

IN THE SUPREME COURT OF FLORIDA

CASE NO. 92,173

ROY CLIFTON SWAFFORD,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

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

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This proceeding involves the appeal of the circuit court's denial of Mr. Swafford's motion for post-conviction relief. The circuit court denied Mr. Swafford's claims following an evidentiary hearing. Citations in this brief to designate references to the records, followed by the appropriate page number, are as follows:

"R. ____" - Record on appeal to this Court in first direct appeal;

"PC-R1. ____" - Record on appeal from denial of the first Motion to Vacate Judgment and Sentence.

"PC-R2. ____" - Record on appeal from denial of the second Motion to Vacate Judgment and Sentence.

"PC-R3. ____" - Record on appeal from denial of the third Motion to Vacate Judgment and Sentence.

"PC-R4. ____" - Pending record on appeal from denial of relief after evidentiary hearing.

"PC-R4T. ____" - Transcript of evidentiary hearing conducted February 6-7, 1997.

All other citations will be self-explanatory or will otherwise be explained.

REQUEST FOR ORAL ARGUMENT

The resolution of the issues involved in this action will determine whether Mr. Swafford lives or dies. This Court has allowed oral argument in other capital cases in a similar procedural posture. A full opportunity to air the issues through oral argument is necessary given the seriousness of the claims and the issues raised here. Mr. Swafford, through counsel, respectfully urges the Court to permit oral argument.

CERTIFICATE OF FONT

This brief is typed in Courier 12 point not proportionately spaced.

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INTRODUCTION

In November of 1985, Mr. Swafford was convicted of first degree murder and sentenced to death. The evidence against Mr. Swafford was circumstantial. There was no physical evidence linking Mr. Swafford to the murder other than a .38 found in trash can at the Shingle Shack bar in Daytona Beach which ballistic analysis identified as the murder weapon. However, the testimony linking Mr. Swafford to that .38 was shaky at best. Mr. Swafford's defense was innocence. Specifically, the defense focused upon the fact that even according to the State, Mr. Swafford could only have committed the murder during an hour to an hour and half period, and this was an insufficient period of time to have raped the victim both vaginally and anally, burned her twice with cigarettes, make sure she was fully clothed, and then shot her nine times.¹

On September 7, 1990, Governor Martinez signed a warrant setting Mr. Swafford's execution for November 13, 1990. Thereafter, collateral counsel was assigned to represent Mr. Swafford by the Office of the Capital Collateral Representative. Collateral counsel sought Chapter 119 materials. In early October of 1990, police reports concerning other suspects James Michael Walsh, Walter Levi, and Michael Lestz were disclosed to Mr. Swafford's counsel. These reports clearly implicated James

¹There was also a question as to whether Brenda Rucker, the victim, was shot at the scene where her body was located, or whether her body was dumped there after she had already been killed. No spent bullets were found at the scene.

Michael Walsh as an individual who may have murdered Brenda Rucker. These reports placed Mr. Walsh one block away from the scene where Brenda Rucker disappeared, fifteen minutes before she disappeared. Mr. Walsh was not seen again until over four hours later. When he reappeared, Mr. Walsh was sweaty and nervous. The reports also revealed that Mr. Walsh had homosexually assaulted Mr. Lestz and while doing so burned him with cigarettes in fashion that "strongly resemble[d] those burns found on the body of Brenda Rucker." (PC-R3. 205).

On October 16, 1990, after receiving an eight day extension of the then controlling Rule 3.851, Mr. Swafford's collateral counsel filed a 3.850 motion which included a claim that Mr. Swafford had not received an adequate adversarial testing because neither he nor his counsel were provided with the Walsh, Levi, or Lestz evidence.² In response, the State of Florida asserted: "James Michael Walsh, Walter Levi, and Michael Lestz were thoroughly investigated and discarded as suspects." (State's Response dated 10/22/90 at 17). The State argued: "There is no constitutional requirement that the prosecution make a complete and detailed accounting to the defense of all police investigatory work on a case." (Id. at 16). The State further asserted: "Swafford has failed to show that this hearsay information was admissible, and failed to demonstrate any

²Mr. Swafford also asserted that additional exculpatory evidence never reached his jury because of either the State's failure to disclose or defense counsel's failure to discover.

culpability of Walsh, so information regarding the investigation would not have changed the outcome." (Id.).

On October 30, 1990, the circuit court summarily denied the 3.850 motion. As to the claim premised upon Walsh, Levi and Lestz, the circuit court stated: "The court finds that the state was not required to provide Swafford with information regarding all suspects investigated." Order Denying 3.850 dated 10/30/90 at 4.

On appeal to this Court, the State repeated the arguments that it had made in the circuit court. This Court's opinion issued on November 14, 1990, and found no error in the circuit court's ruling had been demonstrated. Swafford v. Dugger, 569 So. 2d 1264 (Fla. 1990).

Not until February 7, 1997, at the evidentiary hearing at issue in this appeal, did the State finally reveal the truth as to how the investigation of Walsh as a suspect came to an end. The investigation of James Michael Walsh as perpetrator of the Rucker homicide had ended on January 25, 1983, when Michael Lestz was confronted about his failure to pass a polygraph in July of 1982 during which he denied any involvement in the Rucker homicide.³ (PC-R4T. 538). On January 25, 1983, Michael Lestz revealed that at 6:00 a.m. on February 14, 1982, James Michael Walsh left Mr. Lestz at a laundromat approximately one block away

³On July 23, 1982, Mr. Lestz asserted that on February 14, 1982, Mr. Walsh and Mr. Levi removed his clothing, took his vehicle, and returned several days later with a large amount of money. (Def. Exh. 4).

from the Fina Station at which Ms. Rucker had just arrived at work. On January 25, 1983, Mr. Lestz revealed that at 6:00 a.m. the morning of February 14th, Mr. Walsh left the laundromat in Mr. Lestz' vehicle to go find some drugs, this being fifteen minutes before Ms. Rucker was taken from the Fina Station accompanied by a man of whom composite drawing was made which "strongly resembled" Mr. Walsh. (PC-R4T. 546). At that time, Mr. Lestz further stated that Mr. Walsh did not return until after 10:30 a.m. and then he appeared "[p]retty nervous, sweaty. He was real hyper." (PC-R4T. 65). On January 25, 1983, Mr. Lestz indicated that after Mr. Walsh got back he was anxious to dispose of several guns, specifically including two .38's. On January 25th, it was known that a .38 had mostly likely been the murder weapon. Mr. Lestz' January 25th statement was "very similar" to what Walter Levi had already stated, and was thus corroborated by another witness.⁴ (PC-R4T. 558). Yet as was first revealed on February 7, 1997, the investigation ended then because Captain Randall Burnsed "just didn't find [Mr. Lestz] credible". (PC-R4T. 569). No further investigation was done. Clearly, the State's claim in 1990 that Mr. Walsh and Mr. Lestz had been "thoroughly investigated and discarded as suspects" was a false representation to the courts and to collateral counsel.

⁴On August 30, 1982, Mr. Levi told law enforcement that at approximately 6:00 a.m. on February 14, 1982, Mr. Lestz arrived at the motel room where Mr. Levi had spent the night with Mr. Walsh. Mr. Walsh then departed with Mr. Lestz saying that the pair had "something to do." (Def. Exh. 7). Mr. Levi said that he did not see Mr. Walsh and Mr. Lestz again until between 11:00 a.m. and noon.

STATEMENT OF THE CASE

On February 14, 1982, at approximately 6:15 a.m., Brenda Rucker was abducted from a Fina station in Ormond Beach, Florida. (R. 728, 739-40, 1273). A composite drawing of the assailant who abducted Ms. Rucker was subsequently prepared. (PC-R4T. 547).

On February 15, 1982, Ms. Rucker's body was discovered by sheriff's deputies in a wooded area about six and a half miles from the Fina station. (R. 746, 748). Ms. Rucker had been sexually assaulted (both vaginally and anally), burned twice with cigarettes and shot nine times. (R. 768-69, 771). The bullets passed through her clothing indicated that she was fully clothed at the time she was shot. (R. 767). The most likely fatal shot was "[b]ehind the right ear" where "a faint imprint of the muzzle of a weapon" appeared. (R. 765).

According to a supplemental police report dated March 17, 1982, Michael Walsh had been arrested in Arkansas. (Def. Exh 2). Arkansas authorities discovered in his possession a BOLO for the Rucker homicide in Daytona Beach. (Def. Exh 2). The Arkansas authorities were struck by Mr. Walsh's strong resemblance to the composite drawing contained in the BOLO. As a result, the Arkansas authorities contacted the Volusia County Sheriff's Office on March 17, 1982. (PC-R4T. 546) Volusia County law enforcement commenced investigating Mr. Walsh. And in fact, they "corroborate[d] that, that Mr. Walsh resembled the BOLO". (PC-R4T 546). Law enforcement also determined that Walsh along a

Michael Lestz and Walter Levi had been in Daytona Beach on February 14, 1983.

Thereafter, there were a series of interviews of Mr. Walsh, and his traveling companions, Mr. Lestz, and Mr. Levi. A supplemental police report dated July 20, 1982, summarized a conversation Special Agent Baker had with Mr. Lestz and Mr. Lestz' attorney. (Def. Exh. 3). Special Agent Baker was with the United States Secret Service. Mr. Lestz was in federal custody on a charge of forgery of treasury bonds. (PC-R4T. 85). Agent Baker reported that Mr. Walsh had pistol-whipped Mr. Lestz prior to the two being arrested in March, 1982. (Def. Exh. 3). After pistol whipping Mr. Lestz, Mr. Walsh took him to a motel where he pointed a gun at Mr. Lestz, burned him with cigarettes and said "he was going to kill me by means of placing a pistol behind my left ear and shooting [sic] my brains out and wanted me to think about that before he did it." (PC- R4T 72). In July of 1982, Agent Baker reported that "Lestz' attorney advises that [the information] Lestz has involves several homicides which occurred in the state of Florida including Walsh -- Walsh's murder of a white female." (PC-R4T. 574).

On July 23, 1982, Volusia County personnel interviewed Mr. Lestz and subsequently Mr. Walsh. (PC-R4T. 580). At that time, Mr. Lestz said that he, Walsh and Levi were in the Daytona Beach area "on 2/14, 2/15 1982 . . . Walsh accompanied by Levi had again taken his clothes from him, locked him in a small room and taken his van, that the pair disappeared for several days with

him not knowing where they went." (PC-R4T. 117, Def. Exh. 6 at 4). During Mr. Lestz' July 23rd interview, a polygraph examination was administered. Deception was found in many of the questions answered by Mr. Lestz. Specifically:

Q And deception was found on the question, did you know the Fina station employee Brenda Rucker, and the answer being no?

A Correct.

Q Deception was found on, were you there when Brenda Rucker was shot, and the answer being no? That's on the next page.

A Correct.

Q Deception was found on, did Walsh tell you he shot Brenda Rucker, and the answer was no?

A Correct.

[Irrelevant exchange between the attorneys omitted].

Q And deception was found, did you shoot Brenda Rucker, and the answer was no?

A Correct.

(PC-R4T. 552-53).

On July 23, 1982, Mr. Walsh was interviewed regarding the Rucker homicide. (Def. Exh. 6). A report summarizing this interview was prepared July 26, 1982. "[I]t indicated that Walsh indicated that he would not related what he was doing or his whereabouts during the period of February 14th through 15th, 1982 stating quote, that he would rather not say, close quote". (PC-R4T. 575). The report also noted that Walsh was shown several photographs of the Rucker homicide at which time he was observed as becoming "extremely upset, disorganized, nervous and

unsure of his statements." (Def. Exh 6). The report also stated: "WALSH was asked why upon his incarceration he had a copy of the RUCKER homicide suspect's composite in his possession at which time WALSH indicated that he obtained this composite from a Ormond Beach food store and had simply retained it because of a matter of curiosity." (Def. Exh 6). The report further stated: "WALSH indicated that his primary support during these periods of time were burglaries and robberies of which he did not care to elaborate, that he was a narcotic addict, using little 'D's' (Dialuded)." (Def. Exh. 6).

On August 25, 1982, Volusia County authorities interviewed Walter Levi. (Def. Exh. 1). During that interview, Mr. Levi indicated that "it was common for him and Mr. Lestz to be left at the laundromat while Mr. Walsh went to purchase drugs." (PC-R4T. 555). Mr. Levi indicated that this was the laundromat located on Granada Boulevard. By a law enforcement officer's "own estimate, this was probably a quarter mile or so" from the Fina Station where Brenda Rucker worked. (PC-R4T. 555). The August 30, 1982, police report summarizing the interview of Mr. Levi stated: "LEVI indicated that on numerous occasions after his arrival back in the Daytona area in 1982, that WALSH drove both he and LESTZ to the area of Granada Boulevard at the laundromat and dropped the two off. LEVI indicated that WALSH would then go to the address of 'B.P.' who lives near the intersection of Granada and Route 1 and purchase narcotics." (Def. Exh. 7). The report observed that:

LEVI further indicated that on the 14th of February, in the early morning hours, that he was spending the night in Daytona Beach hotel under a fictitious name with a stolen credit card. LEVI stated that accompanying him on this particular evening was WALSH.

LEVI indicated that at approximately 6:00 AM, that LESTZ responded to the hotel room and picked up WALSH stating that the pair had 'something to do'. LEVI stated that LESTZ informed WALSH that he did not wish LEVI to go with them as he did not know him that well or trust him.

(Def. Exh. 7 at 2).

On September 3, 1982, in Sangamon County, Illinois, the vehicle Mr. Lestz had possession of while in the Daytona Beach area on February 14th was searched pursuant to a search warrant. The search warrant was supported by the affidavit of Bernard Buscher, a Volusia County Deputy Sheriff. In the affidavit Deputy Buscher stated that, when Walsh was arrested in March of 1982, he had in his possession "a composite bulletin concerning details of the Brenda Rucker homicide" (PC-R3. 205). Deputy Buscher also indicated that Brenda Rucker's autopsy "revealed two marks on the body of the victim possibly caused by the application of a lighted cigarette" (PC-R3. 204). Deputy Buscher revealed in the affidavit that Lestz had stated that Walsh subjected Lestz to homosexual attacks during which "Lestz was burned with a cigarette" (PC-R3. 205). Deputy Buscher examined Lestz's burns and "noted that these burns on Lestz' body strongly resemble those burns found on the body of Brenda Rucker." (PC-R3. 205). On February 14th, Walsh was anxious to sell two .38 caliber handguns. Walsh "then dyed his hair black and forced Lestz to drive him to New Orleans" (PC-R3. 205-206).

No physical evidence was found as a result of the search of the vehicle which had previously belonged to Mr. Lestz. However, the failure to find any incriminating evidence did not in any way eliminate Walsh or Lestz as suspects. As Captain Randall Burnsed testified in circuit court:

Q Had anything about that made you skeptical of Mr. Lestz at that point in time?

A No, sir.

Q In fact, the van had, in fact, been sold to somebody else and other people had owned it in the interim time period; is that correct?

A Yes, sir.

Q And, in fact, with reference to the car Mr. Swafford was in, the search of that car produced no physical evidence linking him to the crime either; is that correct?

A Correct.

(PC-R4T. 549-50).

In fact after the results of the vehicle search were in, Captain Burnsed decided to travel to a federal prison in Illinois to interview Mr. Lestz yet again about the Rucker homicide. (PC-R4T. 550-51). So in January of 1983, Captain Burnsed along with Deputy Buscher traveled at county expense to Marion, Illinois to re-interview Mr. Lestz. Captain Burnsed explained that he wanted to obtain from Mr. Lestz an explanation of why he had shown deception on the polygraph examination conducted in July of 1982. (PC-R4T. 538). In fact as Captain Burnsed has now testified, Mr. Lestz' problems with the polygraph "indicate[d] to [Captain

Burnsed] that this meant that Mr. Walsh was more likely to be involved in the homicide". (PC-R4T. 538).

During the January 25, 1982 interview, Mr. Lestz changed his story. (PC-R4T. 568). He abandoned his previous claim of having been locked in a motel room for two days and having a blackout. Instead, he reported that between 6:00 a.m. and 10:30 a.m. on the day of the Rucker homicide, Walsh left him in a laundromat in Daytona Beach, a block from the Fina station. (Def. Exh. 5 at 3) A police report dated January 31, 1983 summarizing the interview of Lestz reported that "LESTZ indicated however that upon WALSH'S [sic] on numerous occasions dropping him off on Granada Boulevard at the laundromat, he would observe WALSH to drive his (Lestz) vehicle west on Granada and make a left turn on US-1 adjacent to the FINA SERVICE STATION at which the victim was abducted." (Def. Exh. 5 at 4). Lestz further indicated that Walsh had on numerous occasions frequented the convenience store near the laundromat and had commented on a particular female clerk working at the convenience store (PC-R4T. 76-77). On January 25, 1983, "LESTZ again reiterated that he felt WALSH was responsible for the homicide of BRENDA RUCKER but again stated that he was not there and that WALSH had not informed him that he killed the victim." (Def. Exh. 5 at 4).

It was revealed for the first time on February 7, 1997, that after the January 25th interview of Mr. Lestz, law enforcement stopped its investigation of Mr. Walsh as a suspect in the Rucker homicide. On February 7, 1997, Captain Burnsed explained his

decision to not pursue Mr. Walsh and Mr. Lestz as a suspect further as follows:

Q I thought you had indicated that the reason for going on January 31st -- actually I guess it was January 25th, 1983 to Illinois to interview Mr. -- to interview Mr. Lestz was because you found him and Mr. Walsh to be serious suspects?

A Correct.

Q So what Mr. Lestz had said before this statement didn't eliminate [Walsh] as a suspect?

A Correct.

Q Okay. So at the time of this statement then Mr. Lestz gives you information indicating that Mr. Walsh is a half block from the crime scene going out to purchase drugs the morning of the crime?

A That's correct.

Q And did that match up with what Mr. Levi had already said?

A It's very similar, yes.

Q At that point in time did you go confront Mr. Walsh with this information?

A I did not. No, sir.

Q After the interview on January 25th, 1983 was any further investigation conducted of Mr. Lestz, Levi or Walsh?

A I'm sorry. Could you repeat that one more time?

Q After this interview, which is January 25th of 1983, was any further investigation conducted of Mr. Lestz, Mr. Levi or Mr. Walsh?

A Yes.

Q And what was that?

A The comparison of the fingerprints and everything with the three individuals were compared with the

latent fingerprints that were obtained from the crime scene. [⁵]

Q When did that occur?

A I don't specifically recall. I don't have the case file in front of me.

Q That had not already been done?

A I'm not sure when that was done.

Q Mr. Walsh's name was first given to you in March of 82. This is ten months later. You don't think that the fingerprints had been submitted previously?

A I don't recall.

Q Okay.

A I don't --

Q So you can't say [then] that investigation occurred after January of 1983 with any certainty?

A Correct.

Q Other than that, was there any further investigation conducted of these three individuals?

A Not that I recall at this time.

(PC-R4T. 557-59).

Q So would it be fair to say after January 25th, 1983 you ceased investigating Mr. Lestz because you just didn't find him credible?

A That's a fair statement. Yes, sir.

(PC-R4T. 569).

Captain Burnsed's testimony on February 7, 1997, for the first time revealed that Mr. Walsh and Mr. Lestz were not eliminated after they were "thoroughly investigated and discarded

⁵Of course subsequently, there were fingerprints submitted from Roy Swafford. The results were all negative for Mr. Swafford.

as suspects." State's Response dated 10/22/90 at 17). Thus, the courts in 1990 and collateral counsel were misled by the representations that Walsh was eliminated after a "thorough" investigation eliminated him; presumably this meant something more than Captain Burnsed's credibility determination. The 1997 Burnsed testimony also flies squarely in face of the January 31, 1983 report authored by Captain Burnsed wherein he stated there was more investigation that needed to be done:

With the interview being terminated with MR. LESTZ, inv. Buscher accompanied by Cpt. Burnsed responded back to INTERNATIONAL AIRPORT, Orlando, Florida on Thursday, January 27, 1983. It is felt that after reviewing all of the information obtained from both LEVI and LESTZ in reference to this case, that once again MR. LEVI should be interviewed.

Further investigation is to follow.

(Def. Exh 5 at 4).

As to re-interviewing Mr. Levi, Captain Burnsed testified at the evidentiary hearing below as follows:

Q On redirect examination you were asked what else could you have done after January 25th of 1983. And your answer was nothing.

Couldn't you have gone back to interview Levi again?

A Certainly could, yes.

Q Since his story and Lestz' story seem to corroborate each other at that point in time?

MR. FOX: Objection. Misstatement, Your Honor.

THE COURT: Be overruled.

MR. MCCLAIN:

Q Didn't they now both indicate that Walsh was in the vicinity of the homicide at the time of the homicide?

MR. FOX: Objection. He did not indicate anything about homicides, just indicating where he was. He's projecting things into the question.

THE COURT: Be overruled.

MR. MCCLAIN:

Q After January 25th of 1983 didn't both Lestz and Levi place Walsh in the vicinity of the homicide at the time of the homicide?

A Yes.

Q Did you go back to Levi in light of what Lestz said to try and get more information?

A No.

Q Did you go and confront Walsh with this?

A I don't recall.

Q In fact, you didn't go ask Walsh, Lestz says you dropped him off at this laundromat half a block away from the Fina Station, what did you do that morning? You didn't do that, did you?

A I don't recall. No, I did not. No, I did not.

(PC-R4T. 582-83).

When collateral counsel found Mr. Lestz in 1994, he indicated that Mr. Walsh had two .38's that he was anxious to dispose of on the evening of February 14, 1982. To that end, Mr. Walsh had Mr. Lestz drive to various bars in the Daytona area while Mr. Walsh tried to unload the .38's. One of the places Mr. Lestz took Mr. Walsh that evening was the Shingle Shack. There, Mr. Lestz remained in his vehicle while Mr. Walsh disappeared inside. (PC-R4T. 122-23, 127-28).

Ray Cass, Mr. Swafford's trial attorney, testified that he did not have any of the police reports concerning James Walsh,

Michael Lestz, and Walter Levi. (PC-R4T. 235-38). Mr. Cass stated: "I don't think I have to go through the whole thing, because I wasn't aware of Mr. Walsh." (PC-R4T. 236). Mr. Cass indicated that the information in the reports was "[v]ery significant." (PC-R4T. 238). If Mr. Cass stated: "I can assure you if I had had that [the information concerning Mr. Walsh], I would have -- I would have used it." (PC-R4T. 239).

Mr. Cass did acknowledge that he had a pretrial conversation with Gene White, the trial prosecutor, during which Mr. Cass inquired about the investigation of other suspects in the Rucker homicide. At that point, the following occurred:

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 with his hand in the air. He had 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.

Q So now you're saying that you actually did ask him to obtain the suspects, to obtain the reports regarding the suspects?

A No. I just left it there. I thought what he told me and what I guess I presumed, rightly or wrongly, that they didn't have any relevance to the case, that there was no -- nothing to be gained by going through enough files -- it would have taken me maybe a month to go through every one of those files.

(PC-R4T. 261).⁶

⁶Interestingly, in the State's 1990 Response to the 3.850, the State asserted that the Walsh "allegations are based on documents which were provided by the Volusia County Sheriff's Office, not from the State Attorney's file." (Response dated 10/22/90 at 17). The State Attorney's Office did not disclose fifty file boxes of other suspects' materials pursuant to 119 requests. Nor did the State Attorney's Office disclose the police reports concerning Mr. Walsh, Mr. Lestz, and Mr. Levi.

Five months after the last interview with Mr. Lestz, Mr. Swafford's name first surfaced as a suspect. In June of 1983, Roger Harper contacted Volusia County authorities indicating that he may have information regarding the Rucker homicide. A June 21, 1983 Supplemental Narrative was prepared by Volusia County law enforcement. According to this report, Mr. Harper indicated that he and four other individuals had traveled from Tennessee to Daytona for the 500 in February of 1982. The group included Roy Swafford. According to Mr. Harper, "SWAFFORD then left by himself late in the evening of 2/13/82 and remained gone the entire night not returning until late in the morning of 2/14/82." (Def. Exh. 8 at 2). Mr. Harper was serving a seven year sentenced for "his part in the burglary of a motor home and the shooting of the motor home's occupants". (Def. Exh. 8 at 1). This crime had occurred June 19, 1982, in Bay County, Florida. (R. 1440-43). Mr. Swafford was Mr. Harper's co-defendant in that case. Mr. Harper told Volusia County authorities that, after Mr. Harper's arrest in Bay County, "SWAFFORD apparently tried to put the entire blame on [Harper]." (Def. Exh. 8 at 5).

Before contacting the authorities about the Rucker homicide, Mr. Harper had contacted an attorney in the Daytona Beach area, Mr. John Tanner. (Def. Exh. 8 at 5). Mr. Harper had told Mr. Tanner that he, Harper, "might have information on a murder. He

The 1990 Response implied that the reason for this is that State Attorney did not have these documents. If Gene White truly had these materials at the State Attorney's Office, then why did the State Attorney's Office not disclose them pursuant to Mr. Swafford's 119 requests?

stated that he received two letters from John Tanner indicating that the information appeared to be good, and that he wanted \$3,000.00 to represent him." (Def. Exh. 8 at 5).

Mr. Harper also reported that on the evening of February 14th, the group from Tennessee got into an altercation at the Shingle Shack. Mr. Harper reported that Mr. Swafford pulled a gun on individuals who were having a dispute over money with his traveling companions. Shortly thereafter police arrived. Meanwhile, Mr. Swafford hid his gun in a bathroom. (Def. Exh. 8 at 4). According to Mr. Harper, when Mr. Swafford was arrested, a male employee of the Shingle Shack came out with a gun he claimed to have found in the bathroom. The gun was turned over to the police. (Def. Exh. 8 at 4). After Mr. Harper came forward, this gun was found to still be in police custody. Ballistics tests were done, and the conclusion was reached that this gun had fired some of the bullets in the Rucker homicide.

Employees from the Shingle Shack were called at Mr. Swafford's trial to testify regarding the seizure of the gun at the Shingle Shack on February 14, 1982. Clark Bernard Griswold and Karen Sarniak, gave two totally different versions as to where this weapon had been seized. Indeed, Mr. Griswold could not identify Mr. Swafford as the individual whom he believed had left a gun in the Shingle Shack on the evening of February 14, 1982. (R. 1042). Mr. Griswold said that he saw an individual acting suspiciously when the police arrived. The individual briefly went into the men's restroom. (R. 1045). Even though he

didn't see a gun on this individual or see the individual hide a gun, (R. 1051) Mr. Griswold testified that he somehow knew that the individual had hidden a gun in the men's restroom (R. 1045). After subsequently searching the men's restroom, Mr. Griswold retrieved a gun from a three foot high trash can in the men's restroom. Mr. Griswold gave it to the police after the suspicious individual was taken into police custody and no gun was found on that person. (R. 1059). Mr. Griswold related that the individual in question, at the time of his arrest, was wearing only jeans and a black t-shirt (R. 1052). The individual was not wearing a leather jacket, as Mr. Harper had indicated that Mr. Swafford was wearing. (R. 825). The other State's witness, Karen Sarniak, specifically remembered and identified Mr. Swafford at his trial. However, she stated that she actually observed Mr. Swafford putting a gun in a wastepaper basket in the ladies' restroom (R. 1093-1094). She remembered this because Mr. Swafford had asked her to "first look in to make sure there wasn't anybody else in there." (R. 1096). She then accompanied him into the ladies restroom and she watched as he took "a gun on his person [and] put [it] in the trash." (R. 1096). He had also asked her to "make sure no one came in" while he was in the ladies restroom. (R. 1097). She also testified that she never saw the police actually seize the weapon from the ladies restroom. (R. 1094). A police officer testified that the gun taken into custody was the one provided by Mr. Griswold which Mr.

Griswold indicated came from the men's restroom at the Shingle Shack. (R. 1062).⁷

At Mr. Swafford's trial, the State relied heavily on the gun which had been seized at the Shingle Shack on February 14, 1982 and which the State argued had been in Mr. Swafford's possession. The State's reliance on this gun is not surprising given the fact that no scientific evidence in any way linked Mr. Swafford to the victim in this case. There was no hair, fiber, finger prints, blood or any other forensic evidence linking Mr. Swafford to the crime.

The State, in order to "prove" that Mr. Swafford possessed this weapon, used an Roger Harper to link the gun to Mr. Swafford. Mr. Harper stated that the gun was "the exact type as [Mr. Swafford] had with the hammer like this" (R. 810). Undisclosed exculpatory evidence regarding Mr. Harper was

⁷In his closing argument, the trial prosecutor recognized that there was a problem with the testimony from Mr. Griswold and Ms. Sarniak. So he argued: "What is important on the Shingle Shack episode where the gun was recovered is, one, there was a gun recovered, and the gun is the one which was identified here by the serial numbers by the police officers and placed in the records." (R. 1393). Later, he called the matter "a red herring run before your path here today." (R. 1394). He wrote off the contradictory testimony saying: "The only person that had any reason to throw away that gun was the person that the police were after, the person that the police suspected. They were after Mr. Swafford. He was the only one that they were after. Is a man just going to throw away a gun when there is nobody questioning him and it doesn't even appear to be similar to anything?" (R. 1394).

Of course the jury did not know that on February 14, 1982, Mr. Walsh told Mr. Lestz to drive around the Daytona Beach area so that he could find a place to unload two .38's. This information was contained in a police report that was not received by defense counsel and would have provided an answer to the prosecutor's otherwise rhetorical question.

presented in Mr. Swafford's previous Rule 3.850 motion. Indeed, Mr. Harper failed to give full disclosure when he testified about his expectations and efforts to gain consideration for his testimony. (R. 835-36). At Mr. Swafford's trial on October 31, 1985, Mr. Harper indicated that he was getting out of prison in "late December or early January this year; about sixty days."

(R. 835). Mr. Harper further testified:

Q Have you received any favorable treatment or any type of benefit from this information which you were wanting to trade for favorable treatment?

A No, sir.

Q But haven't -- I told you if you cooperate and tell the truth and to be honest, that I will try to continue to get you some favorable treatment as far as maybe an early release period?

A Yes, sir, that's what you said.

Q But it hasn't been successful yet?

A No, sir.

(R. 835-36).

However, undisclosed exculpatory evidence demonstrated that there was much more to the story. At the evidentiary hearing conducted in February of 1997, Mr. Swafford's trial attorney, Ray Cass, testified:

Q And so at that point in time in 1984 you had made discovery demand upon the state for any exculpatory evidence?

A (Witness nods head.)

Q And you asked the witness whether or not he was receiving any favorable treatment?

A Yes, sir.

Q And his answer was no?

A That's correct.

Q Now, after that question was asked let me call your attention to what occurs next. There's a -- bottom of that same page. What page number are you on? I forgot.

A This is page twenty-three. And it is the deposition of Roger Dean Harper taken on May 21st, 1984.

Q Mr. White then asked to go off the record?

A Yeah. Down at line twenty-four, Mr. White, can we go off the record for a minute and I will give you this.

Q Okay. And then if you flip to the next page, what occurred?

A By Mr. Pearl, question, Mr. Harper, let me show you a yellow sheet of paper and ask you whether your signature appears at the bottom of that paper.

And, answer, yes, sir.

Is that a letter of which you wrote to Mr. Gene White, the assistant state attorney.

Yes, sir, it is.

Is it genuine.

Yes, sir.

Let me show you a photocopy of a document and ask you whether or not you recall or you received in the mail an original of this document.

Answer, yes.

Is that --

Q So, apparently, Mr. White when you went off the record -- I don't know if you have any independent recollection from being there-- provided a specific document that Mr. Pearl used?

A Piece of yellow paper.

Q And let me call your attention to an attachment to the depo. Papers in front of you.

A Yes, sir. I have read it.

Q Now, what is the date of that letter?

A It's 4/22/84.

Q Is it a letter from Roger Harper to Gene White?

A To Gene White, sincerely, from Roger Harper.

Q So, apparently, Gene White provided you with that letter at the deposition?

A Yes, sir. Because it was marked and made a part of the deposition.

Q Since Mr. White provided you that letter at the deposition, would you have expected that he would have provided you with subsequent letters from the witness?

A I would think so.

Q Did he?

A No, sir. I didn't ask for any, but I --

Q Well, let me ask you --

A My demand was still --

Q Right.

A --was filed in the case.

(PC-R4T. 278-80).

In fact, Mr. Cass did not receive a series of letters that were written by, to or regarding Mr. Harper. These included: 1) a handwritten letter from Mr. Harper to Mr. White dated 8/12/84, which included the statement: "I'll keep my end of the deal if you will. The way things are going I'll be out before you get Swafford to trial. Believe me, I can be very instrumental in weather [sic] or not my family in Tennessee make it to the trial.

. . I know you can have me held in contempt of court for not testifying, but that's exactly what your [sic] going to have to do. I don't want to see Swafford get out of this no more than you do. But I'm intitled [sic] to relief and I want it now, not next year!" (Def. Exh. 9)(Emphasis added); 2) a handwritten letter from Mr. Harper to Gene White dated 5/16/85, which included another effort to get consideration: "I'm writing to ask if you will help get me to work release" (Def. Exh. 10); 3) a handwritten letter to Gene White dated 8/5/85, which included the following statement: "I finish my sentence in Dec. 85, 4 months from now, but I still want out as soon as possible!! Like I said befor, [sic] I do not want a parole but they could just let me go, if they wanted! I wrote and ask Dave Hudson about the reward that was suppose to be offered but he never answered. I'm interest [sic] in that, can the reward be collected?"⁸ (Def. Exh. 12); 4) a typed letter from Gene White to the Florida Parole Commission dated August 27, 1985, which sought the Parole Commission to "give Mr. Harper due consideration" (Def. Exh 13); 5) a typed letter from a Parole Commissioner to Gene White dated August 30, 1985, which indicated that Mr. Harper's presumptive parole release date was October 18, 1990, and that the Commission would make Mr. White's letter "a part of Mr. Harper's file and will be given every consideration" (Def. Exh. 14).⁹

⁸Dave Hudson was a deputy with the Volusia County Sheriff's Office. (R. 820).

⁹As was pled in Mr. Swafford's 1990 Motion to Vacate, Roger Harper filed on November 12, 1985 (the very day Mr. Swafford was

Mr. Swafford's trial counsel specifically testified that he did not receive this series of letters before Mr. Swafford's trial and that the letters would have been used to impeach Mr. Harper had they been disclosed. (PC-R4T. 241-45). Mr. Cass further testified that only after the trial did he learn that Mr. Harper was trying to receive several thousand dollars as a reward for his coming forward against Mr. Swafford. (PC-R4T. 245-46). Mr. Cass learned of Mr. Harper's efforts to receive the reward from John Tanner sometime in January or February of 1986. (PC-R4T. 246). At that time, he wrote Mr. Swafford a letter which stated in pertinent part:

In connection with Roger Dean Harper, I received communication from John Tanner advising me that Harper was attempting to collect a \$5,000.00 reward which he tells me was offered and published by PETCON who is the parent corporation of FINA here in Daytona and which had been offered for information leading to the capture and conviction of the killer of Brenda Rucker. He further tells me that a reward poster was issued and had called me to find out if I had a copy of it. This is the first notice that I have had that a reward had been offered. If this is so, this would be information of evidence recently received and not available at the time of during the trial or in any event, not furnished to the defense by the prosecution. . . It goes without saying that if this information had been available at the time of trial it would have been very effective in the impeachment of the testimony of Roger Harper and please note when you read his deposition and he is asked if he expected to receive any special consideration for his testimony he states no.

sentenced to death) a Motion for Mitigation of Sentence in his Bay County case. (Def. Exh. 17). Even though the motion was untimely, it was granted and Mr. Harper was ordered to be released immediately. (Def. Exh. 18). This effectively granted Mr. Harper what he asked for from Gene White in his August 5, 1985, letter ("I do not want a parole but they could just let me go, if they wanted!"). (Def. Exh. 12).

(Def. Exh. 15).

Mr. Cass testified that Mr. Harper's efforts to get a \$5,000 reward and the information in the letters to and from Mr. Harper were not consistent with Mr. Harper's testimony: "This would totally impeach him, impeach his testimony as to his interest in testifying on behalf of the state." (PC-R4T. 247).

Furthermore, Harper's identification of the gun was clearly suspect given the fact that on May 21, 1984 in deposition he had been shown another gun by Mr. Swafford's other attorney, Howard Pearl,¹⁰ and identified that gun as being Roy Swafford's. He admitted in that deposition that he could not tell one gun from the other and, at trial, admitted this as well (R. 826).

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

¹⁰Howard Pearl was another attorney with the public defender's office who assisted Mr. Cass during the discovery phase of the proceedings against Mr. Swafford.

After Mr. Harper came forward, Mr. Swafford was arrested and charged with the Rucker homicide. The State's case against Mr. Swafford was circumstantial. According to the State, Mr. Swafford had travelled to Daytona Beach that weekend for the Daytona 500 with the four individuals from Tennessee, Mr. Harper and his family members. The group camped outside of town at a campground. Mr. Swafford left the camp alone after midnight and was away from the campground in a vehicle until around 7:00 a.m. on February 14th. In fact, the prosecutor argued in his rebuttal closing: "Most of the witnesses said that he [Swafford] came back around daybreak, and they kept referring to 6:00 o'clock or 6:30, and I asked the last witness, Ricky Johnson, what is the time zone where you're from, Nashville. The light came on. Nashville is on Central Standard Time. They're an hour behind our time. So, when they refer to daybreak, they're probably referring to where they live, and the sun comes up there an hour earlier, 6:00 o'clock." (R. 1384).¹¹

It was undisputed that Mr. Swafford was with a prostitute until about 6:00 a.m. on February 14th. Thus, the State contended that Mr. Swafford abducted Ms. Rucker, sexually assaulted her twice, burned her with cigarettes, and killed her

¹¹Of course this argument is ludicrous. Los Angeles is on Pacific Standard Time, three hours earlier than Eastern Standard Time. When it is 7:00 a.m. in Daytona Beach, it is 4:00 a.m. in Los Angeles. The prosecutor's argument followed to its logical conclusion would be that the sun comes up in Los Angeles at 4:00 a.m. Time zones exist so that the sun rises at approximately the same time within each time zone. So the whole argument that Mr. Swafford returned to the camp at around 7:00 a.m. instead of around 6:00 a.m. is premised upon very shaky ground.

in that one-hour window of opportunity, between 6:00 a.m. when he left the prostitute and 7:00 a.m. when he returned to the camp.

Again, the stolen gun which was identified by a ballistics expert as the murder weapon had been found in the Shingle Shack, a bar in Daytona Beach. Testimony was presented indicating Mr. Swafford had been in possession of such a weapon prior to the arrival of police at the Shingle Shack. The gun was turned over to the police by Mr. Griswold who had found the gun in a trash can in the men's restroom. He did not see who placed the gun there, though he was suspicious of one particular individual who had been in the men's restroom early. He was unable to identify who that individual was.

Mr. Swafford's jury heard nothing about James Michael Walsh, Michael Lestz or Walter Levi. The jury was also unaware of Mr. Harper's numerous attempts to get consideration for his testimony against Mr. Swafford and the testimony of his family members from Tennessee. Without this additional evidence, the jury returned guilty verdicts of first-degree murder and sexual battery. However, Mr. Swafford was acquitted of robbery. The penalty phase was conducted on November 7, 1985. Defense counsel presented no defense at the penalty phase proceedings. After the jury recommended death, Judge Hammond sentenced Mr. Swafford to death on November 12, 1985. This Court affirmed the conviction and sentence on direct appeal. Swafford v. State, 533 So. 2d 270 (Fla. 1988).

On September 7, 1990, Governor Martinez signed a death warrant setting Mr. Swafford's execution for November 13, 1990. Until the signing of the warrant, Mr. Swafford was unrepresented in the post-conviction process. The Office of the Capital Collateral Representative (CCR), the office responsible for providing effective representation to Mr. Swafford in collateral proceedings had been overwhelmed by Governor Martinez's warrant signing policies. In the fall of 1990, CCR was on the verge of collapse. CCR had more active warrants than it had experienced attorneys to work on them. The experienced attorneys, who had not yet resigned and/or left, were burned out and in deteriorating health. In fact, on October 24, 1990, this Court entered an Administrative Order recognizing the difficulties confronting CCR and creating the Overton Commission to investigate the difficulties and issue a report. (PC-R1. 361).

After the signing of the warrant, Mr. Swafford's case was assigned to Jerome Nickerson, who "was basically three years out of law school." (PC-R4T. 328). Mr. Nickerson explained: "I was the most junior of these four senior attorneys and basically I was being pressed into service, like it or not." (PC-R4T. 329). He elaborated: "I was very aware of the fact that we had limited investigatory resources in terms of investigators and we had limited attorneys. And I had what the office could provide me and that was basically for all intents and purposes two baby attorneys and myself, three years out of law school, and we were going to do it." (PC-R4T. 340). Limitations arose from fiscal

considerations. "Because we were operating under certain [fiscal] financial structures. Our chief administrative officer would not allow us to go out and get an investigator investigator [sic]. We could get mental health people, no problem. . . . But in terms of going out and just hiring another criminal investigator, no, we were -- we were not given those kinds of resources and we had to rely on what we had." (PC-R4T. 341).

Through Chapter 119 materials disclosed by the Volusia County Sheriff's Office, Mr. Nickerson learned of Mr. Walsh and the two other individuals who had been with him in the Daytona Beach area. (PC-R4T. 342-43). Based upon the disclosed police reports regarding these three individuals, Mr. Nickerson pled a constitutional claim in a 3.850 filed on Mr. Swafford's behalf. However, due to the shortness of time between the disclosure and the due date under the then controlling Rule 3.851,¹² "we really did not have any additional opportunity to investigate the materials that were disclosed to us". (PC-R4T. 344). "When I filed Mr. Swafford's 3850 the Lestz/Walsh, that crew, was kind of in its infancy. I didn't have a chance to go ahead and run it all the way out." (PC-R4T. 365).

Harun Shabazz was a second chair assigned to Mr. Swafford's

¹²Rule 3.851 in 1990 required postconviction motions to be filed within 30 days of the signing of warrant that set an execution more than 60 days away. Under this rule, Mr. Swafford's 3.850 was due thirty days after his warrant was signed on September 7, 1990. Mr. Nickerson did obtain from this Court a brief extension of the Rule 3.851 due date.

case in 1990. Mr. Shabazz had graduated from law school in 1990. A month and a week after starting at CCR, he was assigned to assist Mr. Nickerson on Mr. Swafford's case. (PC-R4T. 416). Mr. Shabazz was the individual on the Swafford litigation team who was specifically assigned to make efforts to locate Walsh, Lestz, and Levi. Mr. Shabazz "went through the Chapter 119 public records material, which consisted of several police reports. I sifted through there for names, addresses, telephone numbers and the like." (PC-R4T. 418). Mr. Shabazz contacted state and federal prisons in effort to track down the three individuals. However, he was unable to obtain any helpful information. Specifically as to Mr. Lestz who had been incarcerated in the federal system, Mr. Shabazz was told "that once they release the individual, they didn't give any information how you contact an individual, telephone number or address and things of that sort." (PC-R4T. 419). Because Mr. Shabazz was unable to find a way locate Walsh, Lestz or Levi, the decision was made to hire Global Tracing Services. Global "was a private organization" that CCR hired when other efforts to locate an important witness were unsuccessful. (PC-R4T. 420). Global only charged for its services if it were successful in locating the person in question. As Mr. Shabazz explained: "if Global found someone, they would call us back and say they found so-and-so and they would send us a bill a couple weeks later. If they didn't find anyone, then they would just call us that they didn't find anybody." (PC-R4T. 421).

Global's record showed that they were in fact first contacted in 1990 in order to locate Michael Lestz for CCR. Global's records indicated that the inquiry remained "open and active" even though Global was not able to locate Mr. Lestz. (PC-R4T. 594). Since Global was not paid until it was successful in locating the subject of inquiry, inquiries remained open and active until the subject was located. Global's incomplete records showed that at least one follow up inquiry was received from CCR in 1994, shortly before Global was finally able to locate Michael Lestz. (PC-R4T. 594).

Meanwhile on October 15, 1990, Mr. Swafford had initiated post-conviction proceedings in state circuit court. Included in Mr. Swafford's motion was a no adversarial testing claim premised the nondisclosure of information concerning Michael Lestz, Walter Levi, and Michael Walsh and their numerous statements implicating each other in the Rucker homicide. Also included was a no adversarial testing claim premised upon the available but undisclosed impeachment concerning Roger Harper. Despite efforts to locate these individuals, they could not be found in the fall of 1990.

On October 22, 1990, the State submitted its response.¹³ Therein the State asserted "James Michael Walsh, Walter Levi and Michael Lestz were thoroughly investigated and discarded as suspects." (State Response dated 10/22/90 at 17).

¹³Although this response indicated service by fax on October 22, 1990, this Response was not stamped "filed" until October 31, 1990.

At an October 24, 1990, status hearing, the State produced in excess of one thousand (1000) pages of additional documents that had not been previously given to the defense (PC-R1. 455). Mr. Nickerson argued at that hearing: "We have pled that another individual specifically a Mr. Walsh committed this offense. We are saying Mr. Swafford is innocent." (Transcript of 10/24/90 hearing at 13). Mr. Nickerson explained: "Ineffectiveness counsel at the guilt innocence goes to Mr. Walsh. It goes to the materials that weren't disclosed by the state. It goes to what the trial counsel try to do to properly deploy an alibi slash reasonable doubt type of defense." (Id. at 13-14). On October 30, 1990, the circuit court signed an order denying the motion to vacate (PC-R1 436-51).

On November 8, 1990, Mr. Swafford appealed to this Court. Oral argument was held on November 9, 1990. A temporary stay was issued until 1:00 p.m. on November 15, 1990. On November 14, 1990, this Court issued its opinion denying all relief. Swafford v. State, 569 So. 2d 1264 (Fla. 1990).

Mr. Swafford next filed for federal habeas corpus review. The federal district court denied relief. On November 15, 1990, the Eleventh Circuit granted Mr. Swafford a stay of execution in order to hear Mr. Swafford's appeal. Mr. Nickerson terminated his employment with CCR the next day, November 16, 1990. (PC-R4T. 349, 425).

While the appeal was pending in the Eleventh Circuit, Mr. Swafford, through a newly assigned lead attorney, continued

to conduct further investigation into his case. (PC-R4T. 417-22). This included additional efforts to locate Lestz, Levi and Walsh. (PC-R4T. 418-20). Global continued to search pursuant to the open and active inquiry. (PC-R4T. 594). Mr. Swafford's reconstituted litigation team also sought additional ways to track down Walsh, Lestz and Levi. (PC-R4T. 418-19). The federal appeal was held in abeyance after Mr. Swafford filed a second motion to vacate.

While that was pending, Michael Chavis, an investigator hired by CCR in September of 1992, was assigned to Mr. Swafford's case in October of 1992. (PC-R4T. 451-52). He took over the duties that Mr. Shabazz had been performing up to that point. (PC-R4T. 422-23). He testified that he also tried to find some way to locate Walsh, Lestz and Levi. Starting in October of 1992, he reviewed all the 119 materials seeking some way to find these individuals. Just as Mr. Shabazz before him, Mr. Chavis was unable to find a lead which would enable him to locate Walsh, Lestz or Levi. (PC-R4T. 452-55). In early 1993, Mr. Chavis recontacted Global. (PC-R4T. 456). He double checked with them making sure they had the correct names, dates of birth, and social security numbers. (PC-R4T. 456-57). In 1993, Global still was unable to find Walsh, Lestz and Levi. In early 1994, Mr. Chavis again recontacted Global to double check on its progress on the open, active request. No new information was provided because Mr. Chavis had no new information. (PC-R4T.

458). Shortly thereafter in April 1994, Global reported an address for Michael Lestz. (PC-R4T. 459)(Def. Exh. 20).

Meanwhile, Mr. Swafford's second motion to vacate had been summarily denied. While Mr. Swafford's appeal was pending, a remand was ordered to get the facts in reference to new evidence of ex parte contact between the State and the presiding judge in 1990 concerning the preparation of the order denying the first 3.850. After that hearing was held, this Court affirmed the summary denial of the second 3.850. Swafford v. State, 636 So. 2d 1309 (Fla. 1994).

In April of 1994, when Mr. Swafford's collateral counsel was finally able to locate Michael Lestz, he provided Mr. Swafford's collateral counsel with an affidavit which strongly corroborates the 119 material that had not been disclosed to Mr. Swafford's trial defense team. In 1994, Mr. Lestz reiterated his statement to the police on January 25, 1983. He also recalled that Mr. Walsh had gone to the Shingle Shack on February 14th when Mr. Lestz had been driving him to various establishments as Mr. Walsh sought to unload two .38's. Mr. Lestz also explained that he was afraid of Mr. Walsh and had tried to make himself untraceable after his release from prison in December of 1984. "Well, I knew that Walsh was pretty peeved at me and he had escaped one time in Arkansas already and I just had reason to be concerned with him finding me." (PC-R4T. 80). Mr. Lestz instructed his family members to not disclose his whereabouts if any one contacted them looking for him. He made sure his driver's license showed the

wrong address. He avoided using his name on any business transactions or records. (PC-R4T. 80, 94-95). However, in December of 1993, Mr. Lestz had filed for "federal bankruptcy." (PC-R4T. 81).

Despite efforts to locate Mr. Lestz previously, members of Mr. Swafford's assigned litigation team testified that they were unable to ascertain Mr. Lestz' whereabouts until April of 1994. (PC-R4T. 423). After Mr. Lestz was located, Mr. Swafford's litigation team immediately presented a new motion to vacate.

Based on information obtained from Mr. Lestz, Mr. Swafford filed a new Rule 3.850 motion on June 13, 1994. After the circuit court summarily denied relief, this Court reversed and ordered an evidentiary hearing. Swafford v. State, 679 So. 2d 736 (Fla. 1996). The evidentiary hearing was held February 6-7, 1997.

Before the hearing commenced, Mr. Swafford filed a Motion To Disqualify the State Attorney's Office. This was premised upon the election of John Tanner as the State Attorney in the November, 1996 election. Mr. Tanner assumed office in January of 1997. Mr. Harper had disclosed to the police in 1983 that he contacted Mr. Tanner to obtain legal assistance in reference to the information he claimed he had against Mr. Swafford. (Def. Exh 8). Mr. Tanner had written Mr. Harper twice advising him about the usefulness of the information Mr. Harper possessed and offered to represent Mr. Harper in the matter for \$3,000. Subsequent to Mr. Swafford's trial, Mr. Tanner contacted Ray

Cass, Mr. Swafford's trial counsel, and revealed that Mr. Harper had been trying to obtain a \$5,000 reward for the information he had provided against Mr. Swafford. (Def. Exh 15). Given that Mr. Tanner was a material witness, Mr. Swafford sought the disqualification of the entire State Attorney's Office. The motion was denied.¹⁴

During the evidentiary hearing, Mr. Swafford sought to introduce the "Overton Commission Report, which has a file stamped date of June 4, 1991 by the clerk of the Florida Supreme Court." (PC-R4T. 485). Mr. Swafford argued that the report contained factual information regarding the adequacy of CCR's funding in 1990-91 and was relevant to the issue of CCR's due diligence in Mr. Swafford's case, and that "this exhibit is something that this Court can take judicial notice of." (PC-R4T. 487). The State argued against the introduction of the report saying "there is no right effective post-conviction or collateral counsel." (PC-R4T. 486). The circuit court refused to admit the report saying "I'm not going to allow that to be received in just because I don't think it's been properly authenticated." (PC-R4T. 489). When Mr. Swafford's counsel sought to point out the judicial notice provisions, he was cut off by the circuit: "Well, right or wrong, I have ruled. We need to move on or we're going to be here into the evening." (PC-R4T. 489).

¹⁴The circuit court did permit Mr. Swafford to call Mr. Tanner as a witness. However, he testified that he had no memory whatsoever about the matter. (PC-R4T. 518-21).

Mr. Swafford then sought to introduce "Shevin report, which was also received by the Florida Supreme Court and it was pursuant to the direction of the Florida Supreme Court that Robert Shevin conduct[ed] his evaluation of CCR." (PC-R4T. 489). The State indicated it had "the same objection to that report as we just had to the one --". (PC-R4T. 489). The circuit court interjected saying: "Same result." (PC-R4T. 490).

Thereafter, the circuit court entered its order denying 3.850 relief. The circuit court ruled that Mr. Swafford had two years from the disclosure of the 119 materials on October 15, 1990, to locate Mr. Lestz. Without identifying what specific acts Mr. Swafford's collateral counsel failed to undertake, the circuit court using only hindsight concluded that because Mr. Lestz lived in a small town (Elkville, Illinois) which was identified in a 1983 document as his residence, had collateral counsel followed up on this information he "would have discovered that Mr. Lestz was living three (3) miles from Elkville." (PC-R4. 286).

As to the merits of Mr. Swafford's constitutional claim, the circuit court said: "This Court finds that had the testimony of Mr. Lestz been presented to the jury that it would not have probably produced an acquittal." (PC-R4. 287). No cumulative consideration was given to all of the exculpatory evidence that the jury did not hear and which Mr. Swafford has properly plead in his 3.850's.

Thereafter, Mr. Swafford perfected this appeal.

SUMMARY OF ARGUMENT

1. Because the State affirmatively misled this Court and Mr. Swafford's collateral counsel in 1990, and did not disclose significant exculpatory evidence until at the evidentiary hearing conducted in February of 1997, this Court must review the merits of the resulting Brady cumulatively with the other exculpatory evidence previously pled as not being heard by Mr. Swafford's jury and as undermining confidence in the reliability of Mr. Swafford's trial.

2. Under the proper cumulative analysis required by Kyles v. Whitley and State v. Gunsby, Mr. Swafford is entitled to new trial at which the wealth of exculpatory evidence not heard by his original jury can be presented and considered. This exculpatory evidence, not heard by Mr. Swafford's original jury, more than undermines confidence in the outcome. It clearly establishes the trial resulted in verdict unworthy of confidence because a wealth of evidence supporting Mr. Swafford's claim of innocence was not heard.

3. The circuit court erroneously refused to consider reports ordered by this Court which were undertaken in order to evaluate the adequacy of CCR's funding and staffing. These reports were highly relevant to the issue of collateral counsel's diligence in searching for Mr. Lestz. They also establish interference by State of Florida with the adequacy of counsel's resources.

4. The circuit applied the wrong legal standard in evaluating collateral counsel's diligence in searching for Mr. Lestz. A proper analysis would have resulted in a finding of diligence.

5. The circuit court erred in not disqualifying the State Attorney's Office, given that the newly elected State Attorney was a material witness as the circuit determined.

ARGUMENT I

THE STATE'S FALSE ARGUMENT IN 1990 AND ITS FAILURE TO REVEAL THAT A THOROUGH INVESTIGATION OF WALSH, LESTZ AND LEVI DID NOT OCCUR VIOLATES DUE PROCESS AND DEFEATS ANY PROCEDURAL BAR THAT COULD ARISE FROM PRIOR DECISIONS FROM THIS COURT WHICH WERE PREMISED UPON THE STATE'S MISINFORMATION AND FALSE ARGUMENT.

A. INTRODUCTION.

In 1990, Mr. Swafford filed a 3.850 which asserted that he had received an constitutional inadequate adversarial testing. He alleged both that the State had failed to disclose and that trial counsel failed to uncover exculpatory evidence which undermined confidence in the outcome of the capital trial. This evidence concerned Mr. Walsh, Mr. Lestz and Mr. Levi and the police reports regarding the State's investigation of those three individuals as suspects in the Rucker homicide. Mr. Nickerson, Mr. Swafford's attorney at the time, specifically argued that Mr. Swafford was innocent and that Mr. Walsh was the real perpetrator of the Rucker homicide. Mr. Nickerson argued that as to Mr. Walsh an evidentiary hearing was necessary as to both ineffective assistance of counsel and the State's breach of its obligations under the federal constitution: "The state tells you no hearing on ineffective assistance at the guilt innocence. Ineffective counsel at the guilt innocence goes to Mr. Walsh. It goes to the materials that weren't disclosed by the state." (Transcript of 10/24/90 hearing at 13).

The State's Response to 3.850 allegations regarding Mr. Walsh was:

The above allegations are based on documents which were provided by the Volusia County Sheriff's Office, not from the State Attorney's file. There is constitutional requirement that the prosecution make a complete and detailed accounting to the defense of all police investigatory work on a case. [Citation]. Swafford has failed to show that this hearsay information was admissible, and failed to demonstrate any culpability of Walsh, so information regarding the investigation would not have changed the outcome. [Citation].

While Swafford has not demonstrated materiality and this claim could be summarily denied, the state has learned that the Volusia County Sheriff's files were provided to defense counsel and can demonstrate such at an evidentiary hearing. Furthermore, James Michael Walsh, Walter Levi, and Michael Lestz were thoroughly investigated and discarded as suspects.

(Response dated 10/22/90).

The State's Response contained false information which misled the circuit court, this Court, and Mr. Swafford's collateral counsel.¹⁵ The State further affirmatively failed to reveal additional exculpatory evidence. Contrary to the 1990 representation by the State that Walsh, Levi, and Lestz were "thoroughly investigated and discarded as suspects," the State presented evidence in 1997 that the "further investigation" police said was warranted on January 31, 1983, never occurred.

¹⁵The evidence presented by the State on February 7, 1997, was that Mr. White, the trial prosecutor had in his possession fifty file boxes of other suspect materials which he indicated to defense counsel were dead leads but offered him access to anyway. Contrary to the State's 1990 Response, the Volusia County Sheriff's files were not provided to defense counsel, and the State presented no evidence that they were.

It is also worth noting that the State conceded in 1990 that the State Attorney's Office did not possess the Walsh materials and accordingly did not disclose those materials pursuant to a 119 request to Mr. Swafford's collateral counsel.

This fact is and was highly relevant and exculpatory evidence. As a result, the State cannot rely upon this Court's decision in 1990 as erecting some kind of procedural bar precluding consideration of the merits of Mr. Swafford's constitutional claims when it did not reveal the highly relevant evidence until February 7, 1997. In Ventura v. State, 673 So. 2d 479 (Fla. 1996), this Court held: "The State cannot fail to furnish relevant information and then argue that the claim need not be heard on its merits because of an asserted procedural default that was caused by the State's failure to act."

B. 1990 DISCLOSURES AND NON-DISCLOSURES.

In 1990, the Volusia County Sheriff's Office disclosed a series of police reports which concerned the investigation of James Walsh, Walter Levi and Michael Lestz in reference to the Rucker homicide. The last of these reports in chronological order was dated January 31, 1983, and concerned an interview of Michael Lestz on January 26, 1983.¹⁶ The report concluded as follows:

With the interview being terminated with MR. LESTZ, Inv. Buscher accompanied by Cpt. Burnsed responded back to INTERNATIONAL AIRPORT, Orlando, Florida on Thursday, January 27, 1983. It is felt that after reviewing all of the information obtained from both LEVI and LESTZ in reference to this case, that once again MR. LEVI should be interviewed.

Further investigation is to follow.

¹⁶The report indicates that the interview was January 26th (Def. Exh. 5); however, when Captain Burnsed testified in 1997 he indicated that the date of the interview was January 25th. (PC-R4T. 572).

(Def. Exh. 5 at 4).

On October 22, 1990, the State stated in its Response:
"Furthermore, James Michael Walsh, Walter Levi, and Michael Lestz were thoroughly investigated and discarded as suspects."
(Response dated 10/22/90 at 17). The obvious implication was that the "[f]urther investigation" that was "to follow" according to the January 31st report occurred and according to the State eliminated Mr. Walsh as a suspect.

However, not until February 7, 1997, when the State called Captain Burnsed to the witness stand did the State reveal that the "[f]urther investigation" that was "to follow" never occurred. Captain Burnsed testified at the evidentiary hearing below as follows:

Q On redirect examination you were asked what else could you have done after January 25th of 1983. And your answer was nothing.

Couldn't you have gone back to interview Levi again?

A Certainly could, yes.

Q Since his story and Lestz' story seem to corroborate each other at that point in time?

MR. FOX: Objection. Misstatement, Your Honor.

THE COURT: Be overruled.

MR. MCCLAIN:

Q Didn't they now both indicate that Walsh was in the vicinity of the homicide at the time of the homicide?

MR. FOX: Objection. He did not indicate anything about homicides, just indicating where he was. He's projecting things into the question.

THE COURT: Be overruled.

MR. MCCLAIN:

Q After January 25th of 1983 didn't both Lestz and Levi place Walsh in the vicinity of the homicide at the time of the homicide?

A Yes.

Q Did you go back to Levi in light of what Lestz said to try and get more information?

A No.

Q Did you go and confront Walsh with this?

A I don't recall.

Q In fact, you didn't go ask Walsh, Lestz says you dropped him off at this laundromat half a block away from the Fina Station, what did you do that morning? You didn't do that, did you?

A I don't recall. No, I did not. No, I did not.

(PC-R4T. 582-83).

The January 31, 1983, police report indicated that "[f]urther investigation" was warranted. The fact that it never occurred establishes that the State's representation that "James Michael Walsh, Walter Levi, and Michael Lestz were thoroughly investigated and discarded as suspects" was simply false.

C. THE STATE'S CONTINUING OBLIGATION.

This Court has held that the State's obligation under Brady v. Maryland, 373 U.S. 83 (1963), continues throughout the postconviction process. Roberts v. Butterworth, 668 So. 2d 580 (Fla. 1996). In Johnson v. Butterworth, 23 Fla. L. Weekly at S385, S386 (Fla. 1998), this Court stated: "the State is under a continuing obligation to disclose any exculpatory evidence."

Thus here, the State had an obligation to reveal that the "[f]urther investigation" that law enforcement felt was warranted never occurred. Disclosing such exculpatory evidence would also have revealed that the argument made by the State that Mr. Walsh had been eliminated after a "thorough investigat[ion]" was misleading, if not false. The State's failure to disclose the fact that the "[f]urther investigation" did not occur violated due process and itself constitutes a Brady violation.

This undisclosed evidence discredits the police methods employed in investigating the Rucker homicide. The United States Supreme Court has recognized undisclosed evidence is exculpatory where it creates a basis for:

attack[ing] the reliability of the investigation in failing to even consider [another's] possible guilt and in tolerating (if not countenancing) serious possibilities evidence had been planted. See, e.g., Bowen v. Maynard, 799 F.2d 593, 613 (CA10 1986) ("A common trial tactic of defense lawyers is to discredit the caliber of the investigation or the decision to charge the defendant, and we may consider such use in assessing a possible Brady violation"); Lindsey v. King, 769 F.2d 1034, 1042 (CA5 1985) (awarding new trial of prisoner convicted in Louisiana state court because withheld Brady evidence "carried within it the potential. . .for the. . .discrediting. . .of the police methods employed in assembling the case").

Kyles, 115 S.Ct. at 1572.

Disclosure of the State's failure to conduct the "[f]urther investigation' that police believed was warranted did not occur until February 7, 1997. This was exculpatory evidence which "discredit[ed] . . . the police methods employed in assembling the case." Lindsey v. King, 769 F.2d 1034, 1042 (5th Cir. 1985). The State cannot "fail to furnish relevant information and then

argue that the claim need not be heard on its merits". Ventura v. State, 673 So. 2d at 480.

D. MERITS REVIEW IS REQUIRED.

Since the State failed in its continuing obligation to disclose exculpatory evidence in its possession, the merits of this claim must be entertained now. State v. Parker, 23 Fla. L. Weekly S439 (Fla. 1998). Since the State "fail[ed] to furnish relevant information", the claim is now before this Court on the merits. Ventura v. State, 673 So. 2d at 480.

This merits review requires cumulative consideration of all previously pled claims that Mr. Swafford did not receive an adequate adversarial testing because his jury did not hear exculpatory evidence. State v. Gunsby, 670 So. 2d 920 (Fla. 1996). The 1997 disclosure by the State of previously undisclosed Brady material must be evaluated cumulatively with the previously pled claims. Kyles v. Whitley, 115 S.Ct. 1555 (1995). As explained in Kyles:

The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence.

Kyles, 115 S.Ct. at 1566.

The fourth and final aspect of Bagley materiality to be stressed here is its definition in terms of suppressed evidence considered collectively, not item-by-item.

* * *

While the definition of Bagley materiality in terms of the cumulative effect of suppression must accordingly be seen as leaving the government with a degree of discretion, it must also be understood as imposing a

corresponding burden. On the one side, showing that the prosecution knew of an item of favorable evidence unknown to the defense does not amount to a Brady violation, without more. But the prosecution, which alone can know what is undisclosed, must be assigned the consequent responsibility to gauge the likely net effect of all such evidence and make disclosure when the point of 'reasonable probability' is reached. This in turn means that the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police. But whether the prosecutor succeeds or fails in meeting this obligation (whether, that is, a failure to disclose is in good faith or bad faith, see Brady, 373 U.S. at 87, 83 S.Ct. at 1196-1197), the prosecution's responsibility for failing to disclose known, favorable evidence rising to a material level of importance is inescapable.

Kyles, 115 S.Ct. at 1567-68.

The Supreme Court made it clear in Kyles that due process required the prosecutor to fulfill his obligation of knowing of exculpatory evidence in the State's possession and disclosing to defense counsel:

Unless, indeed, the adversary system of prosecution is to descend to a gladiatorial level unmitigated by any prosecutorial obligation for the sake of truth, the government simply cannot avoid responsibility for knowing when the suppression of evidence has come to portend such an effect on a trial's outcome as to destroy confidence in its result.

Kyles, 115 S.Ct. at 1568.

To the extent that the State argues that the prosecutor can transfer his obligation "to learn of any favorable known to others acting on the government's behalf" (Kyles at 1567) to the defense attorney by saying in essence "I have determined that these are all dead leads, but help yourself", this Court has already ruled that the claim is at most merely converted to an ineffective assistance of counsel claim. State v. Gunsby, 670

So. 2d at 921-22 ("To the extent, however, that Gunsby's counsel failed to discover this evidence, we find that his performance was deficient under the first prong of the test for ineffective assistance of counsel as set forth in Strickland v. Washington"); Smith v. Wainwright, 799 F. 2d 1442 (11th Cir 1986). Though such an argument (Mr. White transferred his obligation under Kyles to Mr. Cass) does not appear to Mr. Swafford to be consistent with Kyles, the argument is empty rhetoric ignoring the simple fact that Mr. Swafford did not receive what due process as Kyles explains guarantees: "a fair trial, understood as a trial resulting in a verdict worthy of confidence." Kyles, 115 S.Ct. at 1566. Under Gunsby and Kyles, the question is, regardless of who failed to carry out their constitutional obligation (the prosecutor or the defense counsel), is the verdict obtained in the absence of the undisclosed (to the jury) exculpatory evidence one "worthy of confidence." Kyles, 115 S.Ct. at 1566.

E. CONCLUSION.

Because of the state's nondisclosure of highly relevant information (its failure to conduct the "further investigation" that the police in January of 1983 determined was warranted, discredits the police methods in the case), this Court must now conduct a merits review of the cumulative effects of Mr. Swafford's claim that he did not receive a constitutionally adequate adversarial testing because either the State failed to disclose to defense counsel failed to discover and present to the jury exculpatory evidence.

ARGUMENT II

MR. SWAFFORD WAS DEPRIVED OF HIS RIGHTS TO DUE PROCESS UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AS WELL AS HIS RIGHTS UNDER THE FIFTH, SIXTH, AND EIGHTH AMENDMENTS, BECAUSE EITHER THE STATE FAILED TO DISCLOSE EVIDENCE WHICH WAS MATERIAL AND EXCULPATORY IN NATURE AND/OR PRESENTED MISLEADING EVIDENCE AND/OR DEFENSE COUNSEL UNREASONABLY FAILED TO DISCOVER AND PRESENT EXCULPATORY EVIDENCE.

A. INTRODUCTION.

The Supreme Court has explained:

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

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

Here, Mr. Swafford was denied a reliable adversarial testing. The jury never heard the considerable and compelling

evidence that would have shown that Walsh committed the murder, and that Mr. Swafford did not. Whether the prosecutor failed to disclose this significant and material evidence or whether the defense counsel failed to do his job, no one disputes the jury did not hear the evidence in question. In order "to ensure that a miscarriage of justice [did] not occur," Bagley, 473 U.S. at 675, it was essential for the jury to hear the evidence. Confidence is undermined in the outcome since the jury did not hear the evidence. Garcia v. State, 622 So. 2d at 1331.

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

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

Confidence in the outcome of Mr. Swafford's trial is undermined because the unrepresented evidence was relevant and material to Mr. Swafford's guilt of first degree murder and to whether a death sentence was warranted. Here, exculpatory evidence did not reach the jury. Moreover, the prosecution interfered with defense counsel's ability to provide effective representation and insure an adversarial testing. The prosecution denied the defense the information necessary to alert counsel to the avenues worthy of investigation and presentation to the jury, and in fact, affirmatively misled defense counsel. As a result, no constitutionally adequate adversarial testing occurred. Confidence is undermined in the outcome. There is a reasonable probability of a different outcome. Mr. Swafford was convicted and sentenced without a constitutionally adequate adversarial testing.

B. CUMULATIVE ANALYSIS REQUIRED.

The United States Supreme Court recently recognized that, though a Brady violation may be comprised of individual instances of nondisclosure, proper constitutional analysis requires consideration of the cumulative effect of the individual nondisclosures. Kyles v. Whitley. The reason for this as explained by the United States Supreme Court is in order to insure that the criminal defendant receives "a fair trial, understood as a trial resulting in a verdict worthy of confidence." Kyles, 115 S. Ct. at 1566. Thus, the proper analysis cannot be conducted when suppression of exculpatory

evidence continues or when, despite due diligence, the evidence of the prejudicial effect of the nondisclosure does not surface until later. The analysis must be conducted when all of the exculpatory evidence which the jury did not know becomes known.

In Kyles v. Whitley, the Supreme Court explained the appropriate standard of review of a Brady claim:

The fourth and final aspect of Bagley materiality to be stressed here is its definition in terms of suppressed evidence considered collectively, not item-by-item.

Kyles, 115 S.C.t at 1567.

The result reached by the Fifth Circuit majority is compatible with a series of independent materiality evaluations, rather than the cumulative evaluation required by Bagley, as the ensuing discussions will show.

Kyles, 115 S. Ct. at 1569.

In evaluating the weight of all these evidentiary items, it bears mention that they would not have functioned as mere isolated bits of good luck for Kyles. Their combined force in attacking the process by which the police gathered evidence and assembled the case would have complemented, and have been complemented by, the testimony actually offered by Kyles's friends and family to show that Beanie had framed Kyles. Exposure to Beanie's own words, even through cross-examination of the police officer, would have made the defense's case more plausible and reduced its vulnerability to credibility attack. Johnny Burns, for example, was subjected to sharp cross-examination after testifying that he had seen Beanie change the license plate on the LTD, that he walked in on Beanie stooping near the stove in Kyles's kitchen, that he had seen Beanie with handguns of various calibres, including a .32, and that he was testifying for the defense even though Beanie was his "best friend." On each of these points, Burns's testimony would have been consistent with the withheld evidence: that Beanie had spoken of Burns to the police as his "partner," had admitted to changing the LTD's license plate, had attended Sunday dinner at Kyles's apartment, and had a history of violent crime, rendering his use of guns more likely. With this information, the defense could

have challenged the prosecution's good faith on at least some of the points of cross-examination mentioned and could have elicited police testimony to blunt the effect of the attack on Burns.

Justice Scalia suggests that we should "gauge" Burns's credibility by observing that the state judge presiding over Kyles's post-conviction proceeding did not find Burns's testimony in that proceeding to be convincing, and by noting that Burns has since been convicted for killing Beanie. Of course, neither observation could possibly have affected the jury's appraisal of Burns's credibility at the time of Kyles's trials.

Kyles, 115 S. Ct. at 1573 n. 19 (citations omitted).

C. LOWER COURT'S ANALYSIS VIOLATED KYLES.

The circuit court purported to conduct a merits review saying: "This Court finds that had the testimony of Mr. Lestz been presented to the jury it would not have probably produced an acquittal." (PC-R4. 287). The circuit court elaborated briefly as follows:

Mr. Lestz, in the two (2) statements he gave to the Sheriff's investigators, referred to in defendant's exhibit 5 and 6 introduced into evidence at the February, 1997, evidentiary hearing and the affidavit produced by Mr. Lestz and his testimony that Mr. Lestz gave at the evidentiary hearing in February, 1997, contained many inconsistencies and this Court finds that had the testimony been presented to the trial jury, that it would not have probably resulted in an acquittal given the strong case the state had against Mr. Swafford.

(PC-R4. 287).

This analysis failed to apply the appropriate legal standard to Mr. Swafford's claims. First, there is no cumulative consideration of the rest of the exculpatory evidence that the jury did not hear. This unconsidered exculpatory evidence includes: Mr. Levi's testimony corroborating Mr. Lestz'

testimony that Mr. Walsh left with Mr. Lestz before 6:00 a.m. on the morning of February 14, 1982; Mr. Levi's testimony that Mr. Walsh was a drug addict who frequently left him and Mr. Lestz at the laundromat a block a block from where Brenda Rucker worked while Mr. Walsh went to purchase drugs; Mr. Walsh's suspicious conduct when interviewed by the police and shown pictures of Brenda Rucker; Mr. Walsh's refusal to reveal his whereabouts on February 14th; the similarity between the burns inflicted upon Mr. Lestz while Mr. Walsh sexually assaulted him and the burns found on Brenda Rucker's body after she had been sexually assaulted and then murdered; the statement by Mr. Walsh to Mr. Lestz after Mr. Walsh had burned him with cigarettes that he was going to shot him behind the ear and blow his brains out and the fact that Ms. Rucker was killer by a shot behind her ear after she had been sexually assaulted and burned with cigarettes; Walsh's possession of BOLO for the Rucker homicide; the fact that Walsh bore a strong resemblance to the composite sketch contained in the BOLO; Mr. Walsh's admission that he was supporting himself in February, 1983, through burglaries and robberies; Roger Harper's letters to the prosecution demanding consideration for his testimony, even threatening to risk contempt of court if he did not receive consideration; Mr. Harper's representation in the letters that he could effect whether his family members from Tennessee testified for the State against Roy Swafford; the fact that before coming forward Mr. Harper obtained information from John Tanner about the homicide; the fact that Mr. Harper was

negotiating with Mr. Tanner over whether Mr. Tanner would represent Mr. Harper and Mr. Tanner's subsequent disclosure after the trial to Ray Cass that Mr. Harper had been trying to obtain a \$5,000 for coming forward with information that led to the conviction of Mr. Swafford; the fact that Mr. Harper received an unopposed though untimely sentence reduction to time served the day Mr. Swafford received his sentence of death; the pendency of undisclosed criminal charges against the defense witness, Paul Seiler. None of this was considered by the circuit court in conducting its merits review.

Second the circuit court analysis failed to comply with the following language from Kyles:

Justice Scalia suggests that we should "gauge" Burns's credibility by observing that the state judge presiding over Kyles's post-conviction proceeding did not find Burns's testimony in that proceeding to be convincing, and by noting that Burns has since been convicted for killing Beanie. Of course, neither observation could possibly have affected the jury's appraisal of Burns's credibility at the time of Kyles's trials.

Kyles, 115 S.Ct. at 1573 n. 19. The circuit court failed to evaluate the evidence from the point of view of its possible effect on the jury and whether the verdict rendered in the absence of all of the exculpatory evidence unknown to Mr. Swafford's jury "result[ed] in a verdict worthy of confidence." Kyles 115 S.Ct. at 1566.

Because the circuit court apparently misunderstood the nature of Mr. Swafford's claims, its order denying relief improperly evaluated the evidence. When a defendant establishes that the State withheld material exculpatory evidence, the court

must order a new trial if there is "a reasonable probability that . . . the result of the proceeding would have been different." United States v. Bagley, 473 U.S. 667, 682 (1985). And if the State knowingly used false evidence, the court must order a new trial if "there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." United States v. Agurs, 478 U.S. 97, 103 (1976). In Agurs, the Supreme Court explained why newly discovered evidence claims place a greater burden on the defendant than claims arising from State misconduct:

[T]he fact that such [exculpatory] evidence was available to the prosecutor and not submitted to the defense places it in a different category than if it had simply been discovered from a neutral source after trial. For that reason the defendant should not have to satisfy the severe burden of demonstrating that newly discovered evidence probably would have resulted in acquittal. If the standard applied to the usual motion for new trial based on newly discovered evidence were the same when the evidence was in the State's possession as when it was found in a neutral source, there would be no special significance to the prosecutor's obligation to serve the cause of justice.

427 U.S. at 111. Because the circuit court applied the wrong standard to Mr. Swafford's claims, its order denying relief cannot withstand this Court's review. Without the required cumulative consideration of all the exculpatory not known to the jury because of constitutional failing of the prosecutor and/or the defense counsel, the analysis was defective. Kyles; Gunsby.

Because the truth of a witness's testimony and a witness's motive for testifying are material questions of fact for the

jury, the improper withholding of information regarding a witness's credibility is just as violative of the dictates of Brady v. Maryland as the withholding of information regarding a defendant's innocence. Bagley, 473 U.S. 667; Quimette v. Moran, 942 F.2d 1 (1st Cir. 1991). Impeachment evidence of an important State witness is material evidence that must be disclosed by the prosecution. United States v. Arnold, 117 F.3d 1308 (11th Cir. 1997); Jean v. Rice, 945 F.2d 82 (4th Cir. 1991). As a result of the State's misconduct in this case, Mr. Swafford was precluded from effectively cross-examining key State witnesses and from effectively presenting a defense, and the jury was deprived of relevant evidence with which to evaluate the State's witnesses' credibility.

Generally, the standard to determine materiality is whether "there is a reasonable probability that . . . the result of the proceeding would have been different" had the evidence been available to the defense. Bagley, 473 U.S. at 682. However, a lower standard applies where the State knowingly used false testimony as occurred here. In such a case, the falsehood is deemed to be material "if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." Agurs, 427 U.S. at 103 (emphasis added). Accord Giglio, 405 U.S. at 154. The lower standard applies because such cases involve prosecutorial misconduct and the corruption of the truth-seeking function of the trial. Agurs, 427 U.S. at 104; Bagley, 473 U.S. at 680. The Supreme Court has indicated that this lower

standard of materiality is equivalent to the Chapman v. California, 386 U.S. 18 (1967), "harmless beyond a reasonable doubt" standard, Bagley, 473 U.S. at 679 n. 9, which requires "the beneficiary of a constitutional error to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." 386 U.S. at 24 (quoting Fahy v. Connecticut, 375 U.S. 85, 86-7 (1963)).

In analyzing a Brady claim under the Supreme Court's opinion in Kyles v. Whitley, the focus is the possible effect on the jury of the previously unknown exculpatory evidence. The Court explained:

Justice Scalia suggests that we should "gauge" Burns's credibility by observing that the state judge presiding over Kyles's post-conviction proceeding did not find Burns's testimony in that proceeding to be convincing, and by noting that Burns has since been convicted for killing Beanie. Of course, neither observation could possibly have affected the jury's appraisal of Burns's credibility at the time of Kyles's trials.

115 S. Ct. at 1573 n. 19 (citation omitted)(emphasis added). The Court's review of the evidence in Kyles similarly demonstrates its focus on the jury to determine whether the defendant satisfied the materiality standard established in Bagley. In Kyles, the Supreme Court found that the evidence withheld by the State would not only have resulted in a stronger case for the defense, but would also have substantially reduced, or even destroyed, the value of the State's two best witnesses.

The State in Kyles had physical evidence connecting Mr. Kyles to the crime; however, the Court noted that "none of the

Brady cases has ever suggested that sufficiency of evidence (or insufficiency) is the touchstone." 115 S. Ct. at 1566 n. 8. The Court explained:

[T]he question is not whether the State would have had a case to go to the jury if it had disclosed the favorable evidence, but whether we can be confident that the jury's verdict would have been the same. Confidence that it would have been cannot survive a recap of the suppressed evidence and its significance for the prosecution.

115 S. Ct. at 1575. Thus, the proper analysis is not whether there was and remains sufficient to convict Mr. Swafford. The focus must be on the undisclosed evidence which the jury did not hear and whether the reviewing court "can be confident that the jury's verdict would have been the same."

Moreover, consideration must be given to the undisclosed evidence's potential for providing a basis for:

attack[ing] the reliability of the investigation in failing to even consider [another's] possible guilt and in tolerating (if not countenancing) serious possibilities evidence had been planted. See, e.g., Bowen v. Maynard, 799 F.2d 593, 613 (CA10 1986) ("A common trial tactic of defense lawyers is to discredit the caliber of the investigation or the decision to charge the defendant, and we may consider such use in assessing a possible Brady violation"); Lindsey v. King, 769 F.2d 1034, 1042 (CA5 1985) (awarding new trial of prisoner convicted in Louisiana state court because withheld Brady evidence "carried within it the potential. . .for the. . .discrediting. . .of the police methods employed in assembling the case").

Kyles, 115 S.Ct. at 1572.

In addition consideration must be given to the fact that the State in this case not only withheld exculpatory evidence but also knowingly presented false testimony, the correct standard is whether "there is any reasonable likelihood that the false

testimony could have affected the judgment of the jury." Agurs, 427 U.S. at 103. As to the letters that Mr. White received from Roger Harper, it is cannot be disputed that Mr. White knew of those letters. It also cannot be disputed that those letters demonstrate that Mr. Harper's testimony regarding his efforts to obtain consideration for his testimony were simply false. Accordingly, the Agurs standard applies and must be factor into the cumulative analysis.

Further, any argument by the State that the exculpatory evidence unknown to the jury could have been discovered by trial counsel through the exercise of due diligence, simply converts the claim to one of constitutionally ineffective assistance of counsel. The question remains did Mr. Swafford receive a constitutional adequate adversarial testing and was the resulting verdict, one "worthy of confidence." Kyles, 115 S.Ct. 1566. In Smith v. Wainwright, 799 F. 2d 1442 (11th Cir. 1986), the Eleventh Circuit Court of Appeals addressed the situation in which the State's key witnesses had not been impeached because of trial counsel had failed to obtain discovery from the State which would have revealed the available but unknown impeachment. This failure converted the Brady claim that Smith raised into an ineffective assistance of counsel on which the Eleventh Circuit granted relief. The court explained the significance of the trial attorney's failure to obtain and present the impeachment evidence:

The conviction rested on the testimony of Johnson. His credibility was the central issue in the case.

Available evidence would have had great weight in the assertion that Johnson's testimony was not true. That evidence was not used and the jury had no knowledge of it. There is a reasonable probability that, had their original statements been used at trial, the result would have been different.

799 F.2d 1442, 1444 (11th Cir. 1986). Accord State v. Gunsby.

In United States v. Arnold, 117 F.3d 1308 (11th Cir. 1997), the Eleventh Circuit Court of Appeals found a Brady violation when the State had withheld evidence that one of their key witnesses received favorable treatment in exchange for his cooperation. At trial, he testified that he did not expect a reduced sentence in exchange for his testimony. The court applied the "reasonable likelihood" standard, rather than the stricter "reasonable probability" standard, because the State knew at the time the witness testified that he was lying about his arrangement with the State. 117 F.3d at 1317.

Thus, for all these reasons, the circuit analysis was defective and is thus of no force.

D. CONFIDENCE IS UNDERMINED IN THE OUTCOME.

Proper analysis of Mr. Swafford's claims in this case leads to the inescapable conclusion that confidence in the outcome of trial is undermined and a new trial is required. Consideration must given cumulative to various pieces of evidence that was unknown by Mr. Swafford's jury.

1. Walsh, Lestz, and Levi.

Mr. Swafford was convicted of murder based on circumstantial evidence. The victim was abducted from a convenience store in Ormond Beach at 6:20 a.m. on Sunday, February 14, 1982 (the day

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

At the evidentiary hearing below, undersigned counsel presented the testimony of both Michael Lestz and Walter Levi. In addition, documentary evidence was introduced. This included: 1) transcript of August, 1982, statement of Levi; 2) 3/17/82 police report referencing Arkansas arrest of James Walsh; 3) 7/20/82 police report regarding developments re: Walsh and Lestz; 4) search warrant and accompanying affidavit detailing probable cause to believe Lestz' vehicle used in Rucker homicide; 5) 1/31/83 police report regarding January 26th interview of Michael Lestz; 6) 7/26/82 police report regarding July 23rd interviews of Lestz and Walsh; 7) 8/30/82 police report regarding interview of Walter Levi.

All of the unrefuted evidence established that on February 14, 1982, Michael Lestz and Walter Levi were in Daytona Beach

along with James Michael Walsh. Shortly before 6:00 a.m. on February 14th, Mr. Lestz picked up Mr. Walsh from a motel room where he had spent the night with Mr. Levi. Mr. Lestz drove to a laundromat approximately a block away from the Fina station that employed Brenda Rucker. Dropping Mr. Lestz and/or Mr. Levi off at this laundromat was a common occurrence while Mr. Walsh went somewhere nearby to purchase drugs. Mr. Walsh admitted that at in February, 1983, he was supporting himself and his drug habit by doing burglaries and robberies.

On February 14th, Mr. Walsh left Mr. Lestz at the laundromat a block from where Brenda Rucker had just arrived for work. Mr. Walsh drove away Mr. Lestz' vehicle several minutes before Brenda Rucker disappeared, one block away. A composite sketch of the man believed to be seen driving Ms. Rucker away "strongly resembled" Mr. Walsh according to Arkansas authorities who arrested Mr. Walsh in March of 1982 and found the composite sketch in Mr. Walsh's possession.

Mr. Walsh reappeared at the laundromat to pick up Mr. Lestz nearly five hours later. He seemed nervous, appeared sweaty, and was very hyper. Mr. Walsh told Mr. Lestz that he was anxious to dispose of several .38's he had in his possession. That evening he had Mr. Lestz drive around to several bars in the Daytona area while he, Walsh, sought to unload multiple guns. One of the places that Mr. Lestz drove to that night was the Shingle Shack. While there, Mr. Lestz remained in the vehicle and Mr. Walsh

disappeared inside the Shingle Shack for a period of time.¹⁷ This evidence is particularly significant in light of the lack of evidence tying Mr. Swafford to the .38 found in the trash can in the men's restroom at the Shingle Shack; no one saw Mr. Swafford put a gun in that trash can. The trial prosecutor explained this failure of evidence away with a rhetorical question asking the jury who else would have left a .38 in the trash can in the men's restroom.

After February 14th while they were still in the Daytona Beach area, Mr. Lestz also indicated that Walsh became "upset" upon seeing the fliers about the Rucker homicide containing the composite drawing of the suspect. (Pc-R4T. 73). Mr. Lestz found one flier in his vehicle which had been defaced. Only Walsh and Levi had access to the interior of the vehicle at the time. Mr. Lestz also observed Mr. Walsh snatching these fliers off car windows. Mr. Walsh "grabbed them up and put them in his pocket or tore them up." (PC-R4T. 75). The fliers about the Rucker homicide seemed to bother Mr. Walsh. (Id.).

In March of 1982, Mr. Lestz traveled to Arkansas with Mr. Walsh. There, they were arrested after Mr. Walsh attempted to murder Mr. Lestz. Mr. Walsh sexually assaulted Mr. Lestz and burned him with cigarettes. Mr. Walsh told Mr. Lestz while pointing a gun at him that he was going to put two bullets in the

¹⁷This means Walsh was 1) a block away from where Ms. Rucker disappeared ten minutes before she disappeared and 2) in the bar where the murder weapon was found the very same evening the murder weapon was found there.

back of his head and blow his brains. Mr. Lestz escaped and called the police.

When the police arrested Mr. Walsh, they discovered a BOLO for the Rucker homicide in his back pocket. The police noticed that Mr. Walsh bore a striking resemblance to the composite included in the BOLO. The Arkansas authorities thereupon contacted the Volusia County Sheriff's Office. Volusia County authorities confirmed the resemblance. A March 17, 1982, Volusia County Sheriff's report indicated that Walsh was arrested in Arkansas following an armed robbery in which he told the victim that "he had `killed' three persons' in the State of Florida" (PC-R3. 200).

Volusia County authorities thereafter contacted interviews of Walsh, Lestz, and Levi. These interviews were conducted over a several month period and were documented in numerous police reports. These police reports were undisclosed to Mr. Swafford and his counsel.

Based upon the interviews of Walsh, Lestz and Levi, the State sought a search warrant for the vehicle which had been Mr. Lestz' possession in Daytona Beach in February of 1982. Law enforcement personnel executed a sworn affidavit detailing the probable cause to believe that Walsh, Lestz and/or Levi had committed the Rucker homicide. In addition to the threesome's statements, law enforcement personnel actually observed the burns Mr. Lestz claimed Mr. Walsh inflicted on him with cigarettes while Mr. Walsh sexually assaulted him with the burns on Brenda

Rucker's body and concluded that they "strongly resemble[d]" each other.

2. Discredited police methods.

The January 31, 1983 report authored by Captain Burnsed wherein he summarized his interview of Mr. Lestz on January 26, 1983 concluded that additional investigation was warranted and would occur:

With the interview being terminated with MR. LESTZ, inv. Buscher accompanied by Cpt. Burnsed responded back to INTERNATIONAL AIRPORT, Orlando, Florida on Thursday, January 27, 1983. It is felt that after reviewing all of the information obtained from both LEVI and LESTZ in reference to this case, that once again MR. LEVI should be interviewed.

Further investigation is to follow.

(Def. Exh 5 at 4). As was revealed on February 7, 1997, this "[f]urther investigation" did not occur. Captain Burnsed testified at the evidentiary hearing below as follows:

Q On redirect examination you were asked what else could you have done after January 25th of 1983. And your answer was nothing.

Couldn't you have gone back to interview Levi again?

A Certainly could, yes.

Q Since his story and Lestz' story seem to corroborate each other at that point in time?

MR. FOX: Objection. Misstatement, Your Honor.

THE COURT: Be overruled.

MR. MCCLAIN:

Q Didn't they now both indicate that Walsh was in the vicinity of the homicide at the time of the homicide?

MR. FOX: Objection. He did not indicate anything about homicides, just indicating where he was. He's projecting things into the question.

THE COURT: Be overruled.

MR. MCCLAIN:

Q After January 25th of 1983 didn't both Lestz and Levi place Walsh in the vicinity of the homicide at the time of the homicide?

A Yes.

Q Did you go back to Levi in light of what Lestz said to try and get more information?

A No.

Q Did you go and confront Walsh with this?

A I don't recall.

Q In fact, you didn't go ask Walsh, Lestz says you dropped him off at this laundromat half a block away from the Fina Station, what did you do that morning? You didn't do that, did you?

A I don't recall. No, I did not. No, I did not.

(PC-R4T. 582-83). The failure to conduct the "[f]urther investigation", which the January 31st report indicated was to follow, discredits the police methods employed. It calls into question the police methods as to the entirety of the case, and as the United States Supreme Court recognized in Kyles constituted exculpatory evidence that must be evaluated cumulatively with the other undisclosed evidence.

3. Roger Harper.

Ray Cass, Mr. Swafford's trial attorney did not receive a series of letters that were in the State's possession and were written by, to or regarding Mr. Harper. These included: 1) a

handwritten letter from Mr. Harper to Mr. White dated 8/12/84, which included the statement: "I'll keep my end of the deal if you will. The way things are going I'll be out before you get Swafford to trial. Believe me, I can be very instrumental in weather [sic] or not my family in Tennessee make it to the trial.

. . I know you can have me held in contempt of court for not testifying, but that's exactly what your [sic] going to have to do. I don't want to see Swafford get out of this no more than you do. But I'm intitled [sic] to relief and I want it now, not next year!" (Def. Exh. 9)(Emphasis added); 2) a handwritten letter from Mr. Harper to Gene White dated 5/16/85, which included another effort to get consideration: "I'm writing to ask if you will help get me to work release" (Def. Exh. 10); 3) a handwritten letter to Gene White dated 8/5/85, which included the following statement: "I finish my sentence in Dec. 85, 4 months from now, but I still want out as soon as possible!! Like I said befor, [sic] I do not want a parole but they could just let me go, if they wanted! I wrote and ask Dave Hudson about the reward that was suppose to be offered but he never answered. I'm interest [sic] in that, can the reward be collected?" (Def. Exh. 12); 4) a typed letter from Gene White to the Florida Parole Commission dated August 27, 1985, which sought the Parole Commission to "give Mr. Harper due consideration" (Def. Exh 13); 5) a typed letter from a Parole Commissioner to Gene White dated August 30, 1985, which indicated that Mr. Harper's presumptive parole release date was October 18, 1990, and that the Commission

would make Mr. White's letter "a part of Mr. Harper's file and will be given every consideration" (Def. Exh. 14). As was pled in Mr. Swafford's 1990 Motion to Vacate, Roger Harper filed on November 12, 1985 (the very day Mr. Swafford was sentenced to death) a Motion for Mitigation of Sentence in his Bay County case. (Def. Exh. 17). Even though the motion was untimely, it was granted and Mr. Harper was ordered to be released immediately. (Def. Exh. 18). This effectively granted Mr. Harper what he asked for from Gene White in his August 5, 1985, letter ("I do not want a parole but they could just let me go, if they wanted!"). (Def. Exh. 12).

This undisclosed evidence demonstrated Mr. Harper had much to gain by a conviction of Roy Swafford. This undisclosed evidence demonstrated that Mr. Harper was less than candid in his testimony before the jury regarding his interest in the out come of the case. The undisclosed evidence demonstrated that Mr. Harper had represented to the State that he had power over whether his family members (Carl Johnson, Chan Hirtle and Ricky Johnson) from Tennessee testified. This was impeachment evidence not of just Roger Harper, but of those three individuals as well because of Harper's representation that he could "be very instrumental in weather [sic] or not my family in Tennessee make it to the trial."

Under Kyles ("Beanie's same statement, indeed, could have been used to cap an attack on the integrity of the investigation and the reliability of Detective Dillman" 115 S.Ct. at 1573) the

undisclosed evidence was impeachment of the State's methods as well. The letters were to the trial prosecutor, in his possession, and disclosed his willingness to cave into Mr. Harper's demands. At the very least, they demonstrate that Mr. Harper brought the reward situation to Mr. White's attention.

Despite the myriad of uses a defense attorney could have had for these letters and where these letters led, Mr. Cass undeniably did not have the letters. Mr. Swafford's trial counsel specifically testified that he did not receive this series of letters before Mr. Swafford's trial and that the letters would have been used to impeach Mr. Harper had they been disclosed. (PC-R4T. 241-45). Mr. Cass further testified that only after the trial did he learn that Mr. Harper was trying to receive several thousand dollars as a reward for his coming forward against Mr. Swafford. (PC-R4T. 245-46). Mr. Cass learned of Mr. Harper's efforts to receive the reward from John Tanner sometime in January or February of 1986. (PC-R4T. 246). At that time, he wrote Mr. Swafford a letter which stated in pertinent part:

In connection with Roger Dean Harper, I received communication from John Tanner advising me that Harper was attempting to collect a \$5,000.00 reward which he tells me was offered and published by PETCON who is the parent corporation of FINA here in Daytona and which had been offered for information leading to the capture and conviction of the killer of Brenda Rucker. He further tells me that a reward poster was issued and had called me to find out if I had a copy of it. This is the first notice that I have had that a reward had been offered. If this is so, this would be information of evidence recently received and not available at the time of during the trial or in any event, not furnished to the defense by the prosecution. . . It goes without

saying that if this information had been available at the time of trial it would have been very effective in the impeachment of the testimony of Roger Harper and please note when you read his deposition and he is asked if he expected to receive any special consideration for his testimony he states no.

(Def. Exh. 15).

Mr. Cass testified that Mr. Harper's efforts to get a \$5,000 reward and the information in the letters to and from Mr. Harper were not consistent with Mr. Harper's testimony: "This would totally impeach him, impeach his testimony as to his interest in testifying on behalf of the state." (PC-R4T. 247).

4. Other undisclosed evidence.

Mr. Swafford has previously presented to this Court his claims that numerous other exculpatory evidence was not disclosed. This includes a police report that a witness had been to the scene where the body was found at 9:45 a.m. on February 14, 1982, and took pictures of the sight. At the time there was no body noticed. See Initial Brief, Swafford v. State, Case No. 80,182, p.36-39. Also undisclosed were documents which had been altered regarding the chain of custody the .38 from the Shingle Shack and the bullets removed from Ms. Rucker's body. See Initial Brief, Swafford v. State, Case No. 80,182, p.41-44. Also undisclosed to the defense was the fact that the State prior to trial had filed criminal charges against Paul Seiler, a witness called to the stand by the defense. Since Mr. Seiler was the individual who had given the police the description of the assailant and helped them compile the composite sketch, the filing of the criminal charges against him was a significant

matter effecting his willingness to assist the defense. The State's failure to disclose the pendency of the criminal charges of the defense attorney's failure to learn of the charges precluded the jury of knowing significant exculpatory evidence.

5. Conclusion.

When cumulative consideration is given to all of the exculpatory evidence that the jury did not hear (either because the State failed to disclose or because trial counsel failed to uncover), confidence in undermined in the outcome. Gorham, 597 So. 2d 782 (Fla. 1992); Roman v. State, 528 So. 2d 1169 (Fla. 1988). As a result of the Brady violation, Mr. Swafford, an innocent man, was convicted and sentenced to death. It is time that this injustice be corrected. A new trial must be ordered.

ARGUMENT III

THE CIRCUIT COURT ERRED IN REFUSING TO ADMIT AND/OR TAKE JUDICIAL NOTICE OF THE OVERTON COMMISSION REPORT AND THE SHEVIN REPORT BOTH OF WHICH WERE FILED WITH THIS COURT AS JUDICIAL RECORDS OF INQUIRIES UNDERTAKEN ON BEHALF OF THIS COURT CONCERNING THE ADEQUACY OF CCR'S STAFFING AND FUNDING, AND THUS THESE REPORTS WERE RELEVANT TO THE DILIGENCE INQUIRY CONCERNING CCR'S REPRESENTATION OF MR. SWAFFORD BETWEEN OCTOBER OF 1990 AND JUNE OF 1994.

At the evidentiary hearing below, Mr. Swafford's counsel sought to present to the circuit court two reports which made findings regarding the funding and staffing of CCR during the 1990-1994 time period. These reports were relevant to the issue of collateral counsel's due diligence between October of 1990, when the State disclosed the reports concerning Mr. Walsh, Mr.

Lestz, and Mr. Levi, and April of 1994, when counsel located Mr. Lestz. First, Mr. Swafford sought to introduce the "Overton Commission Report, which has a file stamped date of June 4, 1991 by the clerk of the Florida Supreme Court." (PC-R4T. 485). Counsel for Mr. Swafford argued that the report contained factual information and findings regarding the adequacy of CCR's funding in 1990-91 and was relevant to the issue of CCR's due diligence in Mr. Swafford's case, and that "this exhibit is something that this Court can take judicial notice of." (PC-R4T. 487). The Overton Commission included the Attorney General for the State of Florida and he specifically joined in the final report. The State argued against the introduction of the report saying "there is no right effective post-conviction or collateral counsel." (PC-R4T. 486). So the document is "totally irrelevant." (PC-R4T. 486). The State also objected on hearsay grounds and "[i]t's not been properly authenticated." (PC-R4T. 485). The circuit court refused to admit the report saying "I'm not going to allow that to be received in just because I don't think it's been properly authenticated." (PC-R4T. 489). When Mr. Swafford's counsel sought to point out the judicial notice provisions, he was cut off by the circuit: "Well, right or wrong, I have ruled. We need to move on or we're going to be here into the evening." (PC-R4T. 489).

Mr. Swafford then sought to introduce "Shevin report, which was also received by the Florida Supreme Court and it was pursuant to the direction of the Florida Supreme Court that

Robert Shevin conduct[ed] his evaluation of CCR." (PC-R4T. 489). The State indicated it had "the same objection to that report as we just had to the one --". (PC-R4T. 489). The circuit court interjected saying: "Same result." (PC-R4T. 490).

Section 90.202 of the Florida Evidence Code provides in pertinent part:

90.202. Matters which may be judicially noticed

A court may take judicial notice of the following matters, to the extent that they are not embraced within sec. 90.201:

* * *

- (5) Official actions of the legislative, executive, and judicial departments of the United States and 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.

Section 90.203 of the Florida Evidence Code provides in its totality:

90.203. Compulsory judicial notice upon request

A court shall take judicial notice of any matter in sec. 90.202 when a party requests it and:

- (1) Gives each adverse party timely written notice of the request, proof of which is filed with the court, to enable the adverse party to prepare to meet the request.
- (2) furnishes the court with sufficient information to enable it to take judicial notice of the matter.

Under these provisions, judicial should have been granted. The matter first arose on the morning of February 7, 1997, when undersigned counsel stated: "I wanted to ask the Court to take judicial notice of the Overton -- it was called the Supreme Court Committee -- the one line it's difficult to read in my copy is actually the name of the committee." (PC-R4T. 323). The State was provided a copy of the report and noted "I think this is

going to take some time to review. . . . My objection I intend to make and I believe at this point in time I will making [sic], is the relevance of the document to this case and the fact that there is no right to effective assistance of collateral counsel." (PC-R4T. 324). Thereupon, the circuit court granted the State time to review the report before taking a final position.

Thereupon, undersigned counsel provided the State with a subsequent report and explained that it was another analysis of CCR done for the Florida Supreme Court by Robert Shevin. It was conducted at the request of the Chief Justice Steven Grimes. "And I was going to ask the Court to take judicial notice of that." (PC-R4T. 324). The circuit court then noted on the record that the State was also provided a written copy of this report and would be provided an opportunity to review it.

When the matter was brought up again after the State had an opportunity to review the written materials, the objections made were on grounds specifically not valid under Sec. 90.203 of the Florida Evidence Code. Hearsay and authentication are not proper grounds for objecting to matters subject to judicial notice. Relevancy may be a valid complaint, but here the judge did not grant the relevance objection and the reports in question are clearly relevant. The circuit court erroneously refused to consider these reports. This Court in considering Argument IV, infra, must take judicial notice of these reports, recognizing that the circuit court's analysis was conducted without the

benefit of the reports and was as a result defective as a matter of law.

ARGUMENT IV

THE TRIAL COURT'S CONCLUSION THAT COLLATERAL COUNSEL DID NOT USE DUE DILIGENCE WAS PREMISED UPON THE APPLICATION OF AN ERRONEOUS LEGAL STANDARD OF WHAT CONSTITUTES DUE DILIGENCE AND THUS IS SIMPLY UNSUPPORTED BY THE RECORD.

Each of Mr. Swafford's attorneys who were called below to testify firmly believes that Roy Swafford is innocent of the crime for which he was sentenced to death. From the moment collateral counsel began representing Mr. Swafford, counsel worked as hard as possible to uncover evidence that would exonerate Mr. Swafford and remedy the grave injustice of an innocent man sentenced to die.¹⁸ To establish that a new trial was warranted, collateral counsel conducted a diligent search for Michael Lestz, a witness who previously undisclosed police reports revealed could provide crucial information about the true killer of Brenda Rucker. Mr. Lestz' name first surfaced in October of 1990, and from that point all the evidence is consistent that Mr. Swafford's counsel continuously tried to

¹⁸See In re Winship, 397 U.S. 358, 372 (1970)(Harlan, J., concurring)(noting the "fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free."); Starkie, *Evidence* 751 (1824)("The maxim of the law is . . . that it is better that ninety-nine . . . offenders shall escape than one innocent man be condemned"). Cf. Schlup v. Delo, 513 U.S. 298, 324 (1995)("The quintessential miscarriage of justice is the execution of a person who is entirely innocent."); Herrera v. Collins, 506 U.S. 390, 445 (1993)(Blackmun, J., dissenting)("The execution of a person who can show that he is innocent comes perilously close to simple murder.").

locate Mr. Lestz. After searching for over three and a half years, collateral counsel was finally able to locate Mr. Lestz in April of 1994. Within two months after locating Mr. Lestz, counsel filed an amended 3.850 motion based on Mr. Lestz' affidavit provided to collateral counsel. Despite the diligent efforts of collateral counsel to find Mr. Lestz and thereby prove Mr. Swafford's entitlement to a new trial, the court below ruled that collateral counsel could have found Mr. Lestz immediately upon receiving previously undisclosed police reports on October 15, 1990 and therefore should have filed a post-conviction motion by October 15, 1992. (R. 285-286).

The unrefuted evidence presented at the post-conviction hearing establishes that collateral counsel immediately upon learning of Mr. Lestz' existence searched for Mr. Lestz. Thus the lower court's ruling that counsel was not diligent, improperly analyzes the issue using 20-20 hindsight, saying that because a seven year old address identified a town of 104 people as Mr. Lestz' residence and in fact Mr. Lestz lived several miles away from that town, then reasonable investigation would surely have found Mr. Lestz within two years of October 15, 1983. No consideration was given to the following facts: 1) the address was seven years old; 2) the police records made Mr. Lestz look like a transient traveling the country and supporting himself by committing property crimes; 3) repeatedly phone calls were made to the phone numbers listed in the materials disclosed in October of 1990 and no one would acknowledge knowing Mr. Lestz; 4) CCR is

not funded with unlimited money to send investigators off to every address listed in public records material, no matter how stale, in the hopes that may be an otherwise known transient may still be in the area over seven years later when phone calls do not produce any indication the transient person is still located in the area; 5) CCR's funding is determined by the Florida legislature and the Florida Governor, meaning funding limitations are imposed upon Mr. Swafford's counsel by state action and not Mr. Swafford; 6) Mr. Lestz did not want to be found because he was in fear of Mr. Walsh who had sexually assaulted him while burning him with cigarettes, pointed a gun at him, said he was going to shot him twice behind the ear and blow his brains out, accordingly he instructed his family members to not tell anyone of his whereabouts and he, himself endeavored to cover his tracks by not having his name appear on business records or other documents which may allow someone to locate him.

A. DUE DILIGENCE.

Due diligence is a legal standard which must be properly defined. Due diligence is not explicitly defined in Florida 3.850 caselaw. However, in State v. Gunsby, this Court found that a trial attorney who was did not exercise due diligence at trial rendered deficient performance under the standard announced in Strickland v. Washington, 466 U.S. 668 (1984). This certainly suggests that due diligence is established where an attorney's performance was reasonable under the Strickland standard.

Certainly it cannot require any more of counsel than does the standard set forth in Strickland v. Washington. The case law discussing the Strickland standard makes it clear that the analysis is not to be conducted with 20-20 hindsight, but instead from the point of view of counsel at the time he is conducting his investigation. Obviously, the standard for due diligence should be higher nor any less deferential to counsel. Yet here, the circuit court's entire analysis is premised upon the fact that Mr. Lestz was ultimately located several miles outside of Elkhville, Illinois, and the circuit court wrongly believed that police reports dated 1983, listed his residence as being there.¹⁹ Additionally, this Court should focus on the diligence of collateral counsel. Under 3.850(b), a motion for post-conviction relief can be filed more than two years after the case becomes final if "the facts on which the claim is predicated were unknown to the movant or **the movant's attorney** and could not have been ascertained by the exercise of due diligence." Fl. R. Crim. P. 3.850(b)(1)(1998)(emphasis added). The term "movant's attorney" is clearly referring to collateral counsel only as a 3.850 motion is only used for collateral relief. Thus, on review, this Court should examine whether the lower court's applied the correct standard of what due diligence requires.

¹⁹In fact, the police reports which were introduced into evidence list DuQuoin, Illinois, as Mr. Lestz' residence in 1982. (Def. Exh. 6 at 1, 7/26/82 police report)("LESTZ gave an address of #12 South Oak Street in Duquoin, Illinois, Zip Code is 62832. LESTZ indicated he could be reached at telephone number Area Code 618-542-4804.")

Black's Law Dictionary, which is a legitimate source for this Court to employ in light of the absence of statutory guidance, see, e.g., Gardner v. Johnson, 451 So.2d 477, 478 (Fla.1984), defines "due diligence" as "[s]uch a measure of prudence, activity, or assiduity, as is properly to be expected from, and ordinarily exercised by, a reasonable and prudent [person] **under the particular circumstances.**" Black's Law Dictionary, at 411 (emphasis added). Thus this Court, in assessing the due diligence of collateral counsel in locating Mr. Lestz, needs to account for the particular situation in which collateral counsel found themselves during the course of the investigation.

B. THE CIRCUIT COURT'S ANALYSIS.

The trial court in reaching the conclusion that collateral counsel could have discovered the whereabouts of Michael Lestz "back in the fall of 1990" (PC-R4. 285), conducted an analysis premised entirely upon hindsight without reference to collateral counsel's actual circumstances at the time counsel was seeking to find Mr. Lestz. The trial court based this conclusion on the fact that reports from the Volusia County Sheriff's Office that were used to support a Brady claim and that were attached as appendices to Mr. Swafford's initial 3.850 filed on October 15, 1990 contained information about Mr. Lestz.²⁰ Thus the Court

²⁰As is discussed below in great detail, the information listed in the appendices in Mr. Swafford's October 1990 3.850 was provided by Mr. Lestz to authorities in July 1982 and January 1983.

concluded that based on the information in the Sheriff's reports, collateral counsel, "through the exercise of due diligence, could have located Mr. Lestz (at the time of the 1990 filing) and would have had until October 15, 1992 to file (a 3.850 motion based on newly discovered evidence)." (PC-R4. 285-286).²¹ The circuit court reached this conclusion because after Mr. Lestz was found, it was discovered that he had been living several miles from the town of Elkhville, Illinois, which had been identified as a place Mr. Lestz had resided in 1983.

The trial court seemingly concluded that had collateral counsel "followed up" on the information in the October 1990 3.850 appendix, counsel would have found Mr. Lestz in the fall of 1990. (R. 285-286). The court cites absolutely nothing in the record to support this supposition; instead the court simply states that collateral counsel would have found Mr. Lestz in 1990 if he had "followed up." (R. 286). The circuit did not look at what collateral counsel knew in 1990 and what he did to find Mr. Lestz. Under Strickland and its progeny, reasonable performance does not require perfect performance. An attorney's performance is reasonable if he took reasonable steps to investigate. Here, the circuit court did not even discuss what steps counsel

²¹The court later stated twice that counsel could have located Mr. Lestz within a two-year window from October 15, 1990 to October 15, 1992. (R. 286). Under this scenario, Mr. Swafford would then have two years to file a timely 3.850 motion, see Swafford, 679 So.2d at 739, which burden Mr. Swafford would have satisfied by the June 1994 filing of a 3.850 motion. It is unclear what the court meant by this two-year window conclusion, but is patently clear that the trial court did not properly apply the due diligence standard.

undertook to locate Mr. Lestz. Instead, its analysis was in essence since in hindsight we know where Mr. Lestz was, counsel conducting a perfect investigation with unlimited resources could have located him and accordingly the failure to locate him within two years of October 15, 1990, was not due diligence.

The circuit court referred to four "leads" in the Sheriff's reports which it believes, without any substantiation in the record, "would have led the defense to where Mr. Lestz was residing over that two (2) year time period. . . ." (PC-R4. 286). The first "lead" is that the reports contained an address for Mr. Lestz. (PC-R4. 286). The second "lead" is the name of Mr. Lestz's federal probation officer. (PC-R4. 286). The third "lead" is that the reports contained the name of Mr. Lestz' brother. (PC-R4. 286). The fourth "lead" is that the information contained Mr. Lestz' address while he was on probation. (PC-R4. 286). Without any citation to the evidence or testimony, the court found that any of these three "leads" would have led collateral counsel to Mr. Lestz. (PC-R4. 286). However as explained infra, these leads were shown by unrefuted evidence to have not existed or not to have been leads that led to Mr. Lestz.

Finally, and also without any citation to the evidence in the record, the court states that if collateral counsel had "followed up" on the information in the Sheriff's reports, counsel would have discovered Mr. Lestz in 1990 living and working in a community near the address he provided to the

Volusia County Sheriff in 1982. (PC-R4. 286). The unrefuted evidence is to the contrary.

C. THE PROPER ANALYSIS.

The record created at the post-conviction hearing in fact squarely establishes under the proper due diligence analysis that due diligence was exercised in looking for Mr. Lestz. Despite using reasonable efforts, collateral counsel did not find Mr. Lestz with any of the "leads" on which the lower court relied. The reality is that a duly diligent search occurred and based on the information available at the time counsel using due diligence did not uncover Mr. Lestz until April of 1994, after Mr. Lestz had filed for federal bankruptcy thus generating a paper trial. Counsel did in fact follow the "leads" contained in the 119 materials disclosed for the first time in October of 1990. The unrefuted evidence is that counsel did follow up on the "leads" in the 119 materials, and because of Mr. Lestz' efforts to remain untraceable, Mr. Lestz was not located.

1. Collateral counsel could not have learned the name of Mr. Lestz's federal probation officer or could have discovered Mr. Lestz' whereabouts from a probation officer.

The lower court found that collateral counsel could have determined the name of Mr. Lestz' federal probation officer from the Sheriff's Office reports. (PC-R4. 286). The undisputed testimony was that Mr. Lestz was incarcerated in federal prison in 1982. In January of 1983, Volusia County law enforcement interviewed him at the Marion, Illinois, federal prison where he

was incarcerated. He was not on probation or parole at that time. According to Captain Burnsed, there was no further contact with Mr. Lestz after that interview. So therefore according to the State's own evidence, no federal probation officer was available in the 1982-83 records regarding Mr. Lestz because Mr. Lestz was not yet on either parole or probation.

Mr. Lestz testified that he was released from federal prison in December of 1984 and placed on probation. (PC-R4T. 90). He was released free and clear from any obligation to the government on May 20, 1985. (PC-R4T. 79). During cross-examination, the prosecutor asked Mr. Lestz if he was on probation after serving his federal sentence. Mr. Lestz indicated that the probation last "five or six months." (PC-R4T. 91). After that date, May of 1985, he did not inform federal authorities of his whereabouts. (PC-R4T. 79).

The circuit court's unexplained determination that simply knowing the name of Mr. Lestz' probation officer would have led collateral counsel to Mr. Lestz in 1990 is thus meaningless because the 119 materials did not include such a name. Further, the undisputed evidence was that after an individual is released from federal custody federal authorities will not release to criminal defense attorneys any information other than the fact that the individual is no longer in custody. (PC-R4T. 431, 447-48).

In fact, none of the Sheriff's reports mention the name of Mr. Lestz' probation officer because the reports were written

well before Mr. Lestz was on probation. The only evidence in the record that could at all lead to the name of Lestz' probation officer is that he was in the federal prison in Marion, Illinois in 1983. (Def. Exh. 5 at 3).

Collateral counsel was well aware of this information. However, when counsel attempted to follow-up on this "lead," counsel was told in the fall of 1990 that no information could be provided regarding Mr. Lestz' whereabouts because he was no longer incarcerated. (Tr. 370, 402).²² Essentially, collateral counsel simply could not have learned the name of Mr. Lestz' probation officer from the information contained in the Sheriff's reports.

Even if counsel could have uncovered the probation officer's name, there is nothing at all in the record that supports the lower court's assertion that simply knowing the name of Mr. Lestz's probation officer could have reasonably led to the discovery of Mr. Lestz' address while he was on probation until May of 1985. (PC-R4. 286). Rather, the clear, unrefuted evidence in the record, which comes from the State's own witness, is that

²²Similar attempts to locate Mr. Lestz using information from his incarceration at the federal prison in Marion was equally unsuccessful. Harun Shabazz, collateral counsel who helped investigate Mr. Swafford's case, contacted the prison at Marion and was told that he could not be given information concerning the whereabouts of an individual once he was released. (PC-R4T. 431, 447-448). Mr. Lestz was released from federal prison in December 1984. (PC-R4T. 79). Michael Chavis, a collateral investigator who took over lead investigation of Mr. Swafford's case in October 1992 (PC-R4T. 452) was also told by officials at Marion prison that he could not be provided information about an individual if he was no longer incarcerated. (PC-R4T. 458).

Mr. Lestz' federal probation officer would not reveal any information about Mr. Lestz to defense counsel. (PC-R4T. 592). Unrefuted testimony by Mr. Swafford's witnesses bolsters this contention that defense counsel would not be given Mr. Lestz' address by his federal probation officer. (PC-R4T. 376). In fact, the only reason the State's witness could get information was because she was working for law enforcement. (PC-R4T. 592). Even if counsel could have found the probation officer, counsel simply could not have obtained Mr. Lestz' address from him.

2. The record clearly demonstrates that none of Mr. Lestz' family members would have revealed his location. Thus uncovering any addresses of Mr. Lestz' relatives would not have reasonably led to his discovery.

The lower's court other "lead" is the contention that the Sheriff's Reports contained an address for Mr. Lestz' brother. There is simply nothing in the record or the reports that indicates how collateral counsel could have found an address for Mr. Lestz' brother. In fact, the unrefuted testimony in the record is exactly opposite. Jay Nickerson, Mr. Swafford's lead counsel in the fall of 1990, testified at the evidentiary hearing that the Sheriff's Reports he received through a Chapter 119 request did not contain an address for Mr. Lestz' brother. (PC-R4T. 401). Moreover, the police reports are in evidence, and the circuit court did not cite to where the brother's address is located.

Additionally, even if collateral counsel had an address for Mr. Lestz' brother, the unrefuted evidence in the record is that

knowing the address of Mr. Lestz' brother would not have reasonably led to his discovery.

Mr. Lestz himself testified that his brother would not have revealed his whereabouts. (PC-R4T. 80, 126). Thus the lower court's ruling that the address of Mr. Lestz' brother would have reasonably led to the discovery of Mr. Lestz is contrary to the unrefuted evidence.

The lower court's ruling that the records in counsel's possession would have led to other members of Mr. Lestz' family, including his wife and daughter, who then would have reasonably led counsel to Mr. Lestz, (PC-R4. 286), is also patently refuted by the unrebutted evidence in the record. Mr. Lestz testified at the evidentiary hearing that his family was aware of his desire not to be found and would not have cooperated with anybody looking for him. (PC-R4T. 80).

3. The record clearly refutes the lower court's assertion that simply having the address for Mr. Lestz in the 1982 Volusia County Sheriff's report would have reasonably led to his discovery in the fall of 1990.

The trial court also ruled that "following up" on Mr. Lestz's address in the Sheriff's reports would have reasonably led to counsel locating Mr. Lestz. (PC-R4. 286). However, there is absolutely nothing in the record to show that collateral counsel in 1990 could have found Mr. Lestz if they simply went to the DuQuoin, Illinois address listed in the 1982 Sheriff's

reports.²³ The lower court engaged in pure, rampant speculation completely unsupported by competent substantial evidence in the record. Based on their search for Mr. Lestz, collateral counsel decided that it would not be reasonable to go to Illinois. The address that counsel had for Mr. Lestz in 1990 was eight years old. Jay Nickerson, Mr. Swafford's collateral counsel in 1990, testified at the evidentiary hearing that the older an address is, the harder it is to find someone. He explained that,

[t]he more time you are away from the information that you have, the more likely it is - the more likely it is that that information is going to be stale. You're always looking for stuff within a year or two years. That's considered fairly good stuff to act upon. Older stuff is not that good.

(PC-R4T. 405).

The fact that Mr. Lestz was a transient who did not have a steady job would have further complicated collateral counsel's search for him. (PC-R4T. 405). Ultimately, the seriously dated information combined with Mr. Lestz' lifestyle led collateral counsel to conclude that without additional information, it would not be prudent to simply go to Illinois.

The Court should note that collateral counsel was not unwilling to travel out-of-state to conduct prudent investigation. Mr. Nickerson, for instance, testified that he traveled to Tennessee to track down witnesses relevant to Mr.

²³The circuit court mistakenly believed that the address listed was an Elkhville, Illinois, address, a town of 104 people in 1990 according to Mr. Lestz' testimony. In fact, the address was for DuQuoin, Illinois.

Swafford's case. (PC-R4T. 337). In that case, he was able to follow up on a lead and find the witnesses. In a situation where travel was justifiable, counsel undertook the effort. In the case of simply going to DuQuoin, Illinois, nothing in the record indicates that would have led to Mr. Lestz.

Further, given the information counsel had, there was no reason to go to Illinois in the fall of 1990. Collateral counsel did in fact try to use the 1982 address to track down Mr. Lestz, but the unrefuted evidence in the record proves that those efforts were not fruitful. Counsel wanted to find Mr. Lestz because he was crucial to establishing Mr. Swafford's decision but based on the dated nature of the information and counsel's experience with investigation, counsel determined it was not prudent to merely travel to Illinois in search of Mr. Lestz.²⁴

That collateral counsel was reasonable in not going to Illinois based merely on an eight-year-old address is confirmed by the information counsel obtained when counsel followed up on the address through various efforts in Florida. For instance, Harun Shabazz, a collateral counsel in charge of trying to find

²⁴Counsel's decision was enlightened by the fact that in the fall of 1990, Mr. Swafford was under warrant. Collateral counsel had thirty (30) days to obtain public records, review the records and file a 3.850 motion in the attempt to stop the execution. (PC-R4T. 329-330, 337). Counsel's ability to investigate the case was further hampered by the summary denial of the 3.850 motion, which made stopping Mr. Swafford's execution an immediate priority. (PC-R4T. 345-347, 368). Because of the summary denial, counsel was in an appellate mode with Mr. Swafford's case in the fall of 1990. (PC-R4T. 347) At that point, further investigation had to understandably take a back seat to saving Mr. Swafford's life.

Mr. Lestz starting in the fall of 1990 (PC-R4T. 418), made a phone call to the DuQuoin, Illinois number Mr. Lestz provided in 1982. The person who answered the phone claimed to not know Mr. Lestz. (PC-R4T. 435). Mr. Shabazz asked numerous questions to make sure that the person was telling the truth. (PC-R4T. 435). Basically, simply calling the DuQuoin phone number to find Mr. Lestz did not pan out. (PC-R4T. 420). Counsel even hired Global Tracing Services to track Mr. Lestz down. The State's own evidence recognized that this step was first taken in 1990. Global specializes in finding persons that are hard to find. (PC-R4T. 463). After hiring Global, Mr. Shabazz provided them with Mr. Lestz' name, date of birth, race, social security number, and DuQuoin phone number and address. (PC-R4T. 446). Global conducted a national search for Mr. Lestz, (PC-R4T. 450), but could not find him. (PC-R4T. 421). Counsel essentially used a reliable source, Global Tracing, to find Mr. Lestz based upon all the information available in the Volusia County Sheriff's reports, but even that source could not find Mr. Lestz. Mr. Lestz' DuQuoin address simply led no where.²⁵ Counsel attempted to use the DuQuoin address to find Mr. Lestz, and though it led no where, counsel's efforts were duly diligent.

²⁵Michael Chavis, a CCR investigator who was assigned to Mr. Swafford's case in October 1992, (PC-R4T. At 452), also attempted to track Mr. Lestz down through the 1982 DuQuoin address, but was unable to find him that way. Mr. Chavis checked out the DuQuoin address but could not find Mr. Lestz there. (PC-R4T. 455). He also provided Global Services with the DuQuoin address in early 1993, (PC-R4T. 457), but Global could not find Mr. Lestz either. (PC-R4T. 456).

4. The record clearly demonstrates that Mr. Lestz was a transient making a concerted effort to be incognito after his release from prison in December 1984.

The lower Court's unsubstantiated conclusion that Mr. Lestz was reasonably discoverable if counsel had followed up on the information in the Sheriff's reports ignores the unrefuted evidence in the record that Mr. Lestz made a concerted effort to remain hidden following his release from prison in December 1984. (PC-R4T. 79). Mr. Lestz engaged in myriad actions to make sure his "tracks were covered pretty good." (PC-R4T. 101).

For instance, Mr. Lestz did not inform the prison of his location. (PC-R4T. 79). In addition, he gave a false address on his driver's license so that anyone tracing him through his license would not find him. (PC-R4T. 80, 95). Also, Mr. Lestz had no mailing address. (PC-R4T. 92). Further, Mr. Lestz did not have a permanent address but was instead living as a transient after his release from prison. (PC-R4T. 97). Moreover, he owed no organizations any money, (PC-R4T. 100), making it difficult if not impossible to track him through a credit search.²⁶ Finally, Mr. Lestz made sure to have his brother act as a co-signer in all of his financial obligations. (PC-R4T. 101). Essentially, as Mr. Lestz explained, he intentionally "had myself underground. . . Just, you know, made it difficult for somebody to contact me." (PC-R4T. 126).

²⁶Even the bill collectors could not find Mr. Lestz. (PC-R4T. 103).

Mr. Lestz wanted to remain hidden because he feared being located by Michael Walsh, who he had implicated as the real killer of Brenda Walsh. Mr. Lestz testified "that Walsh was pretty peeved at me and he had escaped one time in Arkansas already and I just had reason to be concerned with him finding me." (PC-R4T. 79-80). Mr. Swafford's collateral counsel knew about Mr. Lestz from the Volusia County Sheriff's reports and desperately wanted to find him in order to prove Mr. Swafford's entitlement to a new trial. However, the lower court, holding counsel to a standard of perfection, assumed without any substantive support that merely possessing the information in the Sheriff's reports would have reasonably led to the discovery of Mr. Lestz in the fall of 1990. As explained above, the information in the reports did not lead counsel anywhere. Counsel attempted to put the information to good use but, as is clear from the unrefuted record, it produced no results. Instead of holding counsel to a standard of perfection as the lower court did, this Court needs to assess what collateral counsel actually did to find Mr. Lestz, determine whether that effort was reasonable under the circumstances. As is demonstrated below, counsel's searched for Mr. Lestz in a duly diligent manner and then filed the 3.850 motion demonstrating Mr. Swafford's entitlement to a new trial immediately upon finding Mr. Lestz.

D. COUNSEL CONDUCTED A DULY DILIGENT SEARCH.

The threshold questions before this Court are really whether collateral counsel was duly diligent in tracking down Mr. Lestz

and then filing a 3.850 for Mr. Swafford with his claim that he was entitled to a new trial. The circuit court applied the wrong standard viewing the matter with 20-20 hindsight and holding counsel to perfection; instead of examining whether what counsel actually did was reasonable under the circumstances. The circuit court should have been analyzing what counsel did.

The issue is not whether counsel could have found Mr. Lestz in the fall of 1990. Rather, the issue for due diligence purposes is whether counsel reasonably conducted a search for Mr. Lestz based on the information counsel had in 1990. Due diligence is not an outcome-determinative test.²⁷ Instead, counsel simply had to do that which was reasonable under the circumstances to satisfy due diligence. The clear, unrefuted evidence in the record establishes that collateral counsel diligently searched for Mr. Lestz and promptly filed a 3.850 after locating him.

Because he intentionally went underground, finding Mr. Lestz in 1990 was like trying to find "a needle in a haystack." Steinhorst v. State, 695 So.2d 1245, 1252 (Fla. 1997)(Kogan, C.J, Anstead & Shaw, JJ., dissenting). Counsel knew that Mr. Lestz was important witness even though the State had asserted in court that he, Walsh and Levi had been thoroughly investigated and discarded as suspects. Counsel nevertheless wanted to find Mr.

²⁷For instance, collateral counsel Nickerson testified at the evidentiary hearing that in some cases he worked on, despite an ongoing search for a person, it had still taken five or six years to track that person down. (PC-R4T. 374-375). An ongoing search would certainly satisfy due diligence requirements even though it took some time to find the witness.

Lestz and talk to him directly. (PC-R4T. 418, 426). To find the witness who would prove Mr. Swafford's constitutional claims, collateral counsel pursued numerous legitimate avenues. That collateral counsel took over three years to locate Mr. Lestz does not mean that counsel was not duly diligent nor does it obscure the fact that counsel conducted a multi-faceted search; rather counsel engaged in a search reasonable under the circumstances for a witness desperately attempting to avoid detection because of his justified fear of James Walsh. In fact, as explained below, but for Mr. Lestz filing personal bankruptcy in December 1993, (PC-R4T. 80-81), it is quite possible collateral counsel would still be looking for Mr. Lestz.

When counsel's steps are examined in greater detail, it is readily apparent that they were diligently and reasonably looking for the witness that would exonerate Mr. Swafford. First, based upon the 1982 DuQuoin address and phone number listed for Mr. Lestz in the Sheriff's report, counsel made phone calls to the number in the attempt to find Mr. Lestz. That proved unfruitful. (PC-R4T. 435). Of course, counsel did not stop there because counsel knew that simply having an old address would not necessarily be useful in locating Mr. Lestz. (PC-R4T. 405).

Harun Shabazz, collateral counsel who was responsible for locating Mr. Lestz from the fall of 1990, (PC-R4T. 416-417), until October 1992, (PC-R4T. 446), then contacted the state Department of Corrections in Florida and Arkansas, (PC-R4T. 434), and the Federal Bureau of Prisons, (PC-R4T. 428-430), in the

effort to find Mr. Lestz. He was told that he could not be given information about a person once they were released from custody. (PC-R4T. 419). He also contacted the Marion, Illinois prison where Mr. Lestz was at one point incarcerated, but was given the same response. (PC-R4T. 431, 447-48). Mr. Shabazz then tried to find Mr. Lestz through the state Department of Motor Vehicles but that proved unavailing as well. (PC-R4T. 436). Finally, Mr. Shabazz conducted an unsuccessful computer credit search for Mr. Lestz. (PC-R4T. 443, 445).

After these efforts proved unsuccessful in finding Mr. Lestz, Mr. Shabazz hired Global Tracing Services to locate Mr. Lestz. (PC-R4T. 420). Global specializes in locating people that are hard to find, (PC-R4T. 403-404, 463), and, because of the cost, is considered a last resort. He received permission to do so and gave Global all the information he had, including Mr. Lestz' date of birth, race, social security number, 1982 DuQuoin address and 1982 DuQuoin phone number. (PC-R4T. 446).

After conducting a nationwide search for Mr. Lestz, (PC-R4T. 450), Mr. Shabazz was informed him that they were unable to locate Mr. Lestz. (PC-R4T. 421). However, the inquiry remained open and active. At that point, Mr. Shabazz "was at wit's end. I didn't know - I didn't think that there was anything else that we could do." (PC-R4T. 422). Work continued on other areas of Mr. Swafford's case and another 3.850 motion was filed in November 1991. (PC-R4T. 422). Mr. Swafford's case proceeded on the information that collateral counsel had, but, in terms of

locating Mr. Lestz, Mr. Shabazz testified that there was no action he failed to take to locate Mr. Lestz. (PC-R4T. 449). And in fact, the State presented no evidence of a specific failure; it instead only asserted that the failure to locate Mr. Lestz established that due diligence did not occur.

In October 1992, Michael Chavis, a CCR investigator, was assigned to Mr. Swafford's case. He also undertook numerous steps to find Mr. Lestz, ultimately having success in early 1994. After first plugging the 1982 DuQuoin address into CCR computer databases and having no luck in finding Mr. Lestz, (PC-R4T. 455, 469), Mr. Chavis then contacted the Department of Corrections for Florida and Illinois. (PC-R4T. 453). This search did not locate Mr. Lestz, nor did a search of the Federal Bureau of Prisons, who indicated that they could not provide information on a person if he was no longer incarcerated. (PC-R4T. 453-454, 457-458). He also contacted the federal prison in Marion, Illinois, but was given the same answer as he received from the Bureau of Prisons. (PC-R4T. 469-470). Further, Mr. Chavis contacted the Department of Motor Vehicles for almost every state, including Illinois, (PC-R4T. 472), and asked if they had a person with a driver's license with the name Michael Lestz. Every DMV told him they had no such person in their records. (PC-R4T. 473).

In early 1993, Mr. Chavis once again contact Global Tracing Services. After re-providing Global with Mr. Lestz' name, date of birth, social security number and 1982 DuQuoin, Illinois address, (PC-R4T. 456), Global could still not find Mr. Lestz.

(PC-R4T. 456). Finally, after contacting Global again in the first part of 1994 with the same information provided earlier, (PC-R4T. 458), Global provided Mr. Chavis with an address for Mr. Lestz.²⁸ (Tr. 459). Mr. Chavis then went to talk to Mr. Lestz in April 1994, a couple of weeks after receiving the information from Global, (Tr. 461-62), and Mr. Swafford filed the 3.850 at issue here in June 1994.

Certainly, if a professional service that specializes in locating hard-to-find persons took three separate tries over the course of three years to find Mr. Lestz,²⁹ then collateral counsel and Mr. Swafford should not be charged with a higher standard of care. The unrefuted evidence in the record is that Global could not find Mr. Lestz until early 1994; at that point, collateral counsel acted promptly and swiftly to speak with Mr. Lestz and then file a new 3.850 relying upon an affidavit obtained from Mr. Lestz.

Mr. Swafford's counsel engaged in reasonable efforts to locate and uncover evidence connecting Mr. Walsh to the Brenda Rucker killing. Collateral counsel engaged in diligent efforts to prove Mr. Swafford's innocence to the courts in recognition

²⁸Although Global would not reveal how they found Mr. Lestz after twice being unsuccessful, it is quite likely that Mr. Lestz emerged in early 1994 because he filed a bankruptcy petition in December 1993. (Tr. 80-81). But for that filing, Global may never have located Mr. Lestz and collateral counsel would still be diligently searching for the man who establishes Mr. Swafford's innocence.

²⁹Global does not request payment unless they are successful in finding the person being sought. (PC-R4T. 421).

that with every passing day, an innocent man continues to be wrongfully denied his freedom. Counsel desperately wanted to find Mr. Lestz because they suspected he had information that could get Mr. Swafford a new trial. Cf. Hoffman v. Haddock, 695 So.2d 682, 685 (Fla. 1997) (Wells, J., dissenting)(noting that "the purpose of postconviction proceedings can only sensibly be to remove from death row as soon as possible those inmates who are not properly there.").

Interestingly, this Court has found attorneys to be competent at trial who conducted investigations similar to that which collateral counsel conducted here. See, e.g., Hardwick v. Dugger, 648 So.2d 100 (Fla. 1995); Downs v. State, 453 So.2d 1102 (Fla. 1984). Accord Loren v. State, 601 So.2d 271 (1st DCA 1992). Cf. Strickland v. Washington, 466 U.S. 668, 690 (1984)(holding that in assessing trial counsel's ineffectiveness, court must "apply[] a heavy measure of deference to counsel's judgments."); Squires v. State, 558 So.2d 401, 403 (Fla. 1990)(same).

E. CONCLUSION.

Applying the proper standard to the evidence that was presented, Mr. Swafford's collateral counsel exercised due diligence. The circuit court's contrary ruling was premised upon application of an erroneous standard. The merits of the claim that Mr. Swafford did not receive a constitutionally adequate adversarial testing are thus before the Court on the merits.

ARGUMENT V

**MR. SWAFFORD'S RIGHTS TO DUE PROCESS AND
EQUAL PROTECTION WERE VIOLATED BY THE
PARTICIPATION OF THE STATE ATTORNEY'S OFFICE
HEADED BY JOHN TANNER BECAUSE MR. TANNER WAS
A NECESSARY AND MATERIAL WITNESS TO MR.
SWAFFORD'S CLAIMS REGARDING MR. HARPER.**

Before the hearing commenced, Mr. Swafford filed a Motion To Disqualify the State Attorney's Office. This was premised upon the election of John Tanner as the State Attorney in the November, 1996 election. Mr. Harper had disclosed to the police in 1983 that he contacted Mr. Tanner to obtain legal assistance in reference to the information he claimed he had against Mr. Swafford. (Def. Exh 8). Mr. Tanner had written Mr. Harper twice advising him about the usefulness of the information Mr. Harper possessed and offered to represent Mr. Harper in the matter for \$3,000. Subsequent to Mr. Swafford's trial, Mr. Tanner contacted Ray Cass, Mr. Swafford's trial counsel, and revealed that Mr. Harper had been trying to obtain a \$5,000 reward for the information he had provided against Mr. Swafford. (Def. Exh 15). Given that Mr. Tanner was a material witness, Mr. Swafford sought the disqualification of the entire State Attorney's Office. The motion was denied.

Rule 4-3.7 of the Rules of Professional Conduct addresses the issue of lawyers who become witnesses:

(a) **When a Lawyer May Testify.** A lawyer shall not act as an advocate at a trial in which the lawyer is likely to be a necessary witness on behalf of the client except where:

(1) the testimony relates to an uncontested issue;

(2) the testimony will relate solely to a matter of formality and there is no reason to believe that substantial evidence will be offered in opposition to the testimony;

(3) the testimony relates to the nature and value of the legal services rendered in the case; or,

(4) disqualification would work a substantial hardship on the client.

Rule 4-3.7. None of the exceptions to the rule applies here.

The Eleventh Circuit Court of Appeals has explained that "a prosecutor must not act as both prosecutor and witness." United States v. Hosford, 782 F.2d 936, 938 (11th Cir. 1986). Florida state courts have also recognized the conflict inherent in a situation where, as in Mr. Swafford's case, a lawyer plays the dual role of prosecutor and witness. In State v. Christopher, 623 So. 2d 1228 (Fla. 3rd DCA 1993), the court explained:

We recognize that the functions of a witness and a prosecuting attorney must be kept separate and distinct and that "the practice of acting as both a prosecutor and a witness is not to be approved and should be indulged in only under exceptional circumstances."

Id. at 1229 (citations omitted).

The circuit court erroneously denied Mr. Swafford's motion to disqualify. Mr. Tanner was clearly a material witness as the circuit court recognized.

CONCLUSION

On the basis of the arguments presented herein, Mr. Swafford urges that this Honorable Court reverse the circuit court, set aside his unconstitutional conviction and death sentence, and order a new trial.

I HEREBY CERTIFY that a true copy of the foregoing Initial Brief of Appellant has been furnished by United States Mail, first class postage prepaid, to all counsel of record on November 12, 1998.

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