing held on February 6-7, 1997.

entered an order denying Swafford's third Rule 3.850 motion on October 21, 1997. (R 282-288).[2] Swafford filed an untimely motion for rehearing on November 10, 1997. (R 290-304). That motion was denied on December 5, 1997. (R 311-312). Swafford filed an untimely Notice of Appeal on January 6, 1998. (R 311-312). The State filed a Motion to Dismiss the case for lack of jurisdiction based on the untimely filing of the Notice of Appeal. That motion was denied by order dated January 26, 1999.

Statement of the Facts:

A. Statement of the Underlying Crime:

The facts of the crime for which Swafford was convicted and sentenced to death are summarized in this Honorable Court's opinion on direct appeal as follows:

> The evidence showed that on the morning of Sunday, February 14, 1982, the victim 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

[2]"R" refers to the record on appeal in the third (current) Rule 3.850 proceeding.

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.

State's witness Patricia Atwell, a dancer at a bar called the Shingle Shack, 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 traveling 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.

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 the expectation of receiving some drugs. Swafford displayed a gun and got the money back. The police were called, and Swafford deposited the gun in a trash can in one of the restrooms. 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 had the gun for some time. 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. Ernest Johnson told of an incident that took place about two months after this murder. After meeting Swafford at an auto race track, Johnson accompanied him to his brother's house. When leaving the brother's house, Swafford suggested to Johnson that they "go get some women" or made a statement to that effect. Johnson testified as follows concerning what happened then:

> Q. Okay. What happened then? What was said by the Defendant?
>
> A. He just asked me if I wanted to go get some girl and I said yeah.
>
> Q. And then what took place?
>
> A. We got in--he asked me if I wanted to take my truck and I said no, so we went in his car.

All right. We went and got a six-pack of beer and started riding. And he said, do you want to get a girl, and I said yeah, where do you want to get one, or something like that. He said, I'll get one.

So, as we was driving, I said, you know, where are you going to get her at. He said, I'll get her. He said--he said, you won't have to worry about nothing the way I'm going to get her, or he put it in that way. And he said--he said, we'll get one and we'll do anything we want to her. And he said, you won't have to worry about it because we won't get caught.

So, I said, how are you going to do that. And he said, we'll do anything we want to and I'll shoot her.

So, he said if--you know, he said that he'd get rid of her, he'd waste her, and he said, I'll shoot her in the head.

I said, man, you're crazy. He said, no, I'll shoot her in the head twice and I'll make damn good and sure

> that she's, you know, she's dead. He said, there won't be no witnesses.
>
> So, I asked him, I said, man, don't--you know, don't that bother you. And he said, it does for a while, you know, you just get used to it.
>
> Johnson then 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.
>
> The jury found Swafford guilty of first-degree murder and sexual battery and recommended a sentence of death. The trial court then sentenced Swafford to death for the first-degree murder.

Swafford v. State, 533 So.2d 270, 271-273 (Fla. 1988).

B. Successive Rule 3.850 Motion:

The evidentiary hearing was held on February 6 and 7, 1997 before the Honorable R. Michael Hutcheson, Circuit Judge of the Seventh Judicial Circuit, pursuant to this Honorable Court's remand in *Swafford v. State*, 679 So.2d 736 (Fla. 1996). This Court directed:

> [T]he trial court on remand to determine whether Swafford has demonstrated as a threshold requirement that his untimely and successive motion for postconviction relief was filed within two years of the time when Lestz's statement could have been discovered through the exercise of due diligence. [citations omitted]. If the trial court determines that Lestz's statement is newly discovered evidence, it must then determine whether the statement, in conjunction with the evidence introduced in conjunction with the evidence introduced in Swafford's first rule 3.850 motion and the evidence introduced at trial, would have probably produced an acquittal.

Swafford, 679 So.2d at 739.

Swafford's first witness was Walter Levi. (T 24). On Sunday, February 14, 1982, the day of the Daytona 500, he was in a motel room in Daytona Beach with James Walsh. (T 24-25). Mr. Walsh left with Michael Lestz at "5:00, 5:30, 6:00 maybe."[3] (T 25). The men "showed up between twelve and one o'clock" that afternoon. (T 50-51).

Mr. Levi met Mr. Lestz, "an acquaintance of Mr. Walsh's," in Daytona Beach approximately a "[w]eek or two" before February 14, 1982. (T 38). Mr. Lestz never stayed with Mr. Levi and Mr. Walsh, although Mr. Levi saw him most every day during the two week period. (T 39). During that period, Mr. Walsh dropped Mr. Levi and Mr. Lestz off at a laundromat "four, five, six. I don't remember" times and told them he was going to buy dope. (T 40). Mr. Walsh showed the men the dope, "a narcotic," upon his return. (T 40). "[N]umerous times," Mr. Levi saw Mr. Walsh "mixed it up on the spoon and shot it in his arm." (T 41).

Mr. Levi was in "Loxahatchee Prison" when he gave the August 25, 1982 statement to the police. (T 52). Right after being released from the prison where he was when he gave his August 25, 1982 statement to Detective Buscher, Mr. Levi "moved back to

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[3]Mr. Levi said that he could not remember "exact times" and his estimate of the time at which Mr. Walsh left the motel room on the 14th was based on what he had read in the police reports. (T 44).

Illinois" to the address he had been living at prior to incarceration. (T 37). Mr. Levi "moved to Michigan in the latter part of '90, first part of '91." (T 53). He lived at the same address in Michigan until November, 1996. (T 53-54).

Mr. Levi was contacted by collateral counsel's investigator Michael Chavis in 1994. (T 36-37). Mr. Chavis obtained his address by contacting Mr. Levi's mother in Illinois. (T 54). His mother had lived at the same address in Illinois from approximately December, 1990 to the present (February 6, 1997). (T 55). She had been at that address from at least mid 1991. (T 55).

Mr. Levi said that he had a driver's license and had had "[t]his particular one five, six years." (T 51). He added that he had had a driver's license "[m]ost of my life. Since I turned age." (T 51). Mr. Levi had had licenses in five states, and at the time of the murder, he most likely had a Florida license, although he "could have had an Illinois license." (T 51-52). Mr. Levi had a Florida license when he was living in Florida and a Michigan license when he was living in Michigan. (T 52). He also had a prison ID number and had been in prisons in Florida and Illinois. (T 53).

Mr. Levi knew Mr. Walsh's wife's residence. (T 61). He "knew how to get a hold of his wife." (T 61). At some point, Mr. Walsh was in the process of getting a divorce. (T 61).

Swafford's next witness was Michael Lestz. (T 63). For

"[a]bout three months" prior to February 14, 1982, he lived in the Daytona Beach area, Orlando, or Ocala. (T 88). Mr. Lestz maintained an address at 12 South Oak Street, Du Quoin, Illinois, which he had "off and on for like five or six years." (T 96, 97). That address was listed on his Illinois driver's license, and it was his correct address prior to his incarceration in the federal prison in September, 1982. (T 69, 89, 90, 95-96). He was released therefrom on December 3, 1984, placed in his brother's "care,"[4] and "remanded to the Seventh District of Illinois Probation Department." (T 79, 90, 91). The federal prison authorities "knew where I was at." (T 91-92).

Mr. Lestz lived in a trailer "on Route 51 in Elkville," Illinois, a small town of "about a hundred and four people" in 1990.[5] (T 78, 92). This residence was "[s]even miles" from the Oak Street address. (T 101). He lived at that address until "roughly June or July of 1985." (T 93). Thereafter, he moved to a home "[a]bout three" miles away, located at "Rural Route 1, Hallidayboro, Illinois," which was a "small town" "[j]ust on the

[4]Lestz's brother was his "sponsor." (T 91). Lestz had asked his brother not to indiscriminately give out his "whereabouts." (T 80, 126). However, it was Lestz's opinion that the federal authorities had his brother's address. (T 98). Further, his brother's correct address appeared on Lestz's car loans and a business loan; he was Lestz's "guarantor." (T 100, 101, 104).

[5]"Now there are about eight hundred there." (T 78).

outskirts of" Elkville.[6] (T 93). He lived there with his wife and daughter continuously "until today . . .." (T 93, 105).

Mr. Lestz's federal probation officer, Bruce Chambers, was "in Benton, which is a town close by," and he knew where Mr. Lestz lived. (T 92). Mr. Lestz reported to Mr. Chambers "every week." (T 92). Indeed, after his probation ended, Mr. Lestz continued to have contact with Mr. Chambers. (T 124).

After he was released from federal prison, Mr. Lestz had some motor vehicles titled in his name. (T 100). Some of those titles bore his correct address. (T 100).

Mr. Lestz owns and operates a "[p]est control" business and has done so "[s]ince the time I got out of prison last," i.e., December 3, 1984. (T 102). Mr. Chambers likely knew that he ran that business as the two men had contact "[s]everal times" in the years after Lestz successfully completed his parole. (T 124, 125).

Swafford introduced the Volusia County Sheriff's Office [hereinafter "VCSO"] reports into evidence. Included thereon is:

July 26, 1982 VCSO Report:

> LESTZ gave an address of #12 South Oak Street in Duquoin, Illinois, Zip Code is 62832. LESTZ indicated that he could be reached at telephone number Area Code 618-542-4804.

Defendant's Exhibit 6 at 1.

January 31, 1983 VCSO Report:

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[6]This address was on his driver's license "[i]n 1993." (T 94-95).

> It was learned by Inv. Buscher that LESTZ was at that time incarcerated in the FEDERAL PRISON CAMP, U.S. Penitentiary, Marion, Illinois, under inmate number 02997-010, telephone: 618/964-1441, Ext. 229.

Defendant's Exhibit 5 at 3.

According to Mr. Lestz, on the morning of February 14, 1982, James Walsh "dropped me off of (sic) a laundromat and came back about five hours later to pick me up." (T 63). It was "[a]bout 6:00 in the morning." (T 64). Mr. Walsh, a drug addict, told Mr. Lestz he was being dropped off because "he needed the vehicle to go purchase some drugs and I wasn't allowed to be there." (T 64, 65). He did not recall a Fina station in the vicinity. (T 65).

Mr. Walsh returned "around 10:30, eleven o'clock." (T 65). He seemed "[p]retty nervous, sweaty. He was real hyper. I thought it was something to do with the drugs." (T 65).

Later, "[t]hat evening he wanted me to take him to some different bars and see if he could sell the guns." (T 65). Mr. Lestz recalled the name of only one bar, "the Shark Lounge." (T 65). Defense Counsel McClain then suggested "the Shingle Shack," (T 65), and when the State's objection was sustained, counsel offered "an affidavit of Michael Eugene Lestz" which he showed to Mr. Lestz. (T 68). He asked his witness whether that document refreshed his recollection of the Shingle Shack as one of the bars he took Mr. Walsh to on the night of the 14th. (T 68). Mr. Lestz responded: "No." (T 68). Mr. Lestz said that he "dropped him off

on the strip known as Atlantic Avenue in Daytona. He seemed at that point to be relieved . . .." (T 68). He did not know whether Mr. Walsh still had the guns at the end of the evening. (T 68). He did not see him dispose of any guns, and he did not know whether he had disposed of any guns. (T 120). Further, even assuming that he had disposed of guns, Mr. Lestz did not know where he had disposed of them. (T 120).

Mr. Lestz recalled having been interviewed by law enforcement officers twice regarding the events of February 14, 1982. (T 69). He said that he did not tell them the truth. (T 70).

Mr. Lestz said that Mr. Walsh "was arrested for assaulting me." (T 72). He claimed that Mr. Walsh "pointed a pistol at me" and eventually "slapped me in the middle of the forehead with that pistol." (T 72). He added that Mr. Walsh "burned me several times on the arm with a cigarette," and threatened to kill him by shooting him in the head with the gun. (T 72).

Mr. Lestz testified that the affidavit he signed was prepared by CCR. (T 107). It was **not** admitted into evidence. (T 136).

Sheriff's Investigator, Bernard E. Buscher testified. He concluded his investigation without an arrest of Mr. Walsh because "[t]here was no evidence to support it." (T 154).

Swafford's next witness was veteran Public Defender Howard Pearl who worked with Ray Cass on Swafford's case throughout the discovery process. (T 171-172). He and Mr. Cass "took it upon

ourselves to go to the city of Ormond Beach Police Department and ask them if they had any additional files or evidence. And they turned over to us a rather large package of work that they had done." (T 173). He acknowledged that he and Mr. Cass could have done the same thing with the Volusia County Sheriff's Office. (T 207). Mr. Pearl added that Prosecutor White was an "honest man" and upon request, "[w]hatever he had he would turn over."[7] (T 207).

Mr. Pearl talked to Witness Seiler at length. (T 180). Mr. Seiler indicated that the man he saw at the Fina station was bearded, and "I knew that Mr. Swafford was not bearded, okay, so I knew there was a possibility of another suspect."[8] (T 180).

Mr. Pearl said that he "had heard during the . . . pretrial discovery . . . that Mr. Harper was asking for compensation as well as some slack because he wanted to get out of prison." (T 184). He claimed not to have known "about Mr. Tanner and his involvement." (T 185). However, he knew that Prosecutor White was attempting to help Mr. Harper with his prison situation because he believed Mr. Harper to be "an important witness against Mr. Swafford." (T 192). At the hearing, Mr. Pearl testified: "I remember Gene White certainly dealing with it. I remember that Mr.

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[7]Further, Mr. Pearl had an "extremely good" relationship with the relevant law enforcement officers. (T 208).

[8]He had no way of knowing whether Swafford was bearded at the time of the murder; it was just that "I never saw him bearded." (T 200).

Harper was certainly in the case as an informant or witness for the State," and "he was looking for some monetary compensation in return for his services." (T 192, 193). Mr. Pearl acknowledged that he "could have asked him [Mr. Harper} anything," including about his motivations for testifying against Swafford, during the deposition which he took from Mr. Harper. (T 196-197).

Mr. Pearl disclosed that the defense trial theory was that Swafford was "not guilty." (T 187). This strategy was based, in part, on witnesses at the Shingle Shack; one allegedly claimed that she saw "someone fleeing the police had run into the women's restroom" and another said "a person trying to flee the police ran into the men's restroom." (T 201-202). Mr Pearl added: "And from that I probably -- . . . believe more than I should."[9] *Id.*

On recross, Mr. Pearl testified that the defense "accepted . . . as true" that Swafford was in the Shingle Shack on the night of February 14, 1982. (T 216). He conceded that given that Swafford was there, the fact that the gun belonging to Swafford was found in one trash can versus another was significant only "because there's a basket that hadn't been looked at." (T 216).

Regarding locating Mr. Lestz, Mr. Pearl testified that if he had known that Mr. Lestz had been in a federal prison in Illinois, he "would have inquired of the federal correctional people, [and]

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[9]For example, there was no testimony that **different** persons were seen going into the separate restrooms.

the Department of Justice, to determine his present whereabouts" and learn "his background." (T 220). Given that the police report contained an address for the prison Lestz was in, and the prison authorities had an address where Lestz had gone upon release, and that while on probation, Mr. Lestz had moved only three miles from that address, Mr. Pearl opined that it would not have been difficult to locate Mr. Lestz. (T 223-226).

Moreover, since Mr. Lestz had been released from federal prison into the custody of his brother, he certainly would have attempted to contact the brother. (T 226). Mr. McClain asked: "If the brother had been instructed by Mr. Lestz not to tell anybody where he was --" Mr. Pearl interjected: "I would have choked him until he told me." (T 227). Mr. McClain pressed: "What if Mr. Lestz was deliberately hiding because he was afraid . . . and had instructed his family and friends in that regard?" (T 227). Mr. Pearl responded: "Mr. McClain, all I can tell you is, somebody would have found him. Somebody did find him. . . . So he was findable." (T 227). He added: "[I] found a man who was hiding and I found him by mail." (T 228). Mr. Pearl also said that if "a professional outfit" was hired to find Mr. Lestz, it should be one "up there" near the address to which Mr. Lestz had moved after leaving federal prison. (T 229).

Swafford's next witness was trial counsel, Raymond Cass, Jr. (T 231). He said that he and Mr. Pearl "would counsel with each

other," although only one of them would try a given case; it was his responsibility to try Swafford's case. (T 232). He and Mr. Pearl "had it a year and a half or two before we got to trial." (T 232). Mr. Cass admitted that a defense as to the guilt/innocence phase looked "[s]omewhat bleak." (T 234).

Mr. Cass said that he did not get any written communication between Prosecutor White and Mr. Harper. (T 241). He claimed he learned of the alleged reward "from John Tanner," and speculated that occurred "in January or February" of 1986. (T 245-246). He "then wrote to Mr. Swafford telling him what I had found." (T 246). Mr. Cass said that he had intended to "look into the possibility of some kind of post-conviction relief motion" regarding the matter, (T 255), but never filed such a motion. (T 304).

Mr. Cass spoke with Prosecutor White well before trial and Mr. White told him that there were other suspects besides Swafford. (T 252). He said that with the information regarding Mr. Walsh, Mr. Levi, and Mr. Lestz, he "would have started on a background" on them. (T 255-256). He "would have asked . . . Mr. White to get the wrap [sic] sheets for me . . . [a]nd also any other local police reports."[10] (T 256). The rap sheets would give him the criminal histories of the individuals involved and other background information such as addresses. (T 257). Mr. Cass said that it was

[10]Mr. White "would, and has" gotten such information for Mr. Cass. (T 259). Mr. Cass added that he has "known Gene for a long time" and "had found him to be the soul of honor." (T 262).

unlikely that he could have gotten most of the subject information into evidence at trial. (T 265-267).

Regarding the prosecution's alleged deal with Mr. Harper, Mr. Cass said that he was "aware prior to trial that Mr. White was attempting to help Mr. Harper with regard to his federal prison sentence." (T 269). During cross-examination at trial, Mr. Cass elicited testimony from Mr. Harper that Mr. Harper had written "to two different lawyers and things before then [reporting his knowledge of Swafford's involvement in Ms. Rucker's murder] asking them what I should do, because I thought I had information." (T 270). Mr. Harper testified: "I wrote to a lawyer here in Daytona, a John Tanner. I even wrote to my public defender." (T 270). Responding to further questions from Mr. Cass on the issue, Mr. Harper said that his letters to Mr. Tanner were written "in late January or February of '83 . . .." (T 271). Mr. Cass explained that he did not delve into this information at Mr. Harper's deposition because "[S]ometimes it's a little better if you reserve it for the trial." (T 272-273). Upon being asked: "So are you suggesting that you made a strategic decision not to ask in deposition?" (T 273). Mr. Cass responded: "I believe so. I think Howard [Pearl] and I both had a feeling about that." (T 273). He further testified:

> Q So, you, . . . were suspicious that he was getting a deal or attempting to get a deal, but you decided that strategically it was better to kind of catch him off guard about it, rather than give him a chance to think

about it and get his answer all ready?

. . . [T]hat was your strategy?

A Yes, sir, it was.

(T 273).[11] He also said that **at trial**, if he had wanted to delve into the "cooperation that he may have been attempting to get and also regarding what Mr. Tanner may have done for him," he could have done so, "depending on the strategy." (T 276).

Mr. Cass testified that at trial, Prosecutor White made it clear on redirect that he had told Mr. Harper "if you cooperated and tell the truth and be honest, I will try to continue to get you some favorable treatment as far as maybe an early release period." (T 274). Further, at Mr. Harper's May 21, 1984 deposition, Mr. White gave Mr. Cass and Mr. Pearl a copy of a letter from Mr. Harper to Prosecutor White regarding his potential testimony and favorable treatment by the State. (T 279). Finally, on recross, Mr. Cass opined that the evidence brought out at trial of the deal to gain his freedom earlier was stronger motivation evidence than that of a potential reward would have been. (T 291).

In fact, Mr. Cass testified that he did make a "strategic

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[11]On redirect, defense counsel attempted to impeach his own witness. Counsel asked: "There was testimony that you made a strategic decision not to discover the deal. In light of the depositions, is that accurate?" Mr. Cass answered: "No, it's not." (T 282). However, Mr. Cass went on to explain that the strategic decision made at deposition was "not to make more inquiries with regards to that" letter to Mr. White from Mr. Harper. (T 302).

decision not to make more inquiries with regards to that [letter to Mr. White attached to deposition] . . .." (T 302). He added that he could have ascertained Mr. Harper's release date from the information provided in the letter, but he "chose not to." (T 303).

Swafford's next witness was former CCR lawyer, Jerome Nickerson, Jr. (T 325). Mr. Nickerson "was lead counsel for Mr. Swafford's case when he originally received the first [death] warrant." (T 326). The warrant was signed on September 7, 1990, and CCR had done no work until then. (T 326, 327).

Mr. Nickerson had an assistant lawyer working with him on Swafford's case, Mr. Shabazz, and he also had the assistance of investigators; one of whom was Mr. Harvil. (T 329, 340). Later, Mr. Nickerson had the assistance of a second attorney. (T 340).

Mr. Nickerson recalled seeing materials referencing Mr. Walsh and "two other individuals." (T 334, 342). CCR "had traced one guy . . . to Arkansas . . .." (T 342). He pled claims regarding Mr. Walsh in the first Rule 3.850 motion as a *Brady* issue. (T 335). Mr. Nickerson left CCR when Swafford's death warrant was stayed by the federal circuit court. (T 348, 354). At that time, Mr. Shabazz took over Swafford's case. (T 360).

Regarding locating potential witnesses or suspects, Mr. Nickerson testified that if a document, including police reports

> leads me out of state, if it turns out that there's a connection with the other state, I'm going to go to the other state, I'm going to go to Arkansas. I'm going to talk to the investigator who made the arrest and see what

> I can get there. I'm going to try and access that state's public records files.

(T 368, 369). Regarding locating Mr. Lestz specifically, Mr. Nickerson said that the first thing to do would have been to "call the federal locator service, Department of Justice." (T 370). He also said he would have called the prison itself; he has located prisoners that way. (T 371). He would also "try and find out where his family is from, where does this guy hang out . . . he's going to try and go back to what he knows or try and find associates . . .." (T 371). Mr. Nickerson testified that if the person being sought has "a 9:00 to 5:00" or has "gotten a loan from GMAC financing. Things like that make it very, very easy to find people in the country." (T 375). Further, Mr. Nickerson said that if he had been looking for Mr. Lestz, he "would have gone to the federal probation officer . . .." (T 376). Also, he "would attempt to access state of Illinois records, driver's license records, things like that." (T 377). He would also have gone to the old address on the police report and have tried to find either Mr. Lestz or someone who knew something about him that would help put him in contact with Mr. Lestz. (T 377).

Mr. Nickerson had "numerous letters . . . between Mr. Gene White . . . and Roger Harper" at the time he did the initial Rule 3.850 motion. (T 384, 386). Although Mr. Nickerson said that he did not believe he had seen the letter indicating that Mr. Harper received a reward for information provided in Swafford's case, (T

389), he admitted, when confronted with the initial 3.850 motion he wrote that he had information regarding the reward and "may have done it through the document you showed me . . .." (T 390).

Mr. Nickerson went to Tennessee twice in preparing the first 3.850 motion. (T 390). He was looking for relatives of Swafford and "also looking for Harper . . . and what I could get on him." (T 391). Mr. Nickerson claimed to have "absolutely no recollection of having Mr. Lestz's address . . .." (T 401).

Swafford next called another of his former CCR attorneys, Harun Shabazz, who "was employed at CCR from August of 1990 to January of . . . 1997." (T 414-415). He began working with Mr. Nickerson on Swafford's case "in September of 1990." (T 416, 424). There were three attorneys, and at least, one investigator working on the case. (T 426). "[T]owards the end of September, first part of October," the information regarding Mr. Lestz, Levi, and Walsh was received. (T 426, 427). At that point, Mr. Shabazz and Attorney Phillips were "assigned to the whole issue of Lestz, Levi and Walsh that became paramount in the case." (T 426).

Mr. Shabazz was "trying to find certain individuals" including "Mr. Lestz, Levi and Walsh." (T 418). Attempting to locate these men, he "went through the Chapter 119 public records material, which consisted of several police reports" and "sifted through there for names, addresses, telephone numbers and the like." (T 418). He claimed to have "contacted the state and federal prison

system[s]," and the federal officials "told me that once they release the individual, they didn't give any information how you could contact an individual, telephone number or address and things of that sort." (T 419). However, he later admitted that he "most likely would have told the investigator to do it for me. So I don't know if I ever personally had called the prison, federal prison system. But I know it's been done on other cases."[12] (T 431). He also admitted that he had seen the police reports which "in the case of Lestz we also ran across an address or . . . telephone number" and got other information such as birth dates, race and social security numbers. (T 419-420). Mr. Shabazz did not recall "making a phone call to see if he was in the parole and probation system." (T 433). He said that "after . . . making that initial . . . attempt to locate these people, I don't think that I made another attempt until the summer of '91." (T 433).

Mr. Shabazz had seen the police report containing the Oak Street, Du Quoin, Illinois address for Mr. Lestz. (T 434). He "thought" that he "called the telephone number . . . [a]nd this was 1990." (T 435). He said: "I believe someone answered the phone. . . [a]nd they said no one by that name lived there." (T 435). He said that he contacted the Department of Motor Vehicles in Tallahassee. (T 435, 436). He made no such attempt in the State

[12]Still later, however, Mr. Shabazz changed his testimony again, claiming that he personally called the federal prison. (T 447).

of Illinois, or any state other than Florida. (T 436, 437).

Anyone from CCR "could put in a request for a search" by Global. (T 421). Mr. Shabazz claimed to have made a request for such a search "in the spring of '91," but later changed the date to "June or July of that summer." (T 439). He claimed that "Global was contacted, you know, two or three times before we actually got any results from Global." (T 440). Mr. Shabazz "didn't think that there was anything else that we could do" to locate Mr. Lestz. (T 422). He made no attempts to locate Mr. Lestz, Levi, or Walsh after contacting Global in June or July of 1991. (T 442).

Mr. Shabazz became lead counsel when Mr. Nickerson left; he was given two other attorneys and two investigators to help him with the case. (T 417, 418). He conceded that beginning in January, 1991, "things got better for CCR in terms of their ability to effectively represent their clients based on the fact that the severe warrant policy . . . was no longer being followed." (T 445).

Mr. Shabazz filed Swafford's second Rule 3.850 motion in "November of 1991." (T 442). Thereafter Mike Chavis was assigned to the case. (T 422). In the "spring of 1994," Mr. Chavis reported that he had located Mr. Lestz. (T 423).

Swafford next presented CCR Investigator, Michael Chavis, (T 451), who testified that he was assigned to Swafford's case in "like October of '92." (T 452). He took over from Mr. Harvil

"[w]ho was the previous investigator" as well as "the initial investigator." (T 467). He "went through all of the material . . . on Mr. Swafford's case," including "ROAs, 119 requests . . .." (T 452). Mr. Chavis claimed to have contacted both the State of Florida's prison system and the federal prison system in Illinois regarding locating Mr. Lestz, Levi, and Walsh. (T 453, 457).

Mr. Chavis said that he contacted Global for the first time in "early '93." (T 457). In the "first part of '94," he contacted Global again.[13] (T 458). He gave Global the same information." (T 458). He got an address for Mr. Lestz and Mr. Levi. (T 459).

Mr. Chavis went to the address Global gave for Mr. Levi and discovered that he was not at that address. (T 461). The resident was Mr. Levi's mother, who "told me she had no idea where he was." (T 461). He claimed to have "contacted Global again" and got "another address." (T 461, 475). This one was valid. (T 475).

The address received from Global regarding Mr. Lestz "was correct." (T 461). Within two to three weeks of getting that information, Mr. Chavis went "to talk to Mr. Lestz" in "around April of '94." (T 461, 462).

Regarding his own efforts to find Mr. Lestz, Mr. Chavis said that he called the federal prison in Marion, Illinois, and "all I

[13]He also testified that based upon his review of CCR's records, Global had been contacted in reference to locating Mr. Lestz in 1991. (T 456-457). Global refuted that CCR had made three such inquiries. (T 594).

could get" was that "[h]e was no longer there." (T 469-470). He claimed to have checked the "Department of Motor Vehicles to (sic) almost every state, if not every state," including Illinois. (T 471, 472). He claimed that he did not get an address for either Mr. Lestz or Mr. Levi. (T 473).

The State called Captain Randall C. Burnsed, one of the investigators involved in Brenda Rucker's murder. (T 522, 523). He testified that Mr. Lestz was "a suspect in the homicide." (T 527). Indeed, Lestz, Levi, and Walsh "tended to put the blame on the other two . . .." (T 528).

Mr. Lestz did not appear to know anything about the Rucker homicide during the early phases of the initial interview. (T 529). Rather, he claimed that Mr. Walsh had done "[a] lot of property crimes" and eventually claimed that he "had killed a person, a male." (T 529). It was only "after Investigator Buscher had laid the [Rucker] homicide out to him . . . that he had started talking about that . . .." (T 529). Prior to that, Mr. Lestz had not indicated that Mr. Walsh had anything to do with the Rucker murder, or even the killing of a woman. (T 529).

At neither interview did Mr. Lestz indicate that Mr. Walsh had "attempted to dispose of guns of any kind at the Shingle Shack Bar on February 14th of 1982." (T 530). To the contrary, he indicated that Mr. Walsh had tried to "get rid of at least two guns on or about that time in the Daytona Beach area . . . to an individual by

the name of Orlando Tony." (T 531). This occurred at "Rudy's Post-time Lounge, which is located in the vicinity of the Daytona Speedway on Highway 92." (T 531). Mr. Lestz indicated that there was only the one bar that they went to for this purpose. (T 565). Neither did the description of the guns Mr. Lestz gave the officers at the time of the initial interviews match the murder weapon, although there was some mention of a thirty-eight. (T 532, 563-564). The initial interview was given after "Lestz through his attorney contacted Agent Baker . . . and informed Baker that Lestz would like to deal with federal authorities for information which he possessed on Walsh." (T 536, 537).

Due to "some problems that Mr. Lestz had with the polygraph exam he took after the initial interview," Captain Burnsed and Investigator Buscher went to Illinois and reinterviewed Mr. Lestz. (T 538). The "problems" seemed to indicate that Mr. Lestz and/or Mr. Walsh may have been involved in the Rucker homicide. (T 538, 558). They wanted to confront Mr. Lestz with the questions on which deception was indicated. (T 538, 553).

At the second interview, Mr. Lestz maintained that he had told the truth the first time, yet he changed his version of events several times during the interview. (T 539, 540). Having observed Mr. Lestz's behavior and considering his psychological condition, Captain Burnsed formed the impression that "he was a very weird individual . . .. I didn't know what to believe . . . in any of

the information that he provided." (T 539).

Although an affidavit was executed and a search warrant obtained, none of the evidence from the Lestz/Walsh vehicle was linked to the crime scene, the victim's body or clothing "or anything. There was just nothing . . .." (T 541, 542). Moreover, the "latent fingerprints developed at the crime scene were compared with all three of the individuals [Lestz, Walsh & Levi] major case prints" without a match. (T 542). Having "nothing that we could show to link [them] with the homicide," the investigation of those suspects ended. (T 542).

Eventually, Roger Harper contacted the authorities and said that "he had information that he thought . . . was relevant to the homicide of Brenda Rucker." (T 543). This lead was followed up on exactly as the lead regarding Mr. Walsh had been. (T 570). "The difference being the lead . . . from Roger Harper led us to the gun that was positively identified as the murder weapon that killed Brenda Rucker." (T 570).

Beginning with the first interview, Mr. Harper consistently told the officers that Swafford disposed of the murder weapon at the Shingle Shack. (T 570). Mr. Lestz never gave any information indicating that Mr. Walsh did, or might have, disposed of a gun at that location. (T 543).

Mr. Walsh denied Mr. Lestz's claims that he had committed any homicides, and essentially denied "all of the criminal activity."

(T 572-573). He suggested that the claims were a "figment of Lestz's imagination." (T 573). He opined that the burns on Mr. Lestz's body were self-inflicted, an opinion which Mr. Levi also held. (T 573, 292).

Investigator Buscher's report indicated that Mr. Lestz's attorney claimed that Mr. Lestz claimed that Mr. Walsh claimed to have murdered two white females. (T 574). When this claim was made, Mr. Lestz's attorney was trying to get favorable treatment on Mr. Lestz's federal sentences in exchange for information on Mr. Walsh. (Defendant's Exhibit 3 at 1). However, when Investigator Buscher personally interviewed Mr. Lestz, "he never referred to the killing of the female, he referred to the killing of a white male . . .." (T 581). It was clear that "the information regarding a white female actually came from Lestz' attorney . . .." (T 585). "[T]he Rucker homicide itself did not come up until Investigator Buscher brought it up;" moreover, "at that time Lestz denied having any knowledge of that . . .." (T 585). Finally, the captain testified that although both Mr. Lestz and Mr. Levi placed Mr. Walsh in the vicinity of the murder at the time thereof, "[t]here was conflicting information as to what both of them had said." (T 583, 584).

State Attorney Investigator, Deborah Reith Champion, phoned the Marion, Illinois federal penitentiary using the phone number "listed in the first paragraph, 618-964-1441." (T 588). She gave

a man in the Records Department Mr. Lestz's name and inmate number (from the police report), and inquired as to Mr. Lestz's whereabouts. (T 588). She was told that Mr. Lestz was "no longer there" and "that his files were transferred to Arkansas." (T 588-589). She was given a number for the U.S. Probation Office for the Western District of Arkansas. (T 589-590). She received all of this information in "not even two minutes." (T 589).

Ms. Champion called the Arkansas number and was told that Mr. Lestz's files had been transferred to the Southern District of Illinois. (T 590). She was given "two phone numbers for that." (T 590). This call also took "two minutes." (T 590).

Ms. Champion then called the number for the Southern District of Illinois and spoke with a probation officer, Jon Koechner. (T 590). He was readily familiar with Mr. Lestz and "explained about him a bit to me." (T 590). He then told her the type of information relative to locating Mr. Lestz which would be contained in his file. (T 591). That included:

> [H]is employment information, any kind of home address, employment address, and any kind of family that he had, . . ., any kind of work, . . ., as far as medical anything like that that (sic) would have been in the file.

(T 591).

Mr. Koechner said that the file was no longer on the premises; it was stored in "their database outside the state." (T 591). Ms. Champion inquired whether the information in the file would be

available to a defense attorney or an investigator. (T 592). Mr. Koechner indicated that it would, explaining that the procedure being used to obtain that information was to petition a federal judge for permission "to look at the file."[14] (T 592).

Ms. Champion also called Global Tracing Services in Seattle, Washington. (T 593). She spoke with John Spencer. (T 593). After checking Global's records, Mr. Spencer reported that there were only two inquiries made by Swafford's counsel - one in 1990 and the other in 1994. (T 594).

The trial judge's order denying the third Rule 3.850 motion after the evidentiary hearing made numerous factual findings on the issue of due diligence. Those include:

> [A]s of October 15, 1990, . . . the defendant's Capital Collateral counsel had information regarding Mr. Lestz and his contention regarding Mr. Walsh and Mr. Levi . . . which reasonably could have led to the discovery of Mr. Lestz's whereabouts back in the fall of 1990. . . . [A]s of October 15, 1990, the defendant was aware of the two (2) Volusia County Sheriff's Office supplemental reports . . . as they were raised as *Brady* violations in its (sic) first 3.850 motion . . .. Accordingly, this Court specifically finds that the defendant, through the exercise of due diligence, could have located Mr. Lestz and would have had until October 15, 1992, to file the instant 3.850 motion . . . rather than raising same in its June, 1994, third 3.850 motion. . ..
>
> Mr. Lestz testified . . . and this Court finds from his testimony that he was living in the same place over that

[14]She also testified that the process is not difficult. (T 592). However, Swafford's tardy objection to the hearsay nature of the question "about how easy or how difficult it is to go into federal court and to obtain that information" was sustained. (T 593).

two year time frame of October 15, 1990 through October 15, 1992. This Court finds . . . that the defendant's collateral counsel could have located Mr. Lestz within that two (2) year window . . .. Mr. Lestz had provided an address to the Sheriff's Office, which, if followed up, would have led to him living just seven (7) miles away in a very small town of 100 plus citizens. Further, this Court finds that had the defendant's collateral counsel followed up the information . . ., they could have learned the name of his Federal probation officer and the name of Lestz's brother and the address of Lestz while he was on probation and this Court finds that any of those leads would have led the defense to where Mr. Lestz was residing over that two (2) year time period in Elkville, Illinois, a town of approximately 104 people in 1990. . . . [T]his Court finds that had the defendant's collateral counsel followed up with the information contained in the two (2) Sheriffs supplemental reports referred to previously, they would have discovered that Mr. Lestz was living in a house approximately three (3) miles from Elkville, Illinois, they would have also discovered that his wife, daughter, and his brother all live in that same very small community and that Mr. Lestz owned and operated a pest control business there. They would have also discovered that Mr. Lestz's brother was well known in the community and had co-signed as a guarantor on Mr. Lestz's car and business loans.

The . . . trial counsel, Ray Cass, . . . testified that prosecutor White told him there had been other suspects, but they had been eliminated. . . . [P]rosecutor White gestured at several file boxes . . . and offered Mr. Cass the opportunity to go through Mr. White's files . . ., but Mr. Cass . . . declined to do so because of the amount of time involved . . .. This Court specifically finds that had . . . Cass, taken up prosecutor White's offer . . ., then the trial counsel, weeks before the start of the murder jury trial, would have discovered also those two (2) Sheriff (sic) reports . . ..

As this Court has found that the defendant has failed to meet the threshold requirement . . .. Although it is not necessary, this Court . . . finds that had the testimony of Mr. Lestz been presented to the jury that it would not have probably produced an acquittal.

(R 285-287).

SUMMARY OF THE ARGUMENTS

AUTHORIZED ISSUE:

The only issues properly before this Honorable Court are those authorized in the opinion remanding this case to the trial court for an evidentiary hearing, i.e., whether Mr. Lestz's alleged "new" statement is newly discovered evidence. Mr. Lestz's alleged "new" statement cannot be newly discovered evidence because it was not admitted into evidence. Neither was Mr. Lestz's evidentiary hearing testimony newly discovered evidence. Swafford has not carried his burden to establish the threshold requirement, i.e., that his third Rule 3.850 motion was filed within two years of the time the "new" statement could have been discovered if it had been pursued with due diligence. Mr. Lestz could have been located many years earlier by either trial or collateral counsel. Moreover, Swafford has failed to show that the alleged "new" evidence, together with the evidence introduced in the first Rule 3.850 motion and the trial evidence would have probably produced an acquittal. Having failed to establish either requirement for relief, muchless both, Swafford is entitled to no relief.

UNAUTHORIZED ISSUES:

The State objects to each of Swafford's five unauthorized claims, and submits that same are procedurally barred. In the alternative, the State asserts that each unauthorized issue is without merit.

Issue I:

The State's 1990 response to Swafford's first Rule 3.850 motion was not misleading. Mr. Walsh and company were investigated for months and were eventually discarded as suspects because there was no evidence to support further investigation. The failure to interview Mr. Levi a third time in no manner prejudiced Swafford. Although Swafford produced Mr. Levi at the evidentiary hearing, he presented nothing new which casts any doubt on the validity of Swafford's conviction. Any *Brady* and *Kyles* components to this claim are procedurally barred.

Issue II:

Swafford's *Brady* and *Kyles* claims are procedurally barred.

Issue III:

Swafford has failed to establish that the circuit court judge abused his discretion in deciding not to take judicial notice of the "Overton Commission Report" or the "Shevin Report." Swafford failed to authenticate the reports, and did not produce any evidence establishing that the reports fell within any of the statutory categories. Any claim that it was mandatory for the judge to take judicial notice of the reports was not made below, and therefore, is procedurally barred; it is also without merit. The content of the reports was subject to the rule prohibiting hearsay, and thus, could not be used as substantive evidence. In any event, any error was harmless.

Issue IV:

Swafford's claim that the rule relating to due diligence in connection with newly discovered evidence applies only to collateral counsel is procedurally barred because it was not raised below. It also lacks merit. Moreover, the issue is not whether collateral counsel used "reasonable steps to investigate" or "reasonably conducted a search for Mr. Lestz based on the information counsel had in 1990," but is that specified by this Court in the opinion on remand. Swafford has utterly failed to establish either the due diligence or prejudice components of the issue on remand.

Issue V:

Swafford's claim that the circuit court judge should have disqualified the entire State's Attorney's Office from handling the evidentiary hearing is without merit. He failed to establish any basis to disqualify the State Attorney, muchless his assistants. The State Attorney had no direct involvement (except as Swafford's witness on this issue) in the evidentiary hearing which was handled by an assistant. Swafford has not demonstrated that the trial judge abused his discretion in ruling that there was no basis for disqualification in this case.

ARGUMENT

The only issues before this Honorable Court are those specified in this Court's opinion on remand, to-wit:

> Whether Swafford has demonstrated as a threshold requirement that his untimely and successive motion for postconviction relief was filed within two years of the time when Lestz's statement could have been discovered through the exercise of due diligence. [citations omitted]. If the trial court determines that Lestz's statement is newly discovered evidence, it must then determine whether the statement, in conjunction with the evidence introduced in conjunction with the evidence introduced in Swafford's first rule 3.850 motion and the evidence introduced at trial, would have probably produced an acquittal.

Swafford, 679 So. 2d at 739. Very little of Swafford's initial brief addresses those issues. The State asserts that to the extent that Swafford has failed to brief and argue the issues this Court authorized, he has abandoned and/or waived any claims in regard to same.

Assuming *arguendo* that said claims are not waived, the State's position on the issue on remand follows:

Newly Discovered Evidence

Standard:

In his third Rule 3.850 motion, Swafford claims that the affidavit/statement of Michael Lestz constitutes newly discovered evidence of his innocence of the first degree murder for which he has been convicted and sentenced to death. For evidence to be newly discovered, it must have been "unknown by the trial court, by the party, or by counsel at the time of trial, and it must appear

that defendant or his counsel could not have known [of it] by the use of diligence." *Jones v. State*, 591 So. 2d 911, 916 (Fla. 1991)[quoting *Hallman v. State*, 371 So. 2d 482, 485 (Fla. 1979)]. Further, Even if there is newly discovered evidence, to merit relief, the new evidence must be so substantial that it would probably produce an acquittal on retrial. *Id.* at 911.

In the opinion remanding this claim for an evidentiary hearing on the newly discovered evidence issue, this Court held:

> [A]s a threshold requirement [Swafford must prove] that his untimely and successive motion for postconviction relief was filed within two years of the time when Lestz's statement could have been discovered through the exercise of due diligence. . . . **If** the trial court determines that Lestz's statement is newly discovered evidence, it must **then** determine whether the statement, in conjunction with the evidence introduced in Swafford's first rule 3.850 motion and the evidence introduced at trial, would have **probably** produced an acquittal.

(citations omitted) *Swafford v. State,* 679 So. 2d 736, 739 (Fla. 1996)(emphasis added). It was Swafford's burden to demonstrate that the Lestz evidence was newly discovered and, if so, that it was so substantial as to probably have produced his acquittal. He utterly failed to do so.

First, Mr. Lestz's alleged "new" statement - the "Lestz's affidavit" 679 So. 2d at 739 - cannot be newly discovered evidence because it was not admitted into evidence. (T 136). Mr. Lestz said that CCR prepared the document, and his testimony at the evidentiary hearing did not track the allegations in the affidavit.

Of particular importance is that the specific allegations in the affidavit on which the remand was based were not substantiated at the hearing. This Court specifically identified the part of the affidavit (alleged to have been that of Mr. Lestz) which underlies the remand, to-wit: "Lestz's statement [the affidavit] places Walsh at the Shingle Shack with the .38 caliber hand gun at or near the time that the murder weapon was discovered in that locale." 679 So. 2d at 736. Contrary to the allegation in the CCR-prepared affidavit, Mr. Lestz's testimony at the hearing does not place Mr. Walsh at the Shingle Shack "with the .38 caliber hand gun" at any time, muchless near the time that the murder weapon was discovered there. Moreover, his testimony does not even remotely suggest that Mr. Walsh actually <u>disposed</u> of the gun, or any gun, at the Shingle Shack. Rather, Mr. Lestz testified that he did not know if, or if so, where, Mr. Walsh disposed of any guns. (T 120). However, **if** Mr. Walsh disposed of a gun on the night in question, it most likely occurred at a bar on Atlantic Avenue and not at the Shingle Shack (which was located on U.S. 1): "He [Walsh] was pretty anxious . . . [a]nd . . . I dropped him off on the strip known as Atlantic Avenue in Daytona. He seemed at that point to be relieved . . .." (T 68). Thus, the "new" statement of Lestz does not establish the alleged fact on which the remand was based. Consequently, the relief Swafford seeks should be denied.

<u>Threshold Issue - Due Diligence</u>:

Assuming *arguendo* that neither the failure to obtain admission of the affidavit into evidence nor to establish the critical allegations contained in the affidavit at the evidentiary hearing ends this Court's consideration of this matter, Swafford must prove that the statement of Lestz given at the evidentiary hearing was newly discovered evidence. The threshold issue is:

> Whether Swafford has demonstrated . . . that his untimely and successive motion . . . was filed within two years of the time when Lestz's statement could have been discovered through the exercise of due diligence.

Swafford, 679 So. 2d at 739. Lestz's statement was established at the evidentiary hearing.[15] Relevant to the due diligence issue, he testified:

1) He maintained an address at 12 South Oak Street, Du Quoin, Illinois, which he had "off and on for like five or six years." (T 96, 97). That address was listed on his Illinois driver's license, and it was his correct address prior to his incarceration in the federal prison. (T 95-96).

2) He was imprisoned in September, 1982 in the "Marion Federal Penitentiary in Marion, Illinois," and was released on December 3, 1984. (T 69, 79, 89, 90). He was required to go back to his "point of conviction" which was "Arkansas," but shortly

[15]The Lestz affidavit was not admitted into evidence. (T 136). Thus, the only "statement of Lestz" is that given during his testimony at the evidentiary hearing.

thereafter, he was placed in his brother's "care"[16] and "remanded to the Seventh District of Illinois Probation Department." (T 91). The federal prison authorities "knew where I was at." (T 91-92).

3) He returned to his home and lived in a trailer "on Route 51, in Elkville," Illinois, a small town of "about a hundred and four people" in 1990. (T 78, 92). This residence was "[s]even miles" from the Oak Street address. (T 101). He lived at that address until "roughly June or July of 1985" when he moved to a home "[a]bout three" miles away, located at "Rural Route 1, Hallidayboro, Illinois," in a "small town" "[j]ust on the outskirts of" Elkville. (T 93). He lived there continuously "until today. . .." (T 93).

4) Federal Probation Officer Bruce Chambers was in "a town close by" and knew where Lestz lived. (T 92). Mr. Lestz reported to Mr. Chambers "every week." (T 92). Indeed, after his probation ended, Lestz continued to have contact with Mr. Chambers. (T 124).

5) After his release from federal prison, some motor vehicles were titled in Mr. Lestz's name. (T 100). Some of those titles bore his correct address. (T 100).

6) Mr. Lestz owns and operates a "[p]est control" business

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[16]Mr. Lestz's brother was his "sponsor." (T 91). Mr. Lestz indicated that the had asked his brother not to indiscriminately give out his "whereabouts." (T 80, 126). However, he opined that the federal authorities had his brother's address. (T 98). Further, his brother's correct address appeared on Lestz's car loans and a business loan; he was Mr. Lestz's "guarantor." (T 100, 101, 104).

and has done so "[s]ince the time I got out of prison last," i.e., December 3, 1984. (T 102). Mr. Chambers likely knew that Mr. Lestz ran that business as the two men had contact "[s]everal times" in the years after Mr. Lestz successfully completed his parole. (T 124, 125).

7) Mr. Lestz married in "'85 or '86" and lived with his wife and their daughter continuously "until this present time." (T 105).

The VCSO reports list the Oak Street address in Duquoin, Illinois, along with a telephone number for Mr. Lestz. (Defendant's Exhibit 6 at 1). Another report lists the prison where Mr. Lestz was incarcerated and gives his inmate number and a telephone number. (Defendant's Exhibit 5 at 3).

With that information, Investigator Champion was able to quickly find information which would have been sufficient to locate Mr. Lestz. This information was available to Swafford upon a proper request thereafter.

I. Trial Counsel

Despite having served a standard discovery demand, Swafford's trial attorneys, Howard Pearl and Ray Cass, went to the Ormond Beach Police Department to inquire about any "additional files or evidence." (T 173). They received "a rather large package of work that they had done" on Swafford's case. (T 173). The attorneys could have, but did not, take such action with the primary investigating agency, the Sheriff of Volusia County. (T 174, 207-

208).

Mr. Pearl had interviewed witness, Paul Seiler, and therefrom "knew there was a possibility of another suspect, someone else." (T 180). Mr. Cass shared his belief "that Mr. Seiler could point to someone else . . . although he could not identify him. . .." (T 180). Also, due to an alleged evidentiary conflict regarding specifically where the murder weapon was found, Mr. Pearl believed that there may have been two guns, and thus, another suspect. (T 203). Due to his "extremely good" relationship with the officers involved, he could have asked them whether there were additional suspects, but he "did not." (T 208). Defense counsel did not further investigate suspect possibilities. (T 203).

Attorney Cass admitted that he had spoken to Prosecutor White prior to trial and that Mr. White told him that there were suspects other than Swafford. (T 252). Mr. Cass testified:

> . . . He was in an office . . . in which there had to be about fifty cartons of files. And when I mentioned any others, I said, well, where are they, you know. And he said well, they had ruled them out, **but they are there.** And he indicated . . . some fifty file boxes. And I said, well, you don't want to pull them. He said, no, **you can just go ahead and look through them yourself, if you want.**

(T 261)(emphasis added). Mr. Cass thought that it would take a long time to go through the files; he did not ask Mr. White if he could quickly find the suspect information for him.[17] (T 262).

[17]Mr. White had always given Mr. Cass any discovery he had requested. (T 260).

Attorney Pearl admitted that had he been looking for Mr. Lestz, he would have found him with the information contained in the VCSO repots. (T 226-227). Mr. Cass and CCR Attorney Nickerson also testified to steps they would have taken to find Mr. Lestz with that information. (T 255-257, 368-377). From Mr. Lestz's testimony at the 1997 evidentiary hearing, it is clear that had those steps been taken, Mr. Lestz would have been found from the information contained in the VCSO reports.

The trial court found "had . . . Cass, taken up prosecutor White's offer . . ., then the trial counsel, weeks before the start of the murder jury trial, would have discovered also those two (2) Sheriff reports . . .." (T 287). Certainly, Swafford has presented nothing to invalidate that determination. Thus, trial counsel could have found Mr. Lestz, Mr. Levi, and Mr. Walsh with the exercise of due diligence, and therefore, there is no newly discovered evidence.

The evidence developed at the evidentiary hearing overwhelmingly shows that Mr. Lestz could have been located prior to trial if trial counsel had exercised due diligence. To the extent that the failure to locate Mr. Lestz within the applicable time frame might appear to be ineffective assistance of trial counsel, the State points out that such a claim is thrice procedurally barred, as follows:

(1) In his first Rule 3.850 motion (filed October 15, 1990),

Swafford alleged that his trial counsel rendered him ineffective assistance in some **15** respects, but did **not** complain of counsel's failure to investigate other potential suspects. *Swafford v. Dugger,* 569 So. 2d 1264, 1267 (Fla. 1990)[See Rule 3.850 motion, claims III and IV, pages 44-78]. The failure to raise the issue in the prior Rule 3.850 motion constitutes an abuse of process. *Foster v. State*, 614 So. 2d 455, 459 (Fla. 1992); *Smith v. State*, 453 So. 2d 388 (Fla. 1984).

(2) It is procedurally barred because such a claim of ineffective assistance was not properly raised in the subject (third) Rule 3.850 motion. The only mention of anything close is the following: "When viewed in conjunction with other evidence never presented because of the State's discovery violations and/or trial counsel's deficient performance, there can be no question that his conviction cannot" stand. (Motion at 18). The State contends that this passing reference to one prong of an ineffective assistance of counsel claim is wholly insufficient to put this issue before the court.

(3) It is procedurally barred because there has been no presentation of evidence sufficient to meet the materiality prong of the *Strickland*[18] ineffective assistance standard. *See Mills v.*

[18]*Strickland v. Washington,* 466 U.S. 668 (1984).

State, 684 So. 2d 801, 804 n.4 (Fla. 1996).[19]

II. Collateral Counsel.

Swafford's first Rule 3.850 motion was filed on October 15, 1990. (T 330). It alleged that the subject VCSO reports, including the reports of July 26, 1982 and January 31, 1983, had not been provided at trial in violation of *Brady v. Maryland.*[20] Thus, it is clear that as of October 15, 1990, Swafford's collateral counsel had the information contained in the VCSO reports pertinent to locating Mr. Lestz.[21] Consequently, if Mr. Lestz could have been located with the exercise of due diligence based upon the information in the VCSO reports, Swafford had until October 15, 1992 to file his instant 3.850 motion.[22] *See Swafford v. State,* 679 So. 2d at 739.

The State contends that the evidence developed at the evidentiary hearing, and set-out hereinabove, overwhelmingly shows

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[19]The State asserts that Swafford's attempt to prop up his fatally tardy presentation of this claim with a citation to *State v. Gunsby,* 670 So. 2d 920 (Fla. 1996) fails. First, *Mills* was decided by this Court **after** *Gunsby*, and therefore, it is the latest pronouncement on the issue. Second, *Gunsby* was expressly limited to the "unique circumstances of this case," 670 So. 2d at 924, and there are no comparable circumstances present in Swafford's case.

[20]373 U.S. 83 (1963). The *Brady* claim has twice been rejected by this Court. *Swafford v. State*, 679 So. 2d at 737, 738.

[21]Indeed, his Collateral Counsel testified he had the information in late September or the first of October. (T 426, 427).

[22]His instant motion was filed on June 13, 199**4**.

that Mr. Lestz could have been located prior to October 15, 1992, if collateral counsel had exercised due diligence. To the extent that the failure to locate Mr. Lestz within the applicable time frame might be ineffective assistance, the State points out that there is no right to effective collateral counsel. *Lambrix v. State,* 698 So. 2d 247, 248 (Fla. 1996). Neither is there any legal basis for relief from the time bar based on a claim of excusable neglect or delay due to collateral counsel's work load and/or staffing shortages, if any.[23]

The truth of the matter is that collateral counsel did not need to hire a "tracing" agency to find Mr. Lestz. All he needed to do was to send his investigator to the address in the VCSO report and inquire. That address was in a small town seven miles from Elkville where Mr. Lestz had lived for five or six years. Mr. Lestz had an Illinois driver's license with that address on it, and he had car titles in his name with that address on them. He had been imprisoned in Illinois. Thus, any reasonably prudent attorney would have soon realized that Mr. Lestz would likely be found in Illinois, and that the South Oak Street address was a good place to begin looking for him.[24]

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[23]In making this point, the State does not even remotely concede that CCR had either problem. CCR had three attorneys and an investigator assigned to Swafford's case. Moreover, CCR counsel could have gone to Illinois to locate Mr. Lestz. (*See* T 390).

[24]However, if there had been a need for a "tracing" agency, diligent and prudent counsel would have contacted an agency in the

Further, collateral counsel could have obtained the information from the federal prison files. Had he examined them, he would have soon learned, at a minimum, the name and address of Mr. Lestz's probation officer (who knew where Lestz was); the name (and most likely the address) of Mr. Lestz's brother; and, the address of Mr. Lestz's residence while he was on probation. Any one of those pieces of information would have led straight to Elkville, Illinois, a town of 104 people (in 1990).[25]

Throughout the entire period at issue - October 15, 1990 to October 15, 1992 - Mr. Lestz was living at a residence three miles from Elkville. He owned and operated a pest control business there, and had for many years. He, his wife, his daughter, and his brother all lived in that small town. His brother was well known at the bank, having signed Mr. Lestz's car and business loans as a guarantor.[26] With these substantial, lengthy contacts and interaction with that small community, there is no reasonable possibility that a diligent attorney would not have found Mr. Lestz, and found him quickly. Indeed, one of Swafford's collateral

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state where Mr. Lestz had lived prior to going to prison. As Attorney Pearl put it, retaining a "professional outfit" in Illinois would have been the proper way to proceed. (T 229).

[25]It is clear that Swafford's attorney could have obtained funding to travel as Mr. Nickerson testified that in 1990, he traveled to Tennessee twice to investigate Swafford's case. (T 390).

[26]The bank would have had addresses for its borrowers and guarantors.

attorneys testified that when a person has a stable job, a car loan, and a driver's license it is "very, very easy to find people in the country." (T 375, 377). He added that he would "try and find out where is his family from, where does this guy hang out . . . . on the assumption that he's going to try and go back to what he knows . . . .." (T 371). If collateral counsel had looked at Mr. Lestz's federal prison file, he would have found out where his family was from. Further, the VCSO report indicated that Mr. Lestz was from that small town in Illinois - all counsel had to do was check to see if he had gone back. Collateral counsel knew how to find Mr. Lestz; he simply failed to do it.

Thus, as the trial court found, had the information contained in the VCSO reports been followed up on, Mr. Lestz could have been located by collateral counsel in time to raise the instant claims in 1992, rather than in 1994. Thus, any claim that the information contained in the alleged affidavit of Mr. Lestz, or any provided during the 1997 evidentiary hearing, was newly discovered evidence fails.

Under the circumstances of this case, it is clear that either trial or collateral counsel could have found Mr. Lestz if they had diligently searched for him. Thus, Swafford has failed to meet the threshold requirement, and his claim of newly discovered evidence fails. This Court's consideration of this case should end at this point.

Secondary Requirement - No Acquittal:

Assuming arguendo that Swafford met the threshold requirement, he is entitled to no relief because he cannot meet the second requirement.

> If the trial court determines that Lestz's statement is newly discovered evidence, it must then determine whether the statement, in conjunction with the evidence introduced in Swafford's first rule 3.850 motion and the evidence introduced at trial, would have probably produced an acquittal.

Swafford, 679 So. 2d at 739. The evidence Swafford claims is newly discovered is not such as would have probably produced an acquittal. That determination does not change when that evidence is considered "in conjunction with the evidence introduced in Swafford's first Rule 3.850 motion and the evidence introduced at trial." *Id.*

It is important to remember that all of Swafford's claims, including the claim about Mr. Walsh, have been previously summarily denied by the trial court, and those rulings have been affirmed by this Court. See *Swafford*, 569 So. 2d 1264 (Fla. 1990); *Swafford*, 636 So. 2d 1309 (Fla. 1994). The "new" Lestz statement is the only reason this matter is back before this Court. Therefore, should this Court find that the new Lestz statement, as established during Lestz's testimony at the evidentiary hearing, contains information of little or no significance, there is no need to again consider the allegations offered in Swafford's first 3.850 motion or the

evidence admitted at trial.[27]

As pointed out earlier, this Court specified that the remand was based on the allegation in the CCR-prepared affidavit that Walsh had at the Shingle Shack a .38 caliber hand gun "at or near the time that the murder weapon was discovered in that locale." 679 So. 2d at 736. However, Mr. Lestz's testimony at the hearing did not establish that allegation. *See supra* text, at 40-41. Moreover, Mr. Lestz did not testify to most of the things set out in the CCR-prepared affidavit which was the basis for the hearing. Thus, there is no additional evidence of any significance beyond what Swafford's trial and collateral attorneys had no later than the first 3.850 proceeding (October, 1990). Having previously determined that that evidence was insufficient to afford Swafford postconviction relief, this Court should reject the instant claim and affirm the trial court's denial of Swafford's third 3.850 motion.

Moreover, in the alternative, the trial court made brief findings on the probability of an acquittal. Judge Hutcheson found that Mr. Lestz's statements as reflected in the police reports Swafford introduced into evidence at the hearing "contained many inconsistencies and . . . had that testimony been presented . . . it would not have probably resulted in an acquittal given the

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[27]None of the allegations in Swafford's second 3.850 motion need be considered. Those claims are procedurally barred. *Swafford v. State,* 636 So. 2d 1309 (Fla. 1994).

strong case the state had against Mr. Swafford." (R 287). This conclusion is well-supported by the evidence.

Mr. Lestz "never referred to the killing of the female," nor did he imply that Mr. Walsh may have killed Brenda Rucker until after the investigator put the specifics of the Rucker murder before him. (T 581). Neither did he ever tell the police anything about the Shingle Shack, (T 570), much less that Mr. Walsh might have disposed of gun(s) there, or at any other topless bar on February 14, 1982. (T 530-531). Mr. Lestz failed the first polygraph, and repeatedly told inconsistent stories during the second interview. (T 539-540). His motive was to retaliate against Mr. Walsh for attacks which he claimed Mr. Walsh had made against him. (T 79-80). Also, he thought that Mr. Walsh might come after him for having reported the attack(s). (T 78-80). Moreover, Mr. Lestz had been institutionalized for psychological problems several times, (Appendix B at 2), and Mr. Levi described him as "crazy."[28] (Appendix C at 15). Certainly, Mr. Lestz's selective memory, and other serious problems at the evidentiary hearing, further reduced his credibility. (*See* T 175-179).

It is clear that the "new Lestz statement" has no real significance in terms of exculpating Swafford of Mrs. Rucker's murder. The first 3.850 and trial evidence have already been held

[28]Further, Mr. Levi opined that Mr. Lestz's claim that Mr. Walsh burned him was "untrue" and that Mr. Lestz burned himself with cigarettes. Id. (Appendix C at 15).

insufficient for that purpose. Thus, this Court need go no further with its analysis in this case, as nothing added to nothing is still nothing. The trial court's order should be affirmed.

Trial Evidence:

Assuming arguendo that the trial evidence should again be considered, it clearly does not benefit Swafford. As the trial court found, the State's case against Swafford was "strong." Indeed, it was overwhelming! The evidence included: Swafford was familiar with the area in which the victim was abducted and where her body was found; he was driving right by the place from which the victim was abducted at precisely the time at which she was taken; the place where the body was found was close to where Swafford was staying; Swafford's gun killed the victim,[29] and it was recovered from Swafford the night after the murder when he discarded it upon police arrival at the scene where Swafford had threatened others with it; Swafford bought a newspaper and called his companions' attention to an article about the victim's murder; Swafford told these companions on the trip back to Tennessee that he was mad because he had lost his gun; Swafford admitted his guilt in the Rucker homicide when he subsequently asked another man to participate with him in the commission of another abduction, rape,

[29]This Court said: "ballistics tests performed later conclusively established that Swafford's gun was the gun used to kill the victim . . .. [E]vidence established the chain of custody and the identification of the gun." Swafford, 533 So. 2d at 272.

and murder (bullets into the back of the head) of a woman and when asked wouldn't that bother him, replied, "you just get used to it;[30] Swafford proceeded to select a victim, instructed his companion what to do, and "drew a gun," (at which point the companion refused to participate, and so, the plan was abandoned); and, while escaped from the authorities who were holding him for the victim's murder, Swafford took hostages at a local hospital, threatened to kill them, and told a newspaper reporter that he was a murderer! Thus, there is no reasonable probability that the alleged evidence regarding Mr. Walsh - which falls far, far short of connecting him to the subject murder - would have made a difference in the outcome of the trial, much less that it would have produced an acquittal!

First Rule 3.850:

Assuming arguendo that Swafford's alleged evidence from his first Rule 3.850 motion should also be considered, it fails to provide a basis for the relief Swafford seeks. As Judge Hammond ruled on that first motion (with regard to the same evidence which is asserted in the third 3.850 motion), "Swafford has failed to show that the hearsay information on other suspects was admissible . . .." *Swafford v. State*, 679 So. 2d at 737-738. Neither did he show that its omission was prejudicial to him. *Id.* To date, Swafford still has not demonstrated that any of the "other

[30]This Court specifically held this to be an admission by Swafford in regard to the instant murder. Swafford, 533 So. 2d at 273-274.

suspects" evidence would have been admissible at trial or that its omission prejudiced him. The State contends that he cannot show either.

For example, there was no basis for admission of the Arkansas police officer's alleged opinion that Mr. Walsh resembled the sketch of the suspect in the Rucker BOLO. Indeed, at Swafford's trial, the court found that the sketch of the alleged perpetrator was not admissible because Mr. Seiler (the person who observed and described the perpetrator to the police) could not state whether the sketch accurately represented the person that he had seen. (TR[31] 1301-1302). Thus, it is highly unlikely that any comparison of the BOLO sketch with Mr. Walsh would have been permitted. Another example is Investigator Buscher's opinion (as stated in his affidavit for search warrant) that the cigarette burns on Mr. Lestz's body "strongly resemble those burns found on the body of Brenda Rucker." Obviously, such an opinion would not be admissible in the absence of a finding that Buscher was an expert in cigarette burns. Swafford has neither alleged, nor shown, him to be such. Neither would Volusia County investigators' opinions that Mr. Lestz was a "significant witness" or that Mr. Walsh was a significant suspect in the Rucker homicide be admissible. At trial, the court rejected the defense's attempt to introduce the specifics of the BOLO description on the theory that "the police felt sufficient

[31]"TR" refers to the record on direct appeal from the trial.

confidence in it to issue a BOLO:"

> How is the police's confidence relevant? If it were relevant, a whole lot of other things would probably come in from the State's point of view. . . I feel it's not relevant what the police believe or think. If it were true, that's what they believe, I think they could come in and testify as to whoever they think was guilty and for whatever reason they come to the conclusion and impose that upon the jury. They don't have the ability to do that. They are not entitled to do that nor are they entitled to come to some conclusions and express those as to who they believe is not guilty or as to conclusions they have about a description. That is, their thought processes based upon hearsay received by them is not legitimate evidence of a case of this nature.
>
> The fact that they may have thought any number of different people may have been, what they thought is not important. What is important are the facts in the case, what was seen, what was observed, what was heard. Those are the facts, not necessarily the conclusions that other persons may have reached concerning that, except the conclusions the jury reaches.

(TR 1296-1297). There are many other factual allegations contained in the police reports which formed the basis for the first 3.850, and Swafford has utterly failed to offer any justification for admissibility of them.

Moreover, had they all been admissible, they still do not undermine confidence in the outcome of Swafford's trial. None of the alleged "evidence" against Mr. Walsh, which is composed chiefly of Mr. Lestz's incredible allegations made through the attorney which he did not have,[32] begins to approach the wealth of credible evidence establishing that Swafford brutally raped and murdered

[32]Mr. Lestz testified that had no attorney at the time the alleged statements regarding Mr. Walsh were made. (T 84).

Mrs. Rucker. *See supra text, at* 55-56. Neither does consideration of the trial evidence, the first 3.850 "evidence," and the alleged newly discovered evidence result in a determination that admission of same would have probably produced Swafford's acquittal of the murder. Thus, Swafford is entitled to no relief, and this Honorable Court's consideration of this appeal should go no further.

Swafford's Unauthorized Arguments

In his initial brief, Swafford purports to raise some five claims. The State submits that all five are unauthorized by this Honorable Court's remand. Since they are unauthorized, they are procedurally barred. However, in an abundance of caution, the State hereinafter more particularly responds to the unauthorized claims:

Swafford's Argument I

Allegations of False Argument:

Swafford claims that the State's 1990 response to his first 3.850 motion misled the courts. (IB at 41). He quotes the statement that Mr. Walsh, Mr. Levi, and Mr. Lestz "were 'thoroughly investigated and discarded as suspects,'" and claims that at the 1997 hearing, evidence showed that "the 'further investigation' police said was warranted on January 31, 1983, never occurred." (IB at 41). He then claims that this alleged misstatement was so

serious that it would prevent "some kind of procedural bar precluding consideration of the merits of Mr. Swafford's constitutional claims . . .." (IB at 42). Swafford's position is absurd.

The authorities investigated Mr. Walsh and company for some ten months after the murder. (T 32-33, 35). The thorough investigation included interviews with Mr. Walsh (at least once), Mr. Levi (at least twice), and Mr. Lestz (at least three times), polygraphs, bodily fluid samples, fingerprint comparisons, and search and testing of personal property. The investigation of these persons ended some five months prior to the commencement of any investigation of Swafford. Moreover, the further investigation referred to is simply a third interview of Mr. Levi.[33] (IB at 42). Thus, it is clear that the investigation as to Mr. Walsh terminated, as Investigator Buscher testified at the 1997 hearing, and Captain Burnsed agreed, because "[t]here was no evidence to support it." (T 154, 542). The State submits that the record well supports the 1990 representation that Mr. Walsh and company were thoroughly investigated and discarded as suspects.

Moreover, although Swafford produced Mr. Levi at the 1997 hearing, he revealed nothing new which incriminated Mr. Walsh or

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[33]The State submits that the belief that a third interview of Mr. Levi was warranted may reasonably have changed as a result of the evidence subsequently received which identified the murder weapon and conclusively linked Swafford to it.

exonerated Swafford. Thus, any failure to reinterview him did not prejudice Swafford in any manner, and therefore, even if the State's "thorough investigation" statement is considered deficient in that Mr. Levi was not interviewed a third time, same unquestionably was not prejudicial to Swafford and can hardly excuse the procedural bar he seeks to avoid.

Of equal absurdity is the claim that the failure to disclose that a third interview of Mr. Levi did not occur constitutes a *Brady* violation. First, any such *Brady* claim is procedurally barred because it was not raised below. *Steinhorst v. State*, 412 So. 2d 332 (Fla. 1982). Assuming no procedural bar, Swafford cannot establish a *Brady* violation. To do so, Swafford must show:

> (1) the government possessed evidence, including impeachment evidence, favorable to the defense; (2) they did not possess the evidence nor could have obtained it with reasonable diligence; (3) the prosecution suppressed the favorable evidence; and (4) had the evidence been disclosed to the defense, a reasonable probability exists that the trial outcome would have been different, i.e., the evidence was material.

United States v. Arnold, 117 F.3d 1308, 1315 (11th Cir. 1997). He has failed to establish these elements.

First, Swafford has not alleged, nor shown, that the failure to interview Mr. Levi for a third time constitutes "evidence" within the meaning of *Brady*. Second, as has been demonstrated hereinabove, he cannot show that the failure to inform him that Mr. Levi was not reinterviewed was favorable to him. Neither can he show that he could not have obtained that information with

reasonable diligence - after all, he had the police report which identified the officers, and he could have asked them whether the further investigation occurred. Moreover, he could have located Mr. Levi years ago and asked him. *See* Statement of the Case and the Facts *supra,* at 11-12. Finally, he cannot show that had he been told that Mr. Levi had not been interviewed a third time, that information would have probably resulted in a different outcome at trial.

Finally, Swafford's *Kyles v. Whitley*, 115 S.Ct. 1555 (1995) claim piggybacked onto the utterly deficient *Brady* claim is likewise devoid of merit. It is also procedurally barred because it was not raised in the lower court. *Steinhorst v. State,* 412 So. 2d 332 (Fla. 1982). Further, even had all of the allegedly exculpatory evidence and information been heard, it would have made no difference in the outcome of the trial. The evidence of Swafford's guilt was, and is, overwhelming! *See supra text, at* 55-56.

Swafford's Argument II

Brady:

This is merely a third presentation of Swafford's original *Brady* claim. This Court has twice rejected this claim, and if this issue is reached by this Court, it must do so yet again. *See Swafford,* 679 So. 2d 736, 739 (Fla. 1996).

To the extent that Swafford again claims that cumulative analysis is required under *Kyles*, the State reasserts, and incorporates herein, its argument in the preceding point. Because there is no *Brady* violation, there is no entitlement to *Kyles'* review.

Nonetheless, had Swafford met his burden to demonstrate newly discovered evidence, he would have received a *Kyles*-like cumulative review under this Court's remand opinion. His efforts to circumvent this Court's holding and obtain such a review without meeting the threshold requirement must fail.

Swafford's Argument III

Judicial Notice:

Swafford claims that the trial judge erred in declining to take judicial notice of two reports he designated the "Overton Commission Report" and the "Shevin Report." (IB at 72-76). He claims that they were relevant to the issue of collateral counsel's due diligence between October, 1990 and April, 1994. (IB at 72-73).

Florida Statutes §90.202 provides which matters "may" be judicially noticed. Swafford claims that the reports he wanted the trial judge to admit into evidence fall under subsections (5) and (6) of that statutory provision. Those subsections provide:

(5) Official actions of the legislative, executive, and

judicial departments of the United States and of any state, territory, or jurisdiction of the United States.

(6) Records of any court of this state or of any court of record of the United States or of any state, territory, or jurisdiction of the United States.

§90.202(5)&(6), Fla. Stat. (1997).

The State contends that Swafford is not entitled to relief. First, the language of the statute makes it clear that the decision whether to take judicial notice is a discretionary one. Swafford has not alleged, much less demonstrated, that Judge Hutcheson abused his discretion in declining to take judicial notice of the reports. The State asserts that the judge's decision was well within his discretion and should not be second-guessed.

Second, Swafford utterly failed to authenticate the reports. His attorney's unsworn allegations that the reports were sanctioned by this Honorable Court are insufficient. Likewise, his claim that the reports were stamped in by this Court's Clerk are insufficient. Swafford did not offer a certified, or sealed, copy of either document. Without such, there is no authentication.

Neither did Swafford produce a scintilla of evidence establishing that the reports were, in fact, "[o]fficial actions of the . . . judicial departments of . . . any state . . ." or "[r]ecords of any court of this state . . .."[34] §90.202(5), Fla.

[34]The State does not concede that either report was an action of the judicial department of this State or were records of this Honorable Court within the meaning and intent of the subject statute.

Stat. (1997). Indeed, in the trial court, he failed to so much as allege that the subject reports fell within any specific provision of the judicial notice statute. (R 323-324, 485-490). Neither did he contend, as he does now for the first time on appeal, that it was mandatory for the trial judge to take judicial notice of the reports.[35] Thus, these claims are procedurally barred. *See Steinhorst v. State*, 412 So. 2d 332 (Fla. 1982).

Third, even if the reports are proper subjects for judicial notice, their content is subject to the rule prohibiting hearsay. Swafford wanted the reports admitted as substantive evidence establishing that collateral counsel was overworked and underfunded. (IB at 72).

> The fact that such a statement was set forth in a document of which the court could take judicial notice does not render it admissible. . .. As was stated in Day v. Sharp, . . ., '[a] trial court may properly take judicial notice of the records of any court . . .. But . . . [w]hat is meant by taking judicial notice of court records? There exists a mistaken notion that this means taking judicial notice of the existence of facts asserted in every document . . . a court cannot take judicial notice of hearsay allegations as being true, just because they are part of a court record or file . . ..

Milton v. State, 429 So. 2d 804, 806 n.4 (Fla. 4th DCA 1983)

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[35]Clearly, it was not mandatory for the judge to take such action. The provision cited in support of this claim requires that the document first fall within one of the categories specified in §90.202 and also that the proponent have first provided "timely written notice of the request . . .." §90.203, Fla. Stat. (1997). Neither prerequisite was met in this case. Swafford's request for judicial notice was made orally during the hearing, and therefore, did not meet the requirements of the statute.

(citations omitted)(emphasis in original). Authoritative publications cannot be used to bolster a witness's credibility or supplement an opinion. *Green v. Goldberg*, 630 So. 2d 606, 609 (Fla. 4th DCA 1993). Such statements are not permitted "to be used as substantive evidence since the treatise is hearsay if it is offered as substantive evidence." *Id.* The content of the reports Swafford offered was inadmissible hearsay.

Fourth, any error in not receiving the reports in evidence was harmless. First, Judge Hutcheson made it clear that he was familiar with the content of those reports. (T 489). Second, the reports were broad-based and general and did not specifically address cases such as Swafford's. Third, Swafford's newly discovered evidence claim is defeated without regard to collateral counsel's lack of due diligence in that trial counsel could have discovered all of the subject information with the exercise of due diligence. *See supra text, at* 44-48. Fourth, any evidence contained in the reports relating to CCR's alleged understaffing and underfunding during the relevant time period was cumulative to the testimony given at the hearing by former-CCR collateral counsel, Mr. Nickerson.

Finally, the alleged understaffing and underfunding of CCR was not relevant to the issue of due diligence of collateral counsel. Swafford's collateral counsel testified that he "went to Tennessee twice in preparation for the 3.850 motion." (T 390). While there,

he talked to many of Swafford's relatives and investigated the case. (T 391-392). Further, counsel and CCR investigators used, or could have used, Global Tracing to investigate Swafford's case during the relevant period. (T 402, 421). There was "at that time . . . a substantial fee" which CCR had the funds to, and did, pay to Global. (T 420). According to CCR, Global was contacted in "June or July of that summer" [1991]. (T 439-440). Later, by the time Mr. Chavis arrived at CCR, in October, 1992, Global did not require payment unless the person was located, (T 463), but CCR failed to make any further inquires during the relevant period.[36] Further, Mr. Shabazz testified that beginning in "January of 1991," "things got better for CCR in terms of their ability to effectively represent their clients . . .." (T 445). Of course, as the trial judge held, the time for filing the Rule 3.850 motion did not expire until October, 199**2**. (T 285).

Thus, it is clear that regardless of any comments in the Overton Commission Report or the Shevin Report relating to CCR's general staffing and funding condition, it had adequate personnel and funding to properly investigate Swafford's case during the relevant time period. Swafford had at least two, and for the most part, three attorneys working on his case throughout the relevant time period, as well as at least one investigator. (T 329, 340,

[36]The evidence established that according to Global, only two CCR inquiries were made of Global - "one in 1990" and "another . . . in 1994." (T 594).

417, 418). That personnel had time to investigate Swafford's case, including making two trips to Tennessee to investigate and interview potential witnesses during the critical two years. There was no testimony that collateral counsel would have been denied funds to travel to Illinois. In addition, CCR personnel contacted various agencies, persons, and services by telephone, including contacting Global Tracing Services, and certainly, they could have so contacted more. Thus, funding and staffing in Swafford's case did not prevent Swafford's collateral counsel from exercising due diligence in regard to locating and interviewing Mr. Lestz. Any error in failing to admit the reports into evidence was unquestionably harmless, and Swafford is entitled to no relief on this claim.

Finally, Swafford's claim that "[t]his Court . . . must take judicial notice of these reports . . ." (IB at 75) is clearly wrong. No such argument was advanced below, and same is, therefore, barred on appeal. *Steinhorst v. State*, 412 So. 2d 332 (Fla. 1982). Further, this Court's job is to review the rulings made by the trial court. In so doing, it may not consider any evidence not admitted below. Swafford's demand that it do so is highly inappropriate, and should be rejected.

Swafford's Argument IV

Collateral Counsel and Due Diligence:

This is the only one of the five points Swafford includes in his brief which is arguably authorized by this Court's remand. Nonetheless, the State submits that this point, as argued by Swafford, is not authorized.

Swafford claims that collateral counsel exercised due diligence in obtaining Mr. Lestz's statement. He claims that this Court should ignore the unquestionable lack of due diligence on the part of trial counsel because the rule relating to due diligence in connection with newly discovered evidence applies only to collateral counsel. (IB at 79). He did not raise this claim in the lower court, and therefore, it is procedurally barred on appeal. *Steinhorst v. State*, 412 So. 2d 332 (Fla. 1982).

Moreover, it is clear that the failure of trial counsel to discover information he could have discovered with the exercise of due diligence defeats any claim that such information is newly discovered. *See Jones v. State*, 591 So. 2d 911, 916 (Fla. 1991)["[T]he asserted facts must have been unknown by the trial court . . . or by counsel at the time of trial, and it 'must appear that the defendant or his counsel could not have known them by the exercise of due diligence.'" *Jones, quoting Hallman v. State*, 371 So. 2d 482, 485 (Fla. 1979)]. Because the record clearly

establishes trial counsel's lack of due diligence regarding Mr. Lestz's statement, the issue of collateral counsel's failure to exercise such diligence need not be reached by this Court.

Assuming *arguendo* that collateral counsel's due diligence, or more appropriately, lack thereof, needs to be considered in this case, Swafford is entitled to no relief. This Court's opinion makes it clear that the issue is not whether collateral counsel used "reasonable steps to investigate" (IB at 81), or "whether [collateral] counsel reasonably conducted a search for Mr. Lestz based on the information counsel had in 1990" (IB at 93), as Swafford claims. Rather, it is

> whether Swafford has demonstrated as a threshold requirement that his untimely and successive motion for postconviction relief was filed within two years of the time when Lestz's statement could have been discovered through the exercise of due diligence.

Swafford, 679 So. 2d at 739. Thus, Swafford's issue four, *as framed* in his initial brief, is unauthorized.

Swafford seeks to mislead this Court as to the legal issue because he clearly cannot meet the threshold requirement.[37] The evidence below showed that trial counsel could have obtained Lestz's statement at the time of trial - a point well before the two year postconviction motion period had run. *See supra text*, at

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[37]Incidentally, the State contends that neither could he show that collateral counsel took reasonable steps to investigate or look for Mr. Lestz. Although collateral counsel may have followed some of the appropriate steps to look for Mr. Lestz, said counsel did not do nearly enough to meet the due diligence threshold.

42-47. It also showed that collateral counsel could have found Lestz's statement within two years of the date counsel obtained the VCSO police reports (which were obtained no later than October, 1990) had said counsel exercised due diligence. *See supra text*, at 48-51.

Moreover, Swafford's CCR attorney testified to what he would have done to find Mr. Lestz.

> Regarding locating Mr. Lestz specifically, Mr. Nickerson said that the first thing to do would have been to "call the federal locator service, Department of Justice." (R 370). He also said he would have called the prison itself; he has located prisoners that way. (R 371). He would also "try and find out where his family is from, where does this guy hang out . . . he's going to try and go back to what he knows or try and find associates . . .." (R 371). Mr. Nickerson testified that if the person being sought has "a 9:00 to 5:00" or has "gotten a loan from GMAC financing. Things like that make it very, very easy to find people in the country." (R 375). Further, Mr. Nickerson said that if he had been looking for Mr. Lestz, he "would have gone to the federal probation officer . . .." (R 376). Also, he "would attempt to access state of Illinois records, driver's license records, things like that." (R 377). He would also have gone to the old address on the police report and have tried to find either Mr. Lestz or someone who knew something about him that would help put him in contact with Mr. Lestz. (R 377)."

Statement of the Case and the Facts *supra*, at 23-24. The testimony at the evidentiary hearing made it clear that very few of these things were done. However, Mr. Lestz's testimony revealed that if they had been done, Mr. Lestz would have been quickly located. Ms.

Champion's testimony further established that the information Swafford's counsel had in October, 1990 was sufficient with which to quickly find Mr. Lestz.

The evidence established that with the exercise of due diligence, Mr. Lestz's statement could have been discovered no later than two years from the date his (first) Rule 3.850 motion was filed on or about October 15, 1990. Collateral counsel, like trial counsel, failed to use due diligence, and therefore, the subject statement of Mr. Lestz is not newly discovered evidence. However, even if the trial court erred in holding that the threshold requirement was not met, Swafford can show no prejudice because any such error was harmless beyond a reasonable doubt. *See, supra text*, at 52-59.

Swafford's Argument V

Disqualification of State Attorney's Office:

As his last point, Swafford presents another unauthorized issue - which is objected to and should be denied on that basis. Nonetheless, assuming *arguendo* that the issue is properly before this Honorable Court, it is without merit.

Swafford claims that the lower court should have granted his motion to disqualify the entire state attorney's office in regard to the conduct of the 1997 evidentiary hearing. (IB at 99). He says that his motion was based on State Attorney John Tanner being

"a material witness." (IB at 99). At the hearing, Swafford sought to inquire of Mr. Tanner regarding his alleged representation of one of the witnesses against Swafford in the instant case, i.e., Roger Harper. There was no contention that Mr. Harper was ever a suspect, and the extent of Mr. Tanner's representation of Mr. Harper was alleged to have been an effort to assist Mr. Harper in obtaining a reward for the information he gave police regarding Swafford's commission of Mrs. Rucker's murder.

The trial judge heard argument on the disqualification motion. (SR 4-20).[38] He ruled that even if Mr. Tanner had, in fact, represented Mr. Harper and Mr. Harper received a $10,000 reward for his information regarding Swafford in the instant case, there was no basis on which to grant the motion because "it would be such a minor aspect of the case it would . . . not affect anything." (SR 20). Swafford has not alleged, much less shown, any facts which would indicate that the trial judge erred in reaching this conclusion.

Moreover, as the State asserted below, the whole issue of Mr. Harper was outside the scope of the remand. (SR 15). The evidentiary hearing was limited to the allegedly new Lestz statement; it had nothing to do with witness Harper. *See Swafford*, 679 So. 2d at 739.

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[38]"SR" refers to the Supplemental Record on Appeal in this case.

Further, Mr. Tanner testified at the hearing that he had "no memory of a Roger Harper." (T 519). He added that although he could remember "some case as a private lawyer contacting an oil company with regards to a reward that had been offered concerning the kidnaping of an employee," he "did[not] know whether that person was Mr. Harper or not."[39] (T 520). Thus, it is clear that Mr. Tanner was not a material witness at the evidentiary hearing, and there was no basis for disqualification of him, much less his entire governmental office. Finally, even if Mr. Tanner had had some information regarding Mr. Harper and his alleged reward, and if that matter had been authorized by the remand, the case law makes it clear that the trial judge did not err in refusing to disqualify the entire State Attorney's Office in this case. *See Meggs v. McClure*, 538 So. 2d 518 (Fla. 1st DCA 1989). *See also*, *State v. Clausell*, 474 So. 2d 1189 (Fla. 1985); *Fitzpatrick v. Fitzpatrick*, 464 So. 2d 1185 (Fla. 1985). Swafford is entitled to no relief.

[39]"I just don't have a clear recollection . . . and have no records of my own or access to records, that I know of, to help with that." (T 520).

CONCLUSION

Based upon the foregoing arguments and authorities, the State respectfully requests that this Court affirm the trial court's denial of relief in all respects.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above has been furnished by U.S. Mail to Martin J. McClain, Counsel for Appellant, 1444 Biscayne Blvd., Suite 202, Miami, Florida, 33132, on this _____ day of May, 1999.

Of Counsel