IN THE SUPREME COURT OF FLORIDA

LEO ALEXANDER JONES,

Appellant,

vs. CASE NO. 92,234

STATE OF FLORIDA,

Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE FOURTH JUDICIAL CIRCUIT
IN AND FOR DUVAL COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE

In 1981, Leo Jones was convicted of the murder of Jacksonville police officer Thomas Szafranski and sentenced to death. Both conviction and sentence have survived numerous challenges, on direct and collateral appeal. State proceedings include the original trial in 1981 and 3.850 evidentiary hearings in 1986, 1992 and 1997. The defense at the original trial included a theory that Glen Schofield was the person who really murdered officer Szafranski. This theory obviously was rejected by the jury, which convicted Jones. The 1986 hearing concerned primarily an allegation that trial counsel was ineffective for failing to discover and present evidence that Glen Schofield was the real killer of officer Szafranski. The circuit court's denial of relief was affirmed by this Court in Jones v. State, 473 So.2d 1244 (Fla. 1985). The 1992 hearing concerned primarily an allegation that Jones had uncovered newly-discovered evidence that he was innocent and that Glen Schofield was the real killer. In Jones v. State, 678 So.2d 309 (Fla. 1996), this Court affirmed the circuit court's judgment that Jones had failed to present newly-discovered, admissible evidence sufficiently credible to entitle him to a new trial under this Court's reasonable-probability-of-acquittal standard.[1] In his

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[1] In Jones v. State, 591 So.2d 911 (Fla. 1991), this Court adopted a new standard for reviewing claims of newly-discovered evidence of innocence, holding that "the trial judge should consider all newly discovered evidence which would be admissible and determine whether such evidence, had it been introduced at

latest 3.850, Jones once again contends that he has uncovered newly discovered evidence that he is innocent. Once again (for at least the fourth time), he has been given the opportunity to present evidence on his claim that he is innocent and that Glen Schofield is the real killer. Once again, he has failed utterly to present credible evidence of his innocence. What he instead has offered includes testimony which is not newly discovered and could have been presented years ago (that of Glen Schofield, for just one example), false affidavits, unpersuasive hearsay testimony from multi-convicted inmates who came forward only at the "eleventh hour," and testimony from an alleged eyewitness who has only the vaguest clue about the circumstances of officer Szafranski's murder and who ultimately admitted on cross-examination that he had not seen Schofield shoot anyone.

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the trial, would have probably resulted in an acquittal."

STATEMENT OF THE FACTS

A. THE NEWLY-DISCOVERED-EVIDENCE CLAIM

The application of the appropriate standard for evaluating newly-discovered claims of innocence requires an evaluation of the "weight of both the newly-discovered evidence and the evidence which was introduced at the trial." Jones v. State, supra, 591 So.2d at 916. In addition, Jones contends that everything he has ever presented or had the opportunity to present (regardless of whether or not he actually did) at any previous 3.850 hearings should also be considered substantively in resolving his claim of innocence. The State does not agree, but would contend that what Jones previously presented or at least had the opportunity to present is relevant to the issues of both due diligence and also whether or not proffered evidence is newly discovered. The State described the evidence and other matters presented at trial and at the previous 3.850 hearings in its brief on appeal from the 1992 evidentiary hearing concerning Jones' claim of innocence. Instead of revising and redrafting its previous factual summary (especially given of the limited amount of time the State has to file its answer brief), the State would ask this Court simply to take judicial notice of its Answer Brief filed in this Court in Case No. 81,346 on or about July 13, 1995.[2] For this Court's convenience,

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[2] Jones attorneys had from at least December 31, 1997 (the date Judge Johnson issued his order denying relief) until February 6, 1998 (i.e., more than a month) to draft Jones' 100-

a copy of the relevant portions of its previous brief are attached hereto as Exhibit A.[3] As for the evidence presented at this hearing, the State cannot accept Jones' incorrect, misleading and incomplete statement of facts. However, before presenting its own statement of facts, the State would offer a few preliminary observations:

First, although Jones has peppered his brief with hints that his evidentiary presentation was seriously curtailed, in fact he presented some twenty-four witnesses in a hearing that lasted four days. These twenty-four witnesses included several that clearly were not newly-discovered under any possible interpretation of that term, including Glen Schofield, whose presence at the courthouse during the 1992 hearing was specifically disclosed to Jones' counsel, but who nevertheless was not called as a witness,[4] and assistant public defender Bill White, whose affidavit was appended to Jones' 1991 3.850 motion but who did not testify at the ensuing

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page initial brief. The State was given one week to draft its response to a document it first saw the afternoon of February 6.

[3] In its previous brief, the trial transcript was cited to as TR, the 1986 3.850 hearing was cited to as PC-R, and the 1992 3.850 hearing was cited to as PC-R2. For convenience, the State will adhere to this style in its transcript citations to the previous proceedings. The record on appeal in this case will be cited to as RI through RVIII. Please note that the instant 3.850 motion and appendix thereto are located in the Record on Appeal in Case No. 91,587 (the appeal from Judge Soud's denial without prejudice for failure to verify). Thus, it will be necessary, on occasion, to cite to that record.

[4] See Jones v. State, supra, 678 So.2d at 314.

1992 hearing.[5]

Second, although Jones complains about the exclusion of testimony and/or the failure of the circuit court to consider out-of-court statements allegedly made by former police officers Mundy and Eason, it should be noted that both Mundy and Eason had been subpoenaed as witnesses by Jones at this hearing and were available to testify. Jones's attorneys were not precluded from calling them as witnesses; instead, Jones' attorneys chose not to call them (RVII 1031, 1040).

Finally, it must be noted that it has never been disputed that both Jones and Schofield were drug dealers in the area, or that Schofield had been in Jones' apartment earlier that evening, or that, initially, Schofield also was a suspect. All of these matters have been known from the beginning. A brief description of the facts of the crime may assist this Court in its evaluation of the testimony presented at this hearing, particularly that presented by "Shorty." Stated briefly, at about one o'clock a.m., three police cars left the scene of a hostage situation on Lee Street in Jacksonville and proceeded east on 6th Street toward Leo Jones' apartment building, planning to turn north on Davis Street.'

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[5] See Appendix to Jones' 1991 3.850 motion; Bill White's affidavit is located at page 113, Record on Appeal in case no. 78,907.

[6] A diagram of the area was introduced in evidence at the instant hearing (Defendant's Exhibit 10, RVII 1121-23). For this Court's convenience, a copy is attached to this Brief as Exhibit

Officer Szafranski was in the third and last of these three police cars. Just before the three cars reached Davis Street, officer Wilmoth passed by, heading South on Davis. After the two lead cars turned North on Davis Street, officer Szafranski was shot. His car came to a stop in the intersection, turned partially to the left. Officer Wilmoth, meanwhile, had made a U-turn (intending to join the other officers) and he proceeded immediately and directly to the victim's car. There was a bullet hole in the top middle part of the windshield. Officer Szafranski was bleeding from the head. He apparently was in convulsions, and his foot was jammed hard on the brake. Officer Wilmoth reached in and put the car in park. Other officers arrived within seconds; within minutes, the area was sealed off, and Jones was arrested in his gun-filled apartment across the street. Two Marlin 30-30 lever action rifles was found under his bed, one of which had Jones' fingerprint on it. Ballistics examination conclusively identified the murder weapon as a Marlin 30-30 lever action rifle, and testified that the striations and other markings on the fragmented bullet were consistent in all identifiable respects with having been fired from

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B. The Court should note that this diagram is drawn with south to the top. As the diagram shows, Davis runs north and south while 6th street runs east and west. Lee and Madison also run north and south, parallel to Davis, with Lee to the west of Davis, and Madison to the East. Fifth Street is one block south of 6th Street, with 4th and 3rd two and three blocks, respectively, south of 6th. Because Interstate 95 is immediately west of Lee Street (parallel to Lee), 6th Street dead-ends at Lee street.

the Marlin 30-30 lever action rifle found under Jones' bed with his fingerprint on it.[7] Jones confessed the next day.'

With these preliminary matters out of the way, the State offers the following summary of the evidence presented at the instant hearing:

Roy Williams--the new "eyewitness" whose discovery ostensibly justified one more evidentiary hearing notwithstanding that Jones' newly-discovered-evidence-of-innocence claim was fully litigated in 1992--testified, initially, that he was at the scene when officer Szafranski was shot. He had been with Schofield earlier that night (RI11 285). Some time later, as Williams was walking "down Fourth and Davis, Sixth and Davis," he saw Schofield "bending down by the apartment or the house" where Leo Jones was staying (RI11 286, 288). Schofield had a gun (RI11 287). Williams was standing across the street with a woman. Williams testified he "just heard some gunfire, and that's it" (RI11 288). Williams started "walking back down the other end." He saw Schofield running down Lee

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[7] Because the bullet was so damaged, a Conclusive identification tying the bullet to that particular Marlin 30-30 was not possible; however, the examiner did have enough points of comparison conclusively to identify the murder weapon as a Marlin 30-30 lever action rifle and conclusively to exclude the other Marlin 30-30 rifle (the one without the print) as having been the murder weapon. The bullet was entirely consistent with, and could have been fired from, the Marlin 30-30 with Jones' print on it.

[8] As noted above, a complete recitation of the trial evidence, with citations to the record, is attached to this brief as Exhibit A.

Street. He saw Marilyn Manning[9] and told her Schofield was in trouble and she should pick him up (RI11 289). The three of them rode off together (RI11 290). Williams could not remember if Schofield still had a rifle (RI11 291). He never told anyone about any of this until "some guy," who could have been CCR investigator Mike Chavis, came to see him in jail (RI11 291). He testified that everything in his affidavit was true (RI11 293). However, contrary to what his affidavit states,[10] when asked on direct examination if he had seen Glen Schofield fire the shot, Williams answered, "No, sir. . . . The only thing I seen him bend down. I didn't see him shoot the rifle." (RI11 296).

On cross-examination, Williams retreated further from what he had stated in his affidavit. First, although he had stated in his affidavit that he had seen Schofield "aiming a rifle at a police car coming down 6th Street toward Davis Street," his testimony at the hearing was that officer Szafranski's car had been parked on Davis Street, in front of Leo Jones' apartment house, with both its right-side tires next to the curb (RI11 301, RIV 437, 439).

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[9] Ms. Manning was interchangeably referred to as Marilyn or Marion. She is the same Marion Manning who testified at the 1986 hearing that she picked up Glen Schofield at 3rd and Davis after the shooting, and that Schofield had told her that Leo Jones had just shot somebody at 6th and Davis (PC TR 115, 120).

[10] See Jones' Appendix to the instant 3.850 motion. Williams stated in his affidavit that he "saw Glen Schofield shoot the police officer through the windshield" (p. 173 of Record on Appeal, Case No. 91,587).

Second, although Williams claimed in his affidavit to have been talking to a female friend of his at 6th and Davis when he saw Schofield kneeling, he testified that he had been at 4th and Davis when he heard gunfire (RI11 298). An attempt to pin Williams down on just where he had been when he "saw" Schofield kneeling down brought an initial response that he had been "across the street" by a dentist's office (RI11 303). However, he subsequently testified that he had been three blocks away, on 3rd and Davis. More importantly, he could not even tell who it was he saw kneeling. Instead, the "girl" he was with pointed and said, "Ain't that Glenn," to which he replied, "I guess so. I don't know" (RI11 319). Asked specifically whether or not he knew if it was Glenn Schofield who had been kneeling down, Williams stated, "No, ma'am, I didn't know whether that was Glenn Schofield. No, ma'am." (RI11 319). The following cross-examination ensued:

> Q So you don't know who you saw with that rifle, do you, sir?
>
> A No, ma'am--yes, ma'am--not really. I didn't know until the girl told me, "I think that's Glenn Schofield." I go, "I don't know, is it," you know.
>
> Q All right. So on the night in 1981, you weren't sure whether that was Glenn Schofield with that rifle, were you, sir?
>
> A No, ma'am, not really.
>
> Q It could have been Jones with that rifle, couldn't it, sir?
>
> A No, ma'am. You got the wrong man on death row. That man ain't the man. You got the wrong man on death

row.

Q Really?

A Yeah.

Q Who told you that?

A Ain't nobody got to tell me that. You got the wrong man on death row.

Q Tell me how it is that you know this, Mr. Williams.

A I know that for a fact you got the wrong man on death row.

Q On what do you base that opinion, sir?

A I base that on everything.

Q For instance?

A Yes, ma'am.

Q For instance?

A Ma'am?

Q Give us some facts on what you base your opinion.

A What I base my opinion on?

Q Yeah.

A You letting the other man get away with murder. You got the wrong man on death row.

Q Really? Who told you that, Mr. Williams?

A Ain't nobody got to tell me that. That's facts. Ain't nobody got to tell me. Got the wrong man on death row.

Q Upon what facts do you base that opinion?

A On everything.

* * *

A That's just my opinion. I think you all got the wrong man on death row, and I'm going to keep saying that there.

* * *

Q Can you say under oath, swearing to God, that you saw Glenn Schofield shoot Tom Szafranski?

A I can't really say. I can't say.

(RIII 320-21, 336-37, RIV 443).

Not only was Williams unable to give any basis for his belief that Jones was innocent, but, incredibly, when asked if he had read the affidavit that Jones' attorneys had secured from him, Williams revealed that HE CANNOT READ AND NO ONE READ THE AFFIDAVIT TO HIM BEFORE HE SIGNED IT (RI11 324, RIV 421). Furthermore, he denied ever having made several of the statements in the affidavit, and other statements in the affidavit are contradicted by his testimony. For example, (a) Williams acknowledged telling CCR investigator Chavis that he had seen Glenn Schofield kneeling down by an apartment building where Leo Jones lived (RIII 328), but, in fact, he had seen no such thing; (b) he never told Mr. Chavis that he had seen Glenn Schofield shoot a policeman through a windshield (RI11 328-29); (c) he acknowledged on cross-examination telling Mr. Chavis that Schofield had run behind Jones' apartment, down Madison toward 4th Street (RIII 329), but his earlier testimony had been that Schofield had run down Lee Street, which is one block west of Davis, while Madison is one block east of Davis; and, finally, (d) he denied ever telling Mr. Chavis that Schofield had told him that

he had thrown the rifle in the river (RI11 331-32).[11]

Further examination revealed that not only was Williams unable to say that he had ever seen Schofield with a rifle or that he had seen Schofield shoot anyone, but he was completely unfamiliar with the actual circumstances of the shooting. As previously noted, he testified that officer Szafranski's car had been parked in front of Leo Jones' apartment, which is south of the intersection of 6th and Davis, instead of being in the intersection, turning north on Davis, when the shots were fired. In addition, he claimed that officer Szafranski had been sitting in his car writing a report, with his dome light on (RI11 370). He even insisted that officer Szafranski had gotten out of his car at one point and had looked around with a flashlight (RIV 439, 450). He also testified that the bullet "came on the side," not through the front windshield RIV 436). Williams could not describe officer Szafranski; he didn't even "know what race he was, it's been so long" (RIV 439). Finally, he had the assassin holding the rifle to his left shoulder while kneeling on his right knee (R III 355, RIV 433), which, as the trial court noted in its order, is "totally inconsistent for one firing a rifle" (RI 146).

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[11] In addition, Williams denied ever having made statements attributed to him by reporters Ellen McGarrahan and Mimi Brubeck. See Appendix to 3.850, document 36 (Record on Appeal in Case No. 91,587 at p. 307). For example, Williams categorically denied having told anyone that he had seen Schofield get a rifle out of a car; he did not know where the rifle "came in at" (RI11 315-16).

In addition to Roy Williams, Jones presented the testimony of two other persons who claimed to have Schofield in the area near the time officer Szafranski was murdered. Dwayne Hagans was the first of these two witnesses to testify. He claimed that he saw Schofield when it was "about summertime" in 1981, right after Hagans had robbed a crap game on Ashley Street. Schofield, driving a rental car, flagged him down, and offered him a rifle. Hagans saw "all these police coming out from the wood," and, thinking they were after him, decided to leave without the proffered gun (RVI 850-51). The next day, Hagans read in a newspaper that a police officer had been killed (RVI 852). Later, after Hagans had been convicted of robbery and second degree murder, he talked to Schofield in prison in 1983, and Schofield told him that he had killed the cop (RVI 852-53). They both were out in 1989. According to Hagans, he was running a drug protection and extortion racket, and Schofield volunteered to be his recruiter; Schofield wanted to initiate the recruits by having them kill police officers (RVI 855). (Hagans could not explain how it would have benefitted his drug organization to attract attention by shooting at police officers, RVI 872-73). Hagans admitted on cross-examination that he had been convicted of armed robbery in 1984, of kidnapping in Georgia in 1989, and of kidnapping and murder in 1993 (for which he was serving a life sentence) (RVI 868-70). He also admitted that he had not come forward with any of this information until after

Jones' 1997 death warrant had been signed; at that point, he told the prison chaplain (RVI 856, 859) . Significantly, even then, he had said nothing to the chaplain or in his affidavit about Schofield trying to give him a gun on Ashley Street the evening before Hagans learned that a police officer had been shot (RVI 860). He claimed that Schofield had been driving and that there was no woman in the car (RVI 862).[12] Hagans admitted that he never actually saw a rifle (RVI 862-63). At one point, he claimed that Schofield had said, "Hold this Winchester, hold it down for me" (RVI 863). Later, he testified that Schofield had not told him what kind of rifle he had (RVI 871). Later, he reversed himself again, stating that Schofield had "identified the gun as a Winchester" (RVI 880). In any event, Hagans could not explain why Schofield would have offered him the gun instead of just taking it out of town himself, or throwing it into one of Jacksonville's many rivers (RVI 864-65). Nor could he explain how he knew that Schofield had been driving a rental car (RVI 878). Hagans admitted that Schofield had never divulged any details about the crime (RVI 872). Finally, Hagans admitted that he was in the same prison with Leo Jones, but denied knowing him or Jones' brother Leroy Clark

[12] Roy Williams' testimony was to the contrary; not only did Williams claim that Marion Manning had been in the car, but he claimed that she had been driving. In addition, Williams did not know whether Schofield even had a gun when he got into the car, and he certainly did not observe Schofield trying to give it away.

(RVI 875-76).[13]

James Corbett testified that he had been driving south on Davis Street at somewhere between 11:30 and 12:OO p.m. when a police car began following him.[14] Trying to duck, he turned right on 6th Street.[15] The police car continued down Davis Street, so Corbett made a U-turn and headed back to Davis (RVII 1068-70). According to Corbett, when he stopped at the intersection of 6th and Davis, Leo Jones' apartment building was "Straight in front of us" (RVII 1070). Corbett testified that he saw Schofield standing on the upstairs porch holding what looked like a rifle (RVII 1070, 1080). Corbett turned left on Davis, then turned right to cut over to Madison, and proceeded south to a house on Madison Street three houses from the corner of 4th and Madison (RVII 1070-71). On the way, he saw Marilyn Manning standing on Madison; she was not in a

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[13] Chaplain McCrae confirmed that Hagans had said nothing to him about anyone trying to present a rifle to him at the time of the murder. Chaplain McCrae testified, however, that not only was it common knowledge in Florida State Prison that Jones was under warrant, but that both Hagans and Jasper Kirtsey told McCrae that they knew Jones (RVI 1050-51).

[14] Corbett testified that he had known Leo Jones for years but that they were not "permanently related" (RVII 1069). Unfortunately, just what he meant by that statement was not clarified during his examination.

[15] As Corbett acknowledged, 6th Street was a one-way street (RVII 1082). In fact, at the time, it was one-way the wrong way for a car heading south on Davis to have turned right on it from Davis Street, as officer Wilmoth testified (RVIII 1222-23), and as State's Exhibit 13 shows. Thus, Corbett would have turned the wrong way down a one-way street with a police car immediately behind him.

car (RVII 1096). An hour or two later, he heard a gunshot. He looked out the window, and saw Schofield running down Madison street, carrying a bat or rifle, with Marilyn not too far behind him (RVII 1072).[16] The next day, he heard that a police officer had been shot (RVII 1072).

On cross-examination, Corbett acknowledged telling no one about what he had seen until after Jones' latest warrant had been signed (RVII 1075-76). He admitted being a convicted felon with probably 80 or 90 arrests (RVII 1079). He had waited 16 years to come forward because he had "been on the run" (RVII 1087). He could not describe what Schofield had been wearing when he had seen him on the porch (RVII 1080-81). Nor could he describe the gun (RVII 1086). In fact, he could not even describe Glenn Schofield (RVII 1102). Finally, after Corbett insisted repeatedly that Leo Jones' apartment had been right in front of him as he was driving east on 6th Street, and that Corbett's headlights would have shined directly at the apartment building, Corbett finally acknowledged (after being shown photographs of the scene) that in fact Jones' apartment was just to the south of 6th street and that an alley would have been right in front of Corbett when he was heading east

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[16] Two witnesses, Reed and Cole, testified at the 1992 hearing that they had seen Schofield running down Madison with a rifle; however, they said nothing about seeing Marilyn Manning behind him. See Jones v. State, supra, 678 So.2d at 315 (noting that Reed and Cole were not credible and that their testimony was "rife with inconsistencies").

on 6th Street (RVII 1112-1116). He insisted, however, that he could see a man standing on the upstairs porch just before midnight (RVII 1116).[17]

The remaining evidence concerning Schofield may be discussed quickly. Five years after Jones passed up the opportunity to call Glenn Schofield as a witness, he finally called him. Schofield admitted being a drug dealer in 1981, and he admitted consummating a drug deal at Leo Jones" apartment between 6 and 7 p.m. the evening of the murder (RIV 535). He testified that he did not know Jones personally and had taken Marilyn Manning with him because she knew which house to go to (RIV 536).[18] Once he got the drugs, he and Marilyn left. They went back to her apartment, bagged the drugs, and went to the "crab people's" house, where they stayed

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[17] State's Exhibit 6 shows a daytime photograph of the upstairs porch. That area was dark even in the daytime.

[18] The State would note that Jones testified at his original trial that Schofield was his roommate and that the guns all belonged to him. The State has argued previously (see Exhibit A) that Jones' testimony about the ownership of the guns was not credible in light of the fact that he also claimed not even to know that there were any guns in the apartment, much less that several guns were in his own bedroom, including a Marlin 30-30 lever action rifle with Jones' fingerprint on it. Now, however, Jones has presented testimony which contradicts his trial testimony (and not for the first time--see Exhibit A). Both Schofield and Roy Williams testified that Schofield resided not with Leo Jones, but at Emerson Arms Apartments (RIII 325, RIV 542). Moreover, Jones has presented evidence that Schofield has stated that he had never owned a rifle. If Schofield was not Jones' roommate, did not even know him personally, and has never owned a rifle, the rifles in Jones' bedroom certainly were not Schofield's.

until 2:00 or 3:00 a.m. Schofield stayed with Marilyn for a while, and then went home (RIV 539-40). Roy Williams had been with them for a while, and had gone to the club with them, but Schofield "didn't carry him home" (RIV 541-42). Schofield testified that he did not kill officer Szafranski (RIV 494, 549, 601). Nor has he ever told anyone that he killed officer Szafranski (RIV 594, 601, 604, 605-06, 625).

Schofield's testimony was essentially consistent with the statement he gave in 1984 to Louis Eliopulos, then an investigator for the public defender. Schofield admitted to Eliopulos that he had been in the Davis Street area prior to the shooting; he denied having shot officer Szafranski or being involved in any capacity with the shooting; he denied trying to borrow any money to leave town, characterizing that idea as ludicrous because, as a drug dealer, he had money and did not need to borrow it; and he denied ever owning a rifle or ever having a rifle in his possession, with or without a scope (RVI 951-53).

Jones offered the testimony of five inmate witnesses who testified that Schofield at one time or another had confessed to killing officer Szafranski. Dwayne Hagans' testimony is discussed above. Like Hagans, the other four inmates have lengthy and serious criminal records.[19] None of these witnesses came forward

[19] Louis Reed is serving a 25 year sentence for armed robbery (RII 161). Lamarr McIntyre has been convicted of murder and two counts of grand theft (RV 658). Carnell Grayer has been

until after Jones' most recent death warrant was signed, waiting anywhere from four to 15 years to report their information. None gave any reasonable excuse for waiting.[20] Moreover, none could provide any details of the crime. Three of them claimed that Schofield had told them that he had shot officer Szafranski because Szafranski was "fucking" with Schofield or that he was a "bad cop" who had been taking money from drug dealers (RV 655, 686, 690-93). None of the three, however, could explain how Schofield could possibly have known who was in the third car of a three-car police convoy driving down the street in the middle of the night.[21] The State would note that McIntyre acknowledged that he, like Roy Williams, had not even read his affidavit (RV 664) and that several things stated in his affidavit were not true (RV 663-64).

The State called officer Wilmoth (RVIII 1217). Wilmoth's wife worked for HRS and had been at the hostage situation on Lee Street (RVIII 1224-25). Wilmoth was just getting off duty, and was headed

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convicted of grand theft, robbery with a firearm, aggravated battery two counts of aggravated assault, attempted kidnapping and murder (RV 683-84). Jasper Ray Kirtsey, who has been continuously in prison for 17-18 years, has been convicted of kidnapping, escape, armed robbery and aggravated battery with a deadly weapon (the last while in prison)(RV 697-99).

[20] For example, Reed claimed he did not know who to report his information to, even though he had been acting as Schofield's jailhouse lawyer and writ writer (RII 167-68). Grayer testified that he had not come forward because he did not think murder was serious (RV 683).

[21] Randy Fallin (Jones' trial attorney) testified that officer Szafranski's reputation was "impeccable" (RV 781).

south on Davis planning to cut over to Lee Street to meet her to discuss baby-sitting arrangements (RVIII 1224, 1226). He could not turn right on 6th Street, because that was one-way the opposite way, so he was going to go down to 5th Street, cut right over to Lee Street, and meet his wife there on Lee, between 5th and 6th Street (RVIII 1226, 1267). Just as he was going past 6th Street, however, he saw three police units heading east on 6th Street (RVIII 1226). So he pulled over 140 feet south of the intersection of 6th and Davis (as he later measured it), and waited to see if the three cars were going to go north or south on Davis (RVIII 1227). They were "one behind the other," following pretty close (RVIII 1227). Officer Wilmoth saw the first two cars turn north on Davis, so, as the third car was pulling up to the stop sign, Wilmoth started to make a U-turn (RVIII 1227-28). Just as he was in the middle of his U-turn, he heard what sounded like shots, thinking, "no, it really can't be" (RVIII 1228). As he pulled out of his U-turn, his headlights shone on Leo Jones' apartment building. Wilmoth could see that side of the building clearly. He saw no one kneeling next to the building with a rifle in his hand (RVIII 1228).

Wilmoth had seen the third car in line just start to leave the intersection and then stop very abruptly. At about the same time, he heard a signal 33, which means that someone fired a gun at the police (RVIII 1229-30). Wilmoth could not see who was in the third

car (RVIII 1230). Wilmoth cautiously approached the third car, not sure where the shots had come from. He saw no one running from the apartment building later identified to him where Leo Jones lived (RVIII 1231). When he got to the car, he found officer Szafranski, bleeding from the head. Szafranski's car was in drive, and Szafranski's foot was hard on the brake. Wilmoth reached in, put the car in park, and used Szafranski's radio to call the dispatcher (RVIII 1232-33). Wilmoth was a "Hundred percent positive" that the dome light was not on in officer Szafranski's car (RVIII 1236). He testified that it took no more than 10 seconds for him to reach Szafranski's car after the shot, and no more than two to three minutes to establish an effective perimeter around the area (RVIII 1237-39).

Officer Wilmoth testified that he had measured the distance from 6th Street to 5th, 4th and 3rd on Davis. From 6th to 5th was 430 feet. From 6th to 4th was 900 feet. From 6th to 3rd was 1435 feet (RVIII 1234-35).

B. THE ALLEGATIONS CONCERNING JUDGE SOUD

The evidence presented on this issue is succinctly set forth in Judge Johnson's order, which the State will quote verbatim except for citations to the record on appeal:

"Judge Soud testified that prior to defendant's trial in this case he saw Leroy Clark in the courtroom and recognized him, although he did not remember Clark's name. Inquiry revealed that

Judge Soud had represented Leroy Clark some 10-12 years before and had also become acquainted with Clark's Mother, Mrs. Hester. Judge Soud then learned that Leroy Clark and Leo Jones were half-brothers and Mrs. Hester was Leo Jones mother. On September 18, 1981 Judge Soud filed a Disclosure of Information that at a time a number of years before he had represented defendant's half brother, Leroy Clark and had become acquainted with defendant's mother. Both sides, including the defendant personally, signed the disclosure and stated that they had no objection to Judge Soud continuing with the case. [RVII 1177-83].

"In August 1997, Alberta Brown told a newspaper reporter that in 1969 she and Mrs. Hester gave attorney A.C. Soud $700.00 (she pulled part of it from her bra) to give to Judge Harvey to have Leo Jones released. [RVI 883-85]. She was not present in court when this was supposed to have been done, nor was she in the courtroom when he was first sentenced. [RVI 887-88].

"The court file in case 68-3923 was placed in evidence at the hearing (St. Ex. 77 [sic, 7]). That file covers defendants Leo Alexander Jones and Willie Fred Badger. The only mention of A.C. Soud in the file is on a separate piece of file folder material about three inches wide dated April 16, 1969 which contains a rubber stamped entry A.C. Soud, Attorney for "Deft" present in court. Another stamped entry said "Mother of Deft present in court." The stamps do not say which defendant or which defendant's

mother. On that date, Leo Jones was sentenced to one year probation. The signed Judgment and Sentence in the court file does not reflect such sentence to be a reduction. While the court file contains two Judgment and Sentence documents dated February 16, 1969, neither of these documents state what the sentence was, whether these are considered Minutes, or which defendant the Clerk meant A.C. Soud represented. [Federal] Judge Ralph Nimmons, the prosecutor in case 68-3928 testified that he has no recollection of the case. [RV 720-21].

"Judge Soud testified:

"1. During the time he represented Leroy Clark in case 68-5932 he never learned Clark had a brother named Leo Jones. [RVII 1160].

"3. [sic] That during the time Mr. Fallin (trial counsel) represented Leo Jones, he never suggested that Jones recognized Judge Soud or that Judge Soud had represented Leo Jones. [RVII 1175-76].

"4. That he has absolutely no recollection of case 68-3923, of Mr. Jones or any connection to 'he or Mrs. Hester.' [RVII 1170].

"5. Nobody has ever been in his office pulling money out of a bra. [RVII 1172].

"6. That he never gave any money to Judge Harvey and that such conduct would be offensive and outrageous to him. [RVII

1185].

"7. That the allegations made in the Motion in this case have 'defamed and placed a stench and taint upon my integrity and name throughout the State of Florida . . . .' [RVII 1185]."

JUDGE JOHNSON'S RULING

Judge Johnson identified basically two grounds in Jones' 3.850 motion:

> 1. That Glenn Schofield actually committed the murder for which Jones was convicted and that the State failed to disclose this at trial or the defense failed to discover it, so the defendant's constitutional rights have been denied. Further, newly discovered evidence establishes defendant's innocence.
>
> 2. That defendant was denied his constitutional rights because he was tried, convicted and sentenced to death by a judge who violated the Judicial Code of Conduct by not disclosing pertinent information that warranted his disqualification and that gave him an interest in the outcome.

(RI 135). Judge Johnson first addressed the second claim. After discussing the evidence, recounted above, Judge Johnson found:

> Alberta Brown, the only person making these allegations, is the mother of four children fathered by Leo Jones. She was never in the courtroom in case 68-3923. She never saw any money paid to Judge Harvey. She waited until after Mrs. Hester's death, and some 28 years after the alleged event, and after the death warrant was signed, to make these allegations. Although Leo Jones has the burden of proof of the allegations in his Motion, he sat within 30 feet of Judge Soud during his testimony and never took the stand to say that A.C. Soud had ever represented him.
>
> There is not one scintilla of credible evidence to support the defendant's allegations that Judge Soud paid

> anything at anytime to Judge Harvey. Nor, is there credible evidence that would require Judge Soud to disclose the possible representation of defendant some twelve years before when he has no recollection of it. Judge Soud made a Disclosure of Information relating to his representation of Leroy Clark in 1981. All agreed he could continue with the case, including Leo Jones. This ground of the Motion is totally without merit.

(RI 137-38).

As to the first claim, after reviewing the evidence, Judge Johnson found that, since Schofield testified, the testimony of those witnesses who allegedly heard Schofield confess was not admissible substantively, but only constitute impeachment of Schofield under Rule 90.608(1) and § 909.614 Fla. Stat. Judge Johnson stated: "They are not independent proof of culpability of Glenn Schofield" (RI 145).

Judge Johnson did find that the testimony of Roy Williams, James Corbett and Dwayne Hagans constitutes newly-discovered evidence and that Jones exercised due diligence in obtaining it (RI 145-46). However, Judge Johnson found none of these witnesses to be credible.

As to Roy Williams, after noting the many inconsistencies in his testimony, Judge Johnson stated: "Roy Williams has been in prison at least six times. His testimony is filled with inconsistencies, contradictions and statements that are not true. His testimony simply lacks credibility and, if given at trial, would not probably result in defendant's acquittal." (RI 147).

As to James Corbett, Judge Johnson stated: "James Corbett was

convicted of Grand Theft in 1978, Burglary in 1992 and Grand Theft in 1993. He said with some emphasis that he . . . probably has had some 80-90 arrests. The Court finds that James Corbett's testimony lacks credibility and, if given before a jury, would not probably result in defendant's acquittal." (R! 148).

As to Dwayne Hagans, Judge Johnson stated: "Dwavne Haaans, a man of many major criminal convictions and currently serving a life sentence for murder, says that Schofield and another guy flagged him down and asked him to hold his rifle down. In his affidavit, he didn't mention anything about this encounter. He never saw the rifle. This testimony lacks credibility and, if given at trial, would not probably result in defendant's acquittal." (RI 148).

In addition, Judge Johnson emphasized that he was considering this testimony cumulatively, stating: "The Court finds that the combined testimony of Roy Williams, James Corbett and Dwayne Hagans, or any two of them, if given at trial would not probably result in defendant's acquittal." (RI 148).

Judge Johnson concluded that none of Jones' constitutional rights had been violated and that Jones' innocence had not been established (RI 149). Jones' Motion to Vacate Judgment and Sentence and for Stay of Execution was denied (RI 149).

SUMMARY OF ARGUMENT

Jones, despite having had numerous opportunities to substantiate his claim that Glenn Schofield, not Jones, was the person who murdered officer Szafranski, has failed to do so. Nothing he has offered is credible, or consistent, or calls into question evidence presented at Jones' trial establishing that: Jones bragged about having guns; Jones threatened before officer Szafranski's murder to use one of his guns to kill a police officer; Jones confessed after officer Szafranski's murder to having carried out that threat; Jones was present in the apartment building from where the shots were fired, in the only apartment in that building in which there were any guns and whose occupants refused to answer the door when the police knocked; Jones was found hiding in a bedroom containing numerous high-powered rifles, including the likely murder weapon, which was under Jones' bed and had Jones' fingerprint on it; Jones gave non-credible testimony at trial in which he denied not only ownership of the guns in his apartment but all knowledge of any guns in his apartment notwithstanding that his fingerprint was on one of them, and claimed to have been undressed and in bed when the shots were fired even though he was fully dressed when the police entered his apartment just a few minutes later.

Jones' "Brady" claim is procedurally barred and meritless. This claim, which was not even raised until Jones' closing

argument, is an attempt to present hearsay testimony from Cleveland Smith, who was not present at the arrest or afterwards and who does not know what role officer Mundy played in either Jones' arrest or confession. Much of what Jones offers here is not newly-discovered and, in fact, is the same type of evidence that Jones attempted to offer at the 1992 hearing. Moreover, regardless of how Mundy described his actions or motivation afterward, the undisputed evidence presented at trial is that Jones did not confess to Mundy and that no one laid a hand on Jones in the six hours leading up to his interrogation.

There is no merit to Jones' "cumulative effect" claim. Judge Johnson considered all of the evidence presented at this hearing, as well as the original trial evidence. Judge Johnson found the testimony presented by Jones, considered individually and cumulatively, not to be credible. As for evidence presented previously, Jones does not have a right to litigate his innocence piecemeal, or to present evidence for the first time in 1997 that he could and should have presented in 1992. Moreover, in light of the utterly inconsistent theories of Schofield's guilt that Jones has presented over the years, cumulative consideration of everything he ever has presented or had the opportunity to present in evidence still utterly fails to prove his innocence.

Because Schofield was available to testify and did testify, his alleged out-of-court statements as to the murder of a police

officer are hearsay and are not admissible substantively under the rules of evidence. Nothing in Chamber v. Mississippi compels the State to discard its valid rules of evidence or requires the substantive consideration of hearsay testimony from multi-convicted prison inmates presented for the first time 16 years after trial.

Jones' contention that Judge Johnson should have drawn an adverse inference about Schofield's credibility simply because Schofield wanted to consult a lawyer before answering questions from attorneys who have been attempting to portray him as a murderer for the past 16 years is frivolous.

Judge Johnson's evidentiary rulings were not erroneous. Evidence that would be admissible--at best--only at a penalty phase in any prosecution of Schofield cannot possibly be relevant to the question of Jones' guilt or innocence. Nor did Judge Johnson err in restricting examination about everything in the world that was "not" in a document admitted in evidence.

Judge Johnson properly determined that there was not "one scintilla" of evidence to prove that Judge Soud had bribed a judge on Leo Jones behalf in 1969. Even Jones does not argue with this finding. (He should never have made the accusation.) The fact that Judge Soud may have represented Jones on a misdemeanor charge in 1969 does not require setting aside Jones' conviction and sentence when Judge Soud had no recollection of ever representing Jones and neither Jones nor his family made any issue about it until 1997.

Jones is not entitled to a copy of a presentence report on Glenn Schofield, especially when he did not even try to obtain such until after the hearing was over and Judge Johnson had ruled on Jones' 3.850 motion.

ARGUMENT

ISSUE I

JONES' BRADY CLAIM IS PROCEDURALLY BARRED; FURTHERMORE, HE HAS FAILED TO DEMONSTRATE THAT THE STATE WITHHELD ANY MATERIAL, EXCULPATORY EVIDENCE IN VIOLATION OF JONES' CONSTITUTIONAL RIGHTS

Jones complains here that the State suppressed evidence that his confession was coerced.[22] His "evidence" is primarily hearsay testimony from a witness who was not involved in Jones" arrest, who does not know anything about the facts of either the crime or the circumstances surrounding the confession, who does not know what officer Mundy's role in this case was, and who offers opinions about Mundy's credibility that are cumulative to information that has been publicly available since at least 1984, and that Jones attempted, unsuccessfully, to present in 1992. In addition, Jones tosses in allegations about detective Eason that have never been proven and, in any event, have been a matter of public knowledge for years. In fact, Jones' attorneys presented such allegations in another case over five years ago. He offers virtually nothing that is either newly-discovered or admissible.

It should be noted at the outset that former officer Smith is a witness who played no part in the investigation or arrest of Leo Jones, who admits he has no knowledge of the actual facts of the

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[22] The State would note that Jones has devoted the greatest amount of attention in his brief to a claim that was not even raised until closing arguments (RVIII 1303).

case (RI11 216), who came forward only in October of 1997 to report matters which allegedly occurred in 1981 (RII 186), and who explained his delay in coming forward as a product of his concern for a pension (RI11 217).

According to Smith (on proffer), Mundy bragged to him that he had "kicked in a door and that he just started beating people." His intention "was to kill somebody, and that another officer stopped him from doing it." (RII 188). In addition, Smith testified that Mundy would "make up charges," "misrepresent facts,"' and had used excessive force to obtain a confession in another case (RII 189-90). Jones' counsel added to the proffer, stating that Smith could testify that there was an investigation of detective Eason in which a criminal defendant had accused Eason of hiring him to commit murder, and that, at a roll call two weeks before the Szafranski shooting, the police were told that there had been an altercation between Jones and another police officer and that "they were to do everything in their power to put Leo in jail" (RII 193-94). Finally, if allowed, Jones' counsel would have elicited Smith's opinion about an alleged lack of detail in the confession Eason obtained from Jones (RII 194-95). It must be noted that upon hearing this proffer, the trial court allowed counsel to present testimony about statements allegedly made at the roll call (RII 196-97). It also should be noted that Smith never testified that he heard Mundy bragging about beating a confession out of Jones; in

fact, Smith only stated that he had read in the paper that Jones had stated that Mundy had beaten a confession out of him (RII 197-98).

Smith testified that at a roll call, it was "brought up" that "an officer had had a fight" and that the suspect involved was "a Mr. Jones." Smith stated, "We were then told to do everything in our power to put Leo Jones in jail"' (RII 199).

On cross-examination, Smith admitted that he was not in the Davis Street area during or after the murder occurred, and played no part in establishing the perimeter or looking for witnesses or suspects (RI11 214). He was not around and had no personal knowledge about the interrogation of anyone in connection with this crime (RI11 214-15). He was not aware that officer Mundy never took any confession from Jones (RI11 215). Nor was Smith aware that Jones had testified at trial that no one had laid a hand on him for six hours prior to his confession (RI11 216). In fact, he had no knowledge of the actual facts of the case; he "didn't keep up with it" (RI11 216). Nor did he have any actual knowledge, other than what Mundy had told him, of whether or not that Mundy had ever touched Jones (RI11 221).

What a defendant in general must prove to substantiate his Brady claim is:

> (1) that the Government possessed evidenced favorable to the defendant (including impeachment evidence); (2) that the defendant does not possess the evidence nor could he obtain it himself with any reasonable diligence; (3) that

> the prosecution suppressed the favorable evidence; and (4) that had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different.

Heawood v. State, 575 So.2d 170, 172 (Fla. 1991) (quoting United States v. Meros, 866 F.2d 1304, 1308 (11th Circuit 1989)). In addition, in the postconviction context, a defendant must present his Brady claim within the applicable time periods of Rule 3.850. Mills v. State, 684 So.2d 801, 804 (Fla. 1996) (holding that to establish Brady claim in postconviction proceeding, defendant "must show in his motion for relief both that this evidence could not have been discovered with the exercise of reasonable diligence and that the motion was filed within one year of the discovery of evidence upon which avoidance of the time limit was based").

In this case, even assuming asguendo, that Smith, personally, could not have been "discovered" earlier, much of what he testified about not only could have been but was. For example, in the course of Jones 1992 3.850 hearing, Jones attempted to introduce the transcript of a police disciplinary hearing and an appellate opinion which, he claimed, showed that Mundy had a "poor reputation for truth and veracity." Defendant's Pre-hearing Memorandum, Record on Appeal in Case No. 81,346 at p. 87. These allegations were not even newly-discovered in 1992 and, in fact, were excluded from evidence on that basis. See Exhibit A, footnote 1. If Jones thought this evidentiary ruling was error, he could and should have appealed that ruling. He did not, and Jones has offered nothing

new here.

As for any allegation that Mundy had just kicked in the door and started beating people, intending to "kill" someone, it should be noted that officer Smith's testimony is merely hearsay; all he knows is what Mundy told him. Mundy himself was subpoenaed as a witness at this hearing, but Jones' counsel chose not to call him (RVII 1031). Thus, Jones presented no direct testimony to prove these facts. At most, any out-of-court statements would be admissible to only to impeach Mundy's trial testimony. But Mundy was not the only officer who participated in Jones' arrest--officers Torrible and Roberts also were there. Moreover, it has always been known that there was a physical altercation during Jones' arrest. The trial evidence showed that Jones resisted his arrest and had to be subdued by the arresting officers. Significantly, however, Mundy was not the officer trying to arrest Jones. In fact, officer Torrible, not officer Mundy, tried to take Jones into custody (TR 978-80). At this time, officer Roberts was placing Bobby Hammonds in custody, and Mundy was in the back of the apartment (TR 210) (hearing on the motion to suppress). Thus, Mundy was not even present at the onset of the physical altercation and did not instigate it, regardless of anything he might have bragged about in subsequent years to officer Smith. Moreover, even if Mundy ever had an intention to kill, he obviously did not carry it out. Jones was not killed; he was not even seriously injured.

In this regard, Jones cites part of the testimony by the doctor who examined Jones after his arrest; however, he omits the most significant part: Dr. Pack described Jones' injuries as "minor" (TR 1300). In addition, Dr. Pack specifically contradicted Jones' trial testimony that the top of Jones' head was swollen or bleeding; Dr. Pack found no such injuries (TR 1300). Furthermore, detective Japour testified that, when he gave Jones his Miranda warnings that morning, Jones, rather than being "all whipped up" as Jones had testified, was smug and cocky, telling Japour that he knew what his "fucking rights" were (TR 1306-08). Eason concurred (TR 1095). Most importantly, the interrogation did not even begin until noon the next day (TR 1096), and Jones himself admitted that between the time he was taken to the hospital until he signed his confession over 6 hours later, no one "laid a hand" on him (TR 1283).

Smith's testimony that Mundy had bragged about just kicking in the door and started beating everybody is not Brady material. t is wholly inconsistent with the trial evidence, an amounts to no more than his exaggerating "some of his doings out on the street,"' which is a trait of which Jones has been aware for years, having offered a disciplinary hearing transcript to just that effect in 1992. See Defendant's Pre-hearing Memorandum, Record on Appeal in Case No. 81,346 at p. 117. Thus, it is merely cumulative of information Jones already possessed. Moreover, in light of the

evidence presented at trial, there is no reasonable probability that the proceeding's outcome would have been substantially affected if Jones had been furnished and/or had presented this information. Robinson v. State, No. 86,136 (Fla. February 12, 1998). Jones has repeatedly litigated the validity of his confession. **His claims** have repeatedly have been found **meritless.** Jones v. State, supra, 440 So.2d at 574; Jones v. State, supra, 528 So.2d at 1174; Jones v. Dugger, 928 F.2d 1020, 1025-27 (11th Cir. 1991). He has presented nothing which calls into question any previous resolution of his voluntariness claim.

As for any allegations about detective Eason, nothing here is newly-discovered. Eason's alleged criminal conduct several years after Jones' trial was investigated in 1988, but Eason was never even charged with any crime, much less convicted. Jones has offered no theory by which a mere investigation could be used in some way to impeach his testimony in this case. Besides that, any issue as to Eason's alleged misconduct is procedurally barred. Jones has offered no justification for having waited until 1997 to raise any issue arising from an investigation that was public knowledge almost ten years ago. Moreover, this Court may judicially take notice that attorneys from CCR (the same agency that has been representing Leo Jones since before his 1991 3.850 motion was filed) raised a Bradv claim concerning same alleged misconduct by Eason in a 3.850 mot**ion** filed on behalf of Gregory

Alan Kokal in 1990 (see Claim XII, paragraph 17, 3.850 motion, contained in the record on appeal in Kokal v. State, case no.90,622, pending on appeal and scheduled for oral argument on March 5, 1997). The burden to allege and prove due diligence rests upon the defense. Bolender v. State, 658 So.2d 82, 85 (Fla. 1995). Jones has not met that burden, and has no right to wait seven years to raise the same issue in his case. Zeigler v. State, 654 So.2d 1162, 1164 (Fla. 1995).

As for Eason's statement to Bill White concerning what Eason had observed Mundy doing, such statement is inadmissible hearsay, not admissible even to impeach Mundy's testimony. As noted previously, Eason was subpoenaed by Jones to testify at this hearing, but Jones declined to call him (RVII 1040). Aside from any issue of due diligence (and not only did Eason supposedly made this statement to Bill White back in the early 1980's, but, in addition, Bill White gave an affidavit in 1991, see fn. 5, supra), Jones has presented no admissible evidence here, and the trial court did not err by failing to consider it.

Finally, as to the statements allegedly made at a roll call, it is hardly remarkable that police would want to put in jail someone who had assaulted a police officer (or any other serious crime, for that matter). But Jones' theory that "the police may have been motivated to manufacture evidence in order to secure Mr. Jones' conviction [for murder] without regard for his innocence,"

Initial Brief of Appellant at 69, would require believing that the police wanted so badly to jail someone who only had assaulted one police officer that they would allow a murderer of another police officer to go free. This is hardly reasonable. In any event, the evidence against Jones was strong, and Judge Johnson was entitled to conclude that any evidence concerning statements made at a roll call sometime before the Szafranski murder "adds nothing to detract from the proof offered at trial" (RI 144).

ISSUE II

THERE IS NO MERIT TO JONES' "CUMULATIVE EFFECT" CLAIM AND JONES WAS NOT DENIED A FULL AND FAIR HEARING

Jones argues here that Judge Johnson failed to consider the "cumulative effect of all the evidence not presented at Mr. Jones' trial." Initial Brief of Appellant at 71. Initially, the State does not disagree with the proposition that, as to Jones' newly-discovered-evidence-of-innocence claim, it is appropriate to consider all the legitimate, newly-discovered evidence properly admitted at this hearing, and to compare it to the evidence admitted at trial. This is not a remarkable proposition. However, the State does not agree with Jones' implication that simply because Judge Johnson individually analyzed the testimony of the various witnesses, he failed to consider combined weight of all the "newly-discovered" evidence. First of all, Judge Johnson not only evaluated the testimony of the newly-discovered witnesses individually, he evaluated their "combined" testimony (RI 148).

Moreover, Jones made this same argument on appeal from the denial of his 1991 motion for postconviction relief based on alleged newly-discovered evidence of innocence. As the State argued then, the evidence is the sum of its parts; that Judge Soud had "individually" addressed the testimony was "entirely consistent with the consideration of all the evidence." Answer Brief of Appellee, Florida Supreme Court Case no. 81,346, at p. 46. This Court found no merit to Jones' contention that Judge Soud had failed to consider the cumulative effect of the newly discovered evidence, and Jones' claim here is equally without merit. Jones v. State, 678 So.2d 309, 313 fn. 1 (Fla. 1996). See Middleton v. Evatt, 77 F.3d 469 (4th Cir. 1996) (unpublished opinion cited in footnote 50 of Jones' brief on appeal) (implicit in trial court's "exhaustive" review of the record was that "cumulative effect of the evidence was considered, even if the term 'cumulative effect' was not expressly employed").

Jones, however, is not content with arguing merely that evidence properly admitted at this hearing must be considered in toto; in addition, he would have required Judge Johnson weigh "evidence that does not satisfy the newly discovered evidence test" (Motion at p. 4), including affidavits of witnesses who have never testified, testimony that is not newly discovered, testimony that is not substantively admissible, testimony that is not admissible at all, and testimony that is procedurally barred. For this

proposition, he cites State v. Gunsby, 670 So.2d 920 (Fla 1996). Gunsbv does not stand for any such proposition. Gunsby dealt with an initial 3.850, not a successive one. Thus, neither the effectiveness of trial counsel nor the question of newly-discovered evidence had been previously raised. In considering the testimony of four allegedly newly-discovered witnesses presented at the 3.850, this Court found that, to the extent that at least some of the testimony should have been discovered through due diligence at the time of the trial, trial counsel's performance was deficient. In these "unique" circumstances, it was not necessary to determine whether or not the evidence was admissible as newly-discovered evidence or as evidence of trial counsel's ineffectiveness; it was in any event admissible under either one theory or the other. Gunsbv does not even hint, much less hold, that evidence not meeting the test for newly-discovered evidence may be considered 16 years after trial when there is no other basis for the consideration of such evidence. In this case, unlike Gunsby, any evidence which does not properly qualify as newly-discovered evidence is not admissible under a theory of ineffectiveness of trial counsel; Jones has already had his "full and fair hearing on his claim of ineffectiveness of trial counsel," and any claim that trial counsel was ineffective for failing to "locate and present witnesses other than those referred to in the first motion for postconviction relief" is procedurally barred, as this Court

already has held. Jones v. State, 591 So.2d 911, 913 (Fla. 1991).

Rule 3.850(b) contains a one-year time limitation for filing motions to vacate judgment and sentence in capital cases. An exception is made for motions based on newly-discovered facts. Rule 3.850(b)(1). Claims filed after the one-year period has elapsed are procedurally barred unless "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." Henderson v. Singletary, 617 So.2d 313, 316 (fn. 3) (Fla. 1993). Thus, in the previous appeal in this case--in fact, in the very opinion which first formulated the present standard for evaluating claims of newly-discovered evidence of innocence--this Court held that the use of Paul Marr's testimony about statements allegedly made to him by Glen Schofield were "procedurally barred" because in the 1986 hearing on Jones" first 3.850 motion, Jones had "unsuccessfully sought to introduce Marr's testimony in support of his claim of ineffective assistance of counsel." Jones v. State, supra at 916 fn. 2.

Because Jones could have--but did not--offer Marr's testimony in support of a claim of newly-discovered evidence of innocence back in 1986, he was procedurally barred from offering this testimony in support of his 1991 claim of newly-discovered evidence of innocence; the testimony simply did not meet the test for newly discovered evidence. Likewise, statements Schofield allegedly made

to Linda Atwater, Stanley Thomas and others who could have testified in previous hearings, but did not, may not be considered, cumulatively or otherwise. They are procedurally barred. Jones v. State, supra. Judge Johnson did not err in failing to weigh such procedurally-barred evidence.

In fact, it is the State's contention that not only does Jones have no valid basis to argue that Judge Johnson erroneously ignored any evidence, but that, in fact, Jones achieved the consideration of evidence and testimony that in truth was not newly discovered and to which Jones was not entitled to present at this hearing: i.e., any evidence that Schofield allegedly confessed.

When this Court first announced a new standard for reviewing claims of newly-discovered evidence of innocence, this Court remanded this case to the circuit court for hearing to consider "all newly discovered evidence which would be admissible." Jones v. State, supra, 591 So.2d at 916. At such hearing, Jones attempted to introduce evidence from several witnesses that Schofield had confessed to the murder of a police officer. Such confessions were admissible--if at all--only under the declaration-against-penal-interest exception to the hearsay rule contained in § 90.804 (2) (c). A necessary prerequisite for the admission of such declarations is a "showing that the declarant is unavailable as a witness." Jones v. State, supra, 678 So.2d at 313. Although Schofield had been present at the courthouse during the hearing,

and although Judge Soud had advised the parties that declarations against interest were admissible only if the declarant is unavailable, Jones did not call Schofield as a witness. In fact, Jones did not even contend, much less actually demonstrate, that Schofield would refuse to testify if called as a witness. On the contrary, Jones' attorney stated:

> There isn't a person in the courtroom here, Your Honor, that doubts what Mr. Schofield would say if he did take the stand. That's not a mystery. I mean we all know what Mr. Schofield will say if he takes the stand. He's going to say, it's a lie, I never said it, I never did it. We all know that. That's a given. You know, he's been working with Detective Housend for the past five days that I've been here. He has no fear of the State of Florida right now. He's working with them. I mean I have no doubt what Mr. Schofield will say on the stand, so I'm not going to call him and I don't think I need to call him.

Id. at 314. In short, Jones admitted that Schofield was available to testify (as Schofield's testimony in the instant hearing confirms--Schofield testified exactly as Jones' counsel at the 1992 hearing had predicted he would) . Because Jones failed to demonstrate that Schofield was unavailable to testify, Judge Soud found that his alleged out-of-court statements regarding the murder of officer Szafranski were inadmissible. This Court affirmed, stating, "The burden was on Jones to establish that Schofield was unavailable and Jones failed to meet that burden. Consequently, we find that Schofield's alleged confessions are not admissible. . . ." Ibid.

Jones' present Schofield-confessed claim is in fact merely a

variation of his prior claim, and is procedurally barred on that basis alone. See Mills v. State, 684 So.2d 801 (Fla. 1996)(evidentiary hearing properly denied where Mills failed to demonstrate that his present claim was not just a variation of prior claims). In addition, testimony about Schofield's alleged confessions was determined at the first hearing not to be admissible evidence. It would seem that such testimony should have been equally inadmissible at this hearing unless Jones could present newlv-discovered evidence, not discoverable previously in the exercise of due diligence, establishing that Schofield's alleged confessions would be admissible under the declaration-against-penal-interest exception to the hearsay rule or otherwise. The only "new" evidence Jones has presented as to Schofield's availability to testify is the testimony of Schofield himself, which Jones presented at this hearing for the first time--five years after having willfully declined to wresent it at the 1992 hearing. It is the State's contention that, since Jones obviously had the opportunity to call Glen Schofield as a witness at the prior hearing in 1992, it is not only reasonable, but necessary, to conclude that Glen Schofield's testimony is not newlv discovered evidence which would now justify the consideration of alleged confessions of the kind ruled inadmissible in 1992.

The issue at this point is not simply the application of 590.804. This hearing was not a retrial of the case, it was a

proceeding to determine whether there should be a retrial sixteen years and several postconviction motions after the fact. The issue as to Schofield's alleged confessions is whether Jones deserves a second chance to present evidence which he could and should have presented in 1992. It is the State's contention that he does not and that Jones is attempting to engage in exactly the kind of piecemeal and repetitious litigation that the time limitations incorporated into 3.850 are supposed to prevent.

In any event, Judge Johnson certainly did not give inadequate consideration to testimony of witnesses who testified in 1992 and whose testimony was found by both Judge Soud and by this Court not to have been admissible evidence, and there is no merit to Jones' "cumulative effect" issue.

As noted previously, Jones argued in his prior appeal that Judge Soud evaluated the newly-discovered evidence individually instead of cumulatively. Jones also argued that Judge Soud erred by not considering procedurally-barred evidence. See Jones' Initial Brief on Appeal in case no. 81,346, at pp. 56-59. This Court found no merit to such claim then, and it has no more merit now.

Even if we did consider all the affidavits and testimony that have been proffered over the years, however, we would find that nothing about Jones' various offerings over the years is consistent except the bare allegation of Schofield's involvement. Depending

on which theory is being advance by Jones at any given moment, Schofield left Jones' apartment unarmed, or with a pistol, or with a rifle; Schofield shot officer Szafranski from the vacant lot to the north of Leo Jones' apartment building, or he shot officer Szafranski from the downstairs apartment, or he shot officer Szafranski from a kneeling position in the bushes on the south side of the apartment building; Schofield disposed of the rifle by returning it to Jones' apartment and replacing the rifle under Jones' bed (presumably while Jones was not looking, as he said nothing about this in his trial testimony), or he tried to give it away, or he threw it into the river, or he left it in Katherine Dixon's apartment; he escaped by running to a car parked right in front of the murder scene and hid there until the police left, or by running down Lee Street, or by running down Madison; he either ran down Madison alone, or with Marilyn Manning following him; he left the area in a rental car with Marilyn Manning and Roy Williams, or he left the area in a rental car without Marilyn; he either went to Georgia or he was still in town the next day trying to borrow money to leave.

The State would note that nowhere in his brief does Jones argue that the evidence admitted at this hearing suffices to establish his innocence or that Judge Johnson erred in concluding that the testimony presented at this hearing--particularly that of Roy Williams--is filled with inconsistencies, contradictions and

statements that are not true. The State would suggest that Jones feels compelled to argue the cumulativeness issue because even he realizes that his evidentiary presentation at this hearing was utterly non-persuasive. The problem, however, with any "cumulative" review is that Jones has never--and can never--explain or reconcile all the inconsistencies in the various theories of Schofield's guilt he has presented over the years. His evidence simply is utterly lacking in credibility, and the more one considers, the less credible his various theories become. There is no merit whatever in Jones' cumulative-evidence claim.

ISSUE III

EVEN ASSUMING THAT SCHOFIELD'S ALLEGED CONFESSIONS ARE NOT PROCEDURALLY BARRED, THEY ARE NOT ADMISSIBLE SUBSTANTIVELY UNDER THE RULES OF EVIDENCE

Jones complains here about Judge Johnson's refusal to consider Schofield's alleged confessions as substantive evidence of Jones' innocence. Just as he did in his appeal the 1992 hearing, Jones does not even attempt to argue that the rules of evidence allow such hearsay statements to be admitted and considered substantively; instead, he relies upon some perceived constitutional right to present such hearsay regardless of the rules of evidence.[23] The State will briefly analyze the state

[23] In his footnote 52, Jones states that he has not included Schofield's 1990 "confession" to Stanley Willie because his affidavit was not accepted by the circuit court in 1992. In fact, Stanley Willie did not claim that Schofield confessed to him. See Exhibit A, footnote 1.

evidentiary rules, and then turn to Jones' Chambers[24] argument.

There are a number of exceptions to the hearsay rule. Many apply whether or not the declarant is available as a witness. These exceptions are set forth in § 90.803, Florida Stat. (1997). By contrast, the exceptions enumerated in § 90.804, including the exception for declarations against interest, are applicable only when the declarant is "unavailable," as defined in § 90.804 (1). Jones v. State, supra, 678 So.2d at 313. In the previous hearing, Jones never even tried to show that Schofield was unavailable. Id. at 313-14. In fact, he was not, as Jones' attorneys predicted in 1992, and as Schofield's testimony at the instant hearing plainly demonstrates. Thus, since Schofield is not "unavailable," his alleged out-of-court statements are not admissible under the declaration-against-penal-interest exception to the hearsay rule.

Schofield testified that he did not kill officer Szafranski and that he never has told anyone the contrary. His inconsistent statements are admissible--if at all--under §§ 90.608 and 90.614.[25] However, such statements are admissible for impeachment; they are not substantively admissible. State v. Smith, 573 So.2d 306, 313 (Fla. 1990) ("There can be no question that evidence of a prior inconsistent statement offered as impeachment is admissible only

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[24] Chambers v. Missississi, 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973).

[25] The State adheres to its position, argued above, that any issue of Schofield's alleged confessions is procedurally barred.

for that purpose unless it is independently admissible."). Thus, as Judge Johnson found, testimony about Schofield's alleged confessions "are not independent proof of culpability of Glenn Schofield" (RI 145). This is a correct statement of law.

Citing Chambers v. Mississippi, however, Jones claims that the testimony of his inmate witnesses should have been considered substantively because they bore such "indicia of reliability" as to overcome any barriers imposed by state rules of evidence. This is the same argument Jones made the last time this case was in this Court. The argument was rejected then; it is equally meritless now.

Jones cites no case holding that a state evidentiary rule must be invalidated whenever it prevents a criminal defendant from admitting any evidence, no matter how dubious. The United States Supreme Court has "never questioned the power of States to exclude evidence through the application of evidentiary rules that themselves serve the interests of fairness and reliability--even if the defendant would prefer to see that evidence admitted." Crane v. Kentucky, 476 U.S. 683, 106 S.CT. 2142, 90 L.Ed.2d 636 (1986). Nor has Jones cited any case in which a rule concerning the use of prior inconsistent statements has been found to violate a criminal defendant's right to present a defense.

Chambers is inapposite. First of all, under Mississippi's then rules, the defendant could neither cross-examine his own

witness about his prior inconsistent statements, nor introduce them for any purpose. Jones obviously was not restricted in this regard. More importantly, however, is that Chambers dealt with the exclusion of statements that were offered under "circumstances that provided considerable assurance of their reliability." 410 U.S. at 300. The hearsay declarant in Chambers had confessed to close acquaintances "shortly after the murder had occurred," and these close acquaintances had reported their information before trial. Ibid. In addition, the declarant himself had given a sworn statement to Chambers' attorney, admitting his guilt. 410 U.S. at 287. None of the witnesses to any of the out-of-court statements were prison inmates serving lengthy sentences.

In this case, by contrast, the witnesses to these alleged out-of-court "confessions" are nearly as non-credible as witnesses can be. All of them are long-term inmates with little or nothing to lose by perjuring themselves. Their prior records include convictions for, inter alia, murder, armed robbery and kidnapping. None of these witnesses came forward until after Jones' most recent death warrant was signed, waiting anywhere from four to 15 years to report their information. At least two of them are in the same prison with Leo Jones and, according to their chaplain, know Jones. Moreover, their testimony is lacking in corroboration. These witnesses provided no information that they could not readily have obtained from a source other than Schofield. What few details they

did provide are inconsistent with other testimony, or simply do not make sense. For example, some of them report that Schofield told them he killed officer Szafranski to pay him back for his treatment of him and/or other drug dealers. But there is virtually no way that officer Szafranski's killer could have known in advance who was in that car.[26] Moreover, not so much as a hint of misconduct on officer Szafranski's part has ever been previously offered in the 16 years between officer Szafranski's murder and this hearing. Jones, in fact, has offered no credible evidence that officer Szafranski was a crooked cop; on the contrary Randy Fallin testified that Szafranski's reputation was "impeccable."[27]

Chambers dealt with the exclusion of reliable and trustworthy evidence. Here, no such reliable and trustworthy evidence has been offered.. As in the previous appeal in this case, Jones has not presented evidence of such "persuasive assurances of trustworthiness" as would justify the disregard of Florida's rules of evidence. Jones v. State, supra, 678 So.2d 315.

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[26] There was some testimony that the police cars had numbers on them, but no names. Even if Schofield could have identified the occupant of the last car from a number on it, Jones has offered no explanation of how Schofield could have known in advance that officer Szafranski would have been cruising up the street at that particular time.

[27] With no credible basis, Jones' attorneys have in this proceeding attempted to trash the reputation of both Judge Soud and officer Szafranski.

ISSUE IV

SCHOFIELD TESTIFIED AT THIS HEARING AND THE MERE FACT THAT HE INITIALLY INVOKED HIS FIFTH AMENDMENT RIGHTS AS A MEANS OF SECURING THE RIGHT TO COUNSEL IS NO BASIS TO IMPEACH SCHOFIELD'S CREDIBILITY; MOREOVER, IMPEACHING SCHOFIELD DOES NOTHING TO EXONERATE JONES

Jones here asks this Court to draw in inference against Schofield from his silence. But Schofield was not silent; he testified. He merely used the invocation of his Fifth Amendment rights as a means to secure his right to counsel.[28] Jones has cited no case stating that adverse inferences may be drawn as to a party or a witness merely on the basis that such person has consulted an attorney. But the State will not dwell long on any suggestion that such inferences may constitutionally be drawn, even though the State seriously doubts that they may. Even if it were constitutionally permissible to draw adverse inferences about the credibility of a witness simply because he chooses first to talk to an attorney, there is no reason to do so in this case. As the State pointed out below, Schofield was at a "great disadvantage;" he was about to be questioned by "the people who are trying to pin a first-degree murder on him," and who had been attempting to do so for years (RII 143-44). That he should wish to talk to an attorney of his own before testifying in such circumstances is eminently

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[28] Schofield first asked the court who was representing him. When Judge Johnson told him no one, Schofield pled "the Fifth," asserting that he did not have "anything to say without an attorney." (RII 140-41).

reasonable and something any of us would do. So why would we draw any adverse inferences from Schofield's invocation of his right to consult with counsel?

And even if we did, so what? We already know that Schofield has a criminal record and has spent most of the last 16 years in prison. How would his invocation of his right to counsel add anything significant to any evaluation of Schofield's credibility? The answer is, it does not. Judge Johnson committed no reversible error here.

ISSUE V

JUDGE JOHNSON DID NOT ERR IN EXCLUDING EVIDENCE THAT WAS TOTALLY IRRELEVANT TO ANY EVALUATION OF LEO JONES' INNOCENCE, OR IN EXCLUDING HEARSAY EVIDENCE ABOUT SCHOFIELD'S ALLEGED STATUS AS A CONFIDENTIAL INFORMANT, OR IN LIMITING JONES' ATTEMPT ENDLESSLY TO CROSS-EXAMINATION SCHOFIELD ABOUT WHAT WAS "NOT" IN A DOCUMENT ADMITTED IN EVIDENCE WHEN SUCH WAS OBVIOUS FROM THE DOCUMENT ITSELF

There are three parts to this issue. First, Jones complains about the exclusion of testimony which, he alleges, would demonstrate the unremarkable proposition that Schofield, after having committing a crime with others, would attempt to minimize his own culpability in his statements to the police. Such statements, allegedly made in the context of seeking reduced sentences and parole, would--Jones contends--be "admissible at a penalty phase if Mr. Schofield were ever tried and convicted of Officer Szafranski's death." Initial Brief of Appellant at 92. He further asserts that the State conceded that such statements would

be admissible at such a penalty proceeding. Id. at 91. In fact, the State conceded no such thing. On the contrary, the Assistant Attorney General French stated:

> Our position, Judge, would be that if we were prosecuting Mr. Schofield, any letters that he may have written to a Judge in a wholly unrelated case, any motions he might have filed to withdraw a guilty plea in an unrelated case, any attempts to obtain early release or work release and [sic; from] any previous incarcerations, and any incident reports arising out of his other cases and any attempts that he made to lessen his sentence would be totally irrelevant and inadmissible in any murder prosecution, and even if--we don't think it would be admissible at any penalty phase either, but even if it would be, certainly none of this evidence would show either that Leo Jones is innocent or that Mr. Schofield is guilty. It's all irrelevant.

(RIV 566) (Emphasis supplied.) Judge Johnson ruled:

> THE COURT: Well, let me just say this: I want these put in the record. I want the appellate court to look at them. I think that you're entitled to bring out his convictions here. I think that you're entitled to bring out any statements in here about his being insane or having mental treatment. I think there are a couple in here in which you said something about being insane. . . . I think you're entitled to do that, but the remainder of things that he sought in other trial courts to get parole or what he did is totally irrelevant and far-fetched to hedge-hop like you've done and say, well, he could be prosecuted and if prosecuted he could be convicted of first degree murder. If he's convicted of first degree murder, he could get the death penalty and if he got the death penalty, then certain things could come in in aggravation. Then he would be entitled to show factors of mitigation, and these could come in by the State to rebut the factors of mitigation, which is what I understand your argument to be.
>
> Mr. McCLAIN: Yes, Your Honor.
>
> THE COURT: That's very, very far-fetched. So I'm going to sustain the objection to these except as you may inquire about his convictions and you may inquire about

any mental treatment he's had or any statements about his insanity.

(RIV 566-67).

The issue in this proceeding was whether or not Jones could present sufficient newly-discovered, admissible evidence of innocence that, if introduced at his trial, would probably produce an acquittal. None of the "evidence" proffered here would be admissible at any trial of Leo Jones, and was properly excluded by Judge Johnson.

Second, Jones complains about Judge Johnson's limitation of cross-examination about what was not in a written statement admitted in evidence. State's exhibit 1 was a written sworn statement signed by Glenn Schofield in 1991, in which he stated that he had never told anyone that he had anything to do with the death of officer Szafranski or any Jacksonville policeman (RV 625-26). On redirect examination, Mr. McClain began to examine Schofield about what was not in the document. The State objected on the ground that the document speaks for itself (RV 631). Mr. McClain responded that he should "be able to ask what's not in the document" (RV 631). Judge Johnson sustained the objection, noting that "The rest of the world is not in the document so we all know that. Nothing else is in it except what's in it" (RV 631-32). Judge Johnson's ruling was not an abuse of discretion.

Finally, Jones complains about Judge Johnson's refusal to allow a proffer from Cleveland Smith regarding Schofield's alleged

status as a confidential informant "for other police officers" in 1981 (RII 181). Judge Johnson sustained the State's objection on the ground that any answer about "other officers" would be hearsay, and refused to allow a proffer on the ground that it would be "senseless" (RII 181-82). This ruling was not error, but even if it was it was harmless; Judge Johnson allowed Jasper Kirtsey to testify that Schofield told him that he was had been a confidential informant (RV 693). (Schofield himself also was asked about this; he denied ever having been a confidential informant. RIV 592). Moreover, Jones' so-called "eyewitness" testimony remains incredible, no matter what the answer to this question.

Nothing here provides any basis for reversal of Judge Johnson's determination that Jones has failed to present newly-discovered, credible evidence of his innocence.

ISSUE VI

JUDGE JOHNSON QUITE PROPERLY FOUND NO BASIS TO GRANT JONES RELIEF FROM HIS CONVICTION AND SENTENCE MERELY ON THE BASIS OF AN ALLEGATION THAT JUDGE SOUD MIGHT HAVE REPRESENTED LEO JONES IN A MISDEMEANOR CASE TWELVE YEARS BEFORE HIS MURDER TRIAL, WHEN JUDGE SOUD HAD NO RECOLLECTION OF HAVING REPRESENTED JONES, AND NEITHER JONES NOR HIS FAMILY RAISED ANY ISSUE OF POSSIBLE BIAS UNTIL SIXTEEN YEARS AFTER TRIAL AND TWENTY-EIGHT YEARS AFTER THE ALLEGED REPRESENTATION

It is now clear that Jones obtained Judge Soud's recusal from this case by making unfounded and wholly non-credible allegations that Judge Soud had committed bribery in 1969. This, even Jones apparently now concedes, as his only complaint about that portion

of Judge Johnson's order which finds "not one scintilla of credible evidence" to support the allegation of bribery is not that it is factually incorrect, but only that it "misses the point." Jones argues that Judge Soud should have recused himself simply on the basis that he had represented Leo Jones in 1969. Jones devotes most of argument on this issue rehashing the evidence suggesting that Judge Soud represented Jones in 1969. The State does not agree with the contention that Judge Soud's testimony "corroborates" any contention that he had represented Jones, Initial Brief of Appellant at 97, and certainly does not agree that the evidence is "irrefutable" on the question of Judge Soud's representation of Jones, Initial Brief of Appellant at 100. Jones attributes no significance to the fact that Alberta Brown was the only witness "making these allegations" and that Jones himself did not testify. Jones argues that Alberta Brown was the only witness who testified because she is the only living witness (aside from Judge Soud) who "knows what occurred;" Jones, he contends, was absent from his own sentencing hearing. Initial Brief of Appellant at 100, footnote 61. Although Jones makes these assertions (that Alberta Brown knows what happened and Leo Jones does not) as if they were irrefutably established by the evidence, in fact, as Judge Johnson noted in his order, Alberta Brown, according to her own testimony, did not attend the hearing and Jones failed to testify one way or the other on this issue. Thus, we have no

evidence that Jones was absent from his own sentencing hearing, and no direct testimony that Judge Soud ever appeared in court on Leo Jones' behalf.

More importantly, Jones himself has "missed the point." As to the issue of representation, Judge Johnson found no "credible evidence that would require Judge Soud to disclose the possible representation" of Leo Jones some 12 years before trial "when he has no recollection of it" (RI 138). Jones assumes that if he could have proved that Judge Soud did, in fact, represent Leo Jones, Judge Soud would have been required to recuse himself on that basis whether or not he recalled such representation, even if the motion to recuse had not been filed for 16 years after trial. Such is not the case. First of all, it is hard to believe that Jones himself would not have known that Judge Soud had represented him--if, in fact, such representation ever occurred. Moreover, the court records Jones now relies upon have been a matter of public record since 1969 and at all times since. Jones has offered no justification for failing until 1997 to complain about Judge Soud's alleged representation of him 28 years ago, and this issue is procedurally barred.[29] Liahtbourne v. Dugger, 549 So.2d 1364, 1366

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[29] The closest he comes is in the affidavit and testimony of Alberta Brown, who claimed that she did not come forward with any information about Judge Soud's representation of Leo Jones because she did not want to get Jones' mother in trouble. Pretermitting any question of the reasonableness of such explanation (why would she be more worried about getting Jones' mother in trouble than allowing Jones to be executed?), it can

(Fla. 1989) (where judge's financial disclosures had been of record "for many years," claim that original trial judge had been biased was procedurally barred in 3.850).[30] But even pretermitting any question of the sufficiency of the proof that Judge Soud ever represented Leo Jones, and pretermitting further any question of Jones' diligence in presenting this matter (and disqualification can certainly be waived for failure to seek it in a timely manner), Jones cites no case--and,the State is aware of none--holding that a defendant may disqualify a judge from presiding over his trial simply because the judge had defended him in an unrelated case some twelve years earlier. The federal circuit courts of appeal have held uniformly that no per se rule disqualifies a judge because he previously had represented (or even prosecuted) a party. See, e.g., Del Vecchio v. Illinois Dept. of Correct-, 31 F.3d 1363 (11th Cir. 1994) ("Prosecuting a defendant in one case is not the kind of action from which we can presume bias or prejudgment in a future case."); U.S. v. Lovaalia, 954 F.2d 811 (2nd Cir. 1992) ("A judge's prior representation of one of the parties in a proceeding,

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provide no justification for the delay if no bribery occurred, as clearly it did not.

[30]Jones cites Porter v. Sinuletarv, 49 F.3d 1483 (11th Cir. 1995) for the proposition that procedural bars and/or due diligence do not apply here. Porter does not, however, dispense with the requirement of due diligence in presenting a motion to disqualify, and certainly does not excuse a defendant's failure to raise a ground for disqualification of which he should be at least as aware of as the judge.

for example, does not automatically warrant disqualification."); David v. Citv and Countv of Denver, 101 F.3d 1344 (10th Cir. 1996) ("a judge's prior representation of a witness or a party in an unrelated matter does not automatically require disqualification"); Corbett v. Bordenkircher, 615 F.2d 722 (6th Cir. 1980) (same); Murshv v. Beto, 416 F.2d 98, 100 (5th Cir. 1969) (same). And state authority indicates that disqualification is not warranted where no adversarial relationship had existed. Guiliano v. Wainwriaht, 416 So.2d 1180 (Fla. 4th DCA 1982)(fact that appellate judge sitting on appeal from defendant's second conviction had represented prosecution witness during trial which led to defendant's first conviction did not disqualify judge where no adversarial relationship had existed between defendant and judge in first case). Jones presented no credible evidence that there was anything out of the ordinary in his representation of Jones--if such representation occurred--as would demonstrate even the appearance of bias against Jones in his murder trial 12 years later, especially considering that Judge Soud had no recollection of ever having represented Jones.

Jones obtained Judge' Soud's recusal in the first place only by making allegations of bribery which--even he admits--were without any substance whatever. The remaining allegation--that his conviction and sentence should be overturned because Judge Soud merely had represented Jones in 1969--is both procedurally barred

and meritless.

ISSUE VII

JONES IS NOT ENTITLED TO THE COMPELLED DISCLOSURE OF A PRESENTENCE REPORT THAT WAS NOT SOUGHT UNTIL AFTER THE CONCLUSION OF THE HEARING BELOW AND IS IN ANY EVENT PRIVILEGED INFORMATION NOT SUBJECT TO CHAPTER 119 DISCLOSURE

In his brief, Jones argues only six issues. However, Jones recently filed a motion asking this Court to compel the Department of Corrections (DOC) to furnish his counsel with a copy of Schofield's presentence investigative report (PSI). By order dated February 9, 1998, this Court directed that the motion to compel would be treated as "an issue on appeal." Thus, the State responds to the motion here. The motion should be denied.

The motion alleges that an investigator retained by Jones' attorneys was denied access to Shofield's PSI on December 17, 1997--during the pendency of the hearing below. However, instead of raising any issue of his entitlement to the disclosure of such document during the evidentiary hearing Judge Johnson had granted, inter alia, as to any public records claims Jones had concerning the St. Johns County Sheriff's office, RI 95, Jones waited until January 12, 1997 (almost two weeks after Judge Johnson ruled on Jones' 3.850) to present this issue in a motion for rehearing (RI 170-71). Judge Johnson denied rehearing (RI 177-78). Jones should now be estopped from seeking relief in this Court.

In any event, Judge Johnson did not err in denying Jones'

motion to compel the production of Schofield's PSI, and Jones has demonstrated no valid reason why his requested relief should be granted now.

In the first place, Jones request has not been filed within the time limits specified in Rule 3.852, and Jones offers no explanation why he should be allowed to continue to raise 119 issues within the context of his 3.850 proceedings some 10 months after his warrant was signed, and after his 3.850 evidentiary hearing was concluded and his motion ruled upon. Rule 3.850 (g).

Second, he is not entitled to acquire a copy of Schofield's PSI. PSI's are exempt from § 119.07, Florida Statutes (1997), and Article I, § 24(a) of the Florida Constitution. § 945.10(1)(b), Florida Statutes (1997). Jones gained access to the DOC's files on Schofield through a public records request, but Schofield's PSI is not a public record, and he is not entitled to a copy.[31]

CONCLUSION

Jones was convicted of murder in 1981--almost 17 years ago. He has had manifold opportunities to substantiate his claim that Glenn Schofield is guilty of the murder for which Jones was convicted, and he has never been able to undermine confidence in the outcome of his 1981 trial. All he has ever been able to present is hearsay, rumor, speculation and innuendo--no part of

[31] By inadvertance, Jones' investigator apparently was allowed to see the PSI. Notwithstanding this inadvertant disclosure, he is not entitled to a copy.

which is consistent with any other part. Such is not a valid basis for setting aside a valid judgment of conviction. It is now time for Jones to pay the price for his cold-blooded assassination of a Jacksonville police officer. His 3.850 motion was properly denied, and Judge Johnson's judgment should be affirmed in all respects.

Respectfully submitted,

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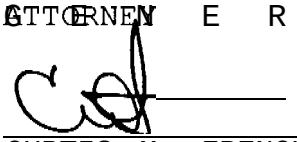
ATTORNEY GENERAL



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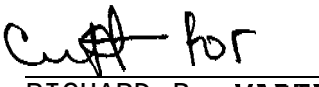

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by hand delivery to the Office of Capital Collateral Regional Counsel, Northern District, P.O. Drawer 5498, Tallahassee, Florida 32314-5498, and by U.S. Mail to Martin J. McClain, Assistant CCRC, 1444 Biscayne Blve., Suite 202, Miami, Florida 33132-1422, this 13th day of February, 1998.

CURTIS M. FRENCH
Assistant Attorney General

IN THE SUPREME COURT OF FLORIDA

LEO ALEXANDER JONES,

Appellant,

vs. CASE NO. 92,234

STATE OF FLORIDA,

Appellee.
_____/

EXHIBITS FOR
ANSWER BRIEF OF APPELLEE

EXHIBIT	DOCUMENT
A	Statement of Case and Facts of Appellee's Answer Brief filed July 13, 1995
B	Diagram of Murder Scene

EXHIBIT “A”

STATEMENT OF THE CASE AND FACTS

In 1981, Leo Alexander Jones was convicted of murder and sentenced to death. Both conviction and sentence have survived numerous challenges, on direct. and collateral appeal. Jones v. Dugger, 928 F.2d 1020 (11th Cir.), cert. denied, 112 S.Ct. 216 (1991); Jones v. Dugger, 533 So.2d 290 (Fla. 1988); Jones v. State, 528 So.2d 1171 (Fla. 1988); Jones v. Wainwright, 473 So.2d 1244 (Fla. 1985); Jones v. State, 440 So.2d 570 (Fla. 1983).

Now, Jones seeks postconviction relief based on a claim of newly discovered evidence. The circuit court initially denied relief on this claim without a hearing, applying the standard of Hallman v. State, 371 So.2d 482, (Fla. 1979), to Jones' alleged newly-discovered evidence. This Court, adopting a new standard for reviewing claims of newly-discovered evidence, reversed and remanded the case to the circuit court for an evidentiary hearing. Jones v. State, 591 So.2d 911 (Fla. 1991).

After an evidentiary hearing, the circuit court denied relief. Thereafter, Jones' motion for rehearing was denied. This appeal follows.

The -application of the appropriate standard necessitates an evaluation of the "weight of both the newly-discovered evidence and the evidence which was introduced at the trial." Ibid. Jones' Statement of the Case and Facts not only contains numerous factual assertions with which the state cannot agree (e.g. " No one witnessed the actual shooting," Brief of Appellant, p.2; Hammond and Jones gave statements only "after hours of interrogation, beatings and coercion," Brief of Appellant, pp. 2

and 3; "Ms. Reed's testimony basically mirrored that of Mr. Cole, " Brief of Appellant, p.20; etc.), but indiscriminately mixes together references to trial evidence, evidence which could have been introduced at trial but was not, and exhibits which have never been admitted in evidence. Therefore,. the state offers the following:

A. The Evidence At Trial

At 1:00 a.m. on May 23, 1981, three police officers, in separate cars, left the scene of a hostage situation and proceeded east on 6th street in Jacksonville toward Davis street (TR 708-09). Officer Dyal, in the second car (TR 709), testified that as he turned left on Davis Street, he heard a "large bang, a rifle shot or a gunshot" (TR 710). He looked to his right rear at an apartment building just southeast of the intersection of Davis and 6th streets, and observed flashes from two more "real loud" gunshots "coming from this . . . brick apartment house" (TR 710).

Officer Szafranski, in the third car, was shot in the head (TR 737). His car came to a stop in the intersection (TR 737). The first officer to him testified that he was in convulsions and his foot was jammed on the brake so hard he could not be pulled out of his car (TR 738).

Other officers quickly arrived. Patrons of a bar across the vacant lot just north of the apartment building stated that the shots had come from the apartment building (TR 743, 766). Officer Wilmouth entered the lower left apartment and found one young man and some women and children (TR 744-45). While there, he heard "footsteps running back and forth, not just walking but

running back and forth to the apartment that was directly overhead on the top left" (TR 745). Meanwhile, Officer Mundy entered the downstairs right-hand apartment. It was unoccupied and empty except for some junk in the back and a table against the front window on which lay a pack of matches and a still-cold bottle of orange juice (TR 769, 775). There was a piece of newspaper in the window "set up" in a way that would have been "good camouflage" (TR 811-12), as well as a fresh "recoil" mark on the window frame (TR 814, 820).

Officer Mundy, along with Officer Roberts, proceeded up the stairwell. No one responded when they knocked on the door to the upper left-hand apartment, but an elderly man answered from the upper right-hand apartment (TR 778). He let them search his apartment. While there, they heard footsteps coming from the upper left-hand apartment (TR 779). The two upper apartments shared a porch, so the officers proceeded out the front door of the upper right-hand apartment across the porch to the front door of the opposite apartment (TR 779-80). It was open (TR 780). Officer Mundy, now joined by not only Officer Roberts but also Officer Torrible, shouted into the darkness, "Police. Is there anyone home. . . If so, come forward." No one did (TR 782). Officer Mundy entered, with his flashlight. He thought he saw someone on a couch at the end of the hall (TR 783). Finding a light switch, he turned it on. He observed Bobby Lee Hammond pretending to be asleep but jerking uncontrollably (TR 787). Hammond lept to his feet when Officer Mundy "racked" his shotgun and told him to wake up (TR 788). Mundy asked Hammond if anyone else was in the house and whether any guns were in the house.

Hammond answered no to both questions (TR 788). However, after Mundy ordered anyone else in the apartment to came out or be shot, Leo Jones spoke up from a bedroom (TR 719). Officer Torrible attempted to take him into custody (TR 791). As officer Torrible conducted a "pat down" for weapons, Jones dropped a live .380 caliber bullet (TR 975, 979). Both he and Hammond began fighting the officers (TR 972, 980). With difficulty, they were subdued and taken away (TR 798).

It should be noted here that both Hammond and Jones were fully dressed when discovered by the police, even though Hammond was pretending to be asleep and Jones was hiding in a darkened bedroom (TR 831).

There were many guns in the apartment. Under the bed in Jones' bedroom were two 30-30 caliber lever-action Marlin rifles (each of which had one fired shell casing in the barrel) and a fully loaded M-14 Ruger semi-automatic rifle (TR 994-95). A legible fingerprint lifted from one of the two Marlin rifles was identified as Jones' (TR 995). In the living room were two more guns: a .30 caliber carbine with a fold-up paratrooper stock and a .22 caliber rifle (TR 995).

A firearms examiner testified that the bullet which killed Officer Szafranski, although fragmented, could be conclusively identified as having been fired from a 30-30 Marlin lever action rifle, and was consistent (although not conclusively so) with having been fired from the 30-30 Marlin lever action rifle that had Jones' fingerprint on it (TR 1013, 1040, 1048-49).

Hammond testified that he was Leo Jones' cousin (TR 912), and had been at Jones' apartment since 11:30 that evening; he had

planned to spend the night (TR 914). Glen Schofield (later identified as Jones' roommate) was there when Hammond arrived, but left the apartment about an hour before the murder, carrying a pistol (TR 915, 928, 964). Jones, Hammond testified, left LO-15 minutes before the murder carrying a rifle (TR 915, 920, 937). Hammond heard a shot, and Jones returned to the apartment almost immediately, still carrying the rifle (TR 918, 919). Jones told him to "lay back down." Soon afterwards, the police arrived (TR 919).

Detective Eason testified that he talked briefly to Jones at 4:00 a.m. Jones was "cocky" and "hostile" (TR 1095). Because of injuries described by Eason as "slight" and by the examining doctor (Dr. Pack) as "minor", Eason sent Jones and Hammond to the hospital for examination and, afterwards, to breakfast (TR 1095, 1300). Eason did not talk to Jones again until noon (TR 1096). Jones was still "cocky" and told Eason repeatedly that he understood his rights (TR 1096). Then they talked, having a "pretty far range of conversation" during which Eason developed a "fairiy good rapport" with Jones -- to the point they even had an "arm wrestling match" (TR 1118). Jones eventually signed a written statement admitting that he had taken a rifle from his apartment, walked downstairs to the empty apartment, shot the policeman from behind the window, returned to the apartment, hid the rifle under the bed, and waited until the police came (TR 1100). After signing the statement, he explained orally why he had shot the policeman:

> I'm tired of being fucked with. I go to the store and I'm fucked with. I go down the street and I'm fucked with. My friends are

> fucked with, my family is fucked with, and I'm tired of policemen fucking with me, and I decided I'd kill a policeman and that's why I did it. (TR 1101)

This explanation was consistent with a threat Jones had made only a week before, when after being arrested on several charges, including possession of a firearm by a convicted felon (TR 1144, 1272-73), Jones stated "he was tired of police hassling him, that the police weren't the only ones that had guns and that he was going to shoot a mother-fucking pig" (TR 1142).

After the state rested, Jones presented the testimony of three witnesses and also testified himself. Nathaniel- Hamilton (resident of the upper right-hand apartment) testified he heard two shots spaced 2 to 3 seconds apart, which he thought came from the vacant lot north of the apartment building (TR 1160-61). He admitted on cross-examination that the first shot, which woke him up, was very, very loud and he really did not know where it came from (TR 1165). He also testified the police treated him "al.1 right" (TR 1166).

Two additional witnesses, one living in the next building to the north of Jones' apartment building, and one in the next building to the south, testified that they thought from the sound of the shots that they had come from the vacant lot next to Jones' apartment building and not from the building itself (TR 1173, 1193).

Jones testified that he shared his apartment with Glen Schofield and that the guns were Schofield's (TR 1216). Schofield had been there earlier that evening, but left after Jones' cousin Bobby Hammond arrived (TR 1216). Jones did not see

whether or not Schofield was carrying a pistol when he left (TR 1216, 1287). Afterwards, Jones and Hammond watched television for 40 to 45 minutes and then went to bed (TR 1219). Hammond lay on the sofa, while Jones went to the bedroom and undressed (TR 1219-20). Twenty minutes or so later, Jones "heard a gun -- heard two gunshots" (TR 1221). The shots came from the vacant lot next door (TR 1225). Jones put his clothes back on (TR TR 1226). When the police knocked on the door, Jones ordered Hammond not ***to*** open it (TR 1226). After the police entered by the front door to the porch, both Jones and Hammond we're beaten with a flashlight (TR 1232). Later, on the way to jail, Jones was beaten and kicked for "ten minutes or so" (TR 1235). He was kicked and beaten with "flapjacks" upon his arrival at the station (TR 1235-36). Then he was taken upstairs to a room where he was kneed in the side, jumped on, hit with a pipe in his "privates" and threatened (TR 1237-38). After all this he was so "whipped up" he could not say anything (TR 1238). He was then taken to the hospital (TR 1242). The whole top of his head was swollen and bleeding (TR 1242). After his return, he was interviewed by Detective Eason, who presented him with a theory of the case, wrote it up, and made Jones sign it (TR 1246-47). Jones signed it because he was "whipped all up" (TR 1247). He denied threatening to kill a police officer a week before the **crime** (TR 1248-49).

On cross-examination, Jones denied owning a gun (TR 1252) (even though he had bragged about how many guns he owned only a week before shooting Officer Szafranski (TR 1142)). He denied knowing that there were guns under the bed he was "sleeping" in

(TR 1253) (even though one of them had his fingerprint on it, TR 1013)).

Jones denied sleeping in the same bed Schofield slept in (TR 1253). However, when the prosecutor asked Jones if the bed with the guns under it was Jones' "regular" bed, Jones -- recognizing the implications of this question -- admitted only that he slept there "at times" (TR 1254). He could not explain why he had gotten fully dressed, including shirt and shoes, after having earlier undressed and gone to bed, when he had no intention of allowing the police into the apartment (TR 1256).

Asked why he had not told the doctor what had happened to him or what was wrong with him when he was taken to the hospital for examination, Jones answered: "I couldn't tell him. I was all whipped up, how could I tell him?" (TR 1264).

He admitted that although he did not like guns, he had at least one in his possession not too many days before the murder of Officer Szafranski (TR 1273). He denied knowing any weapons were in his apartment the night of the murder (TR 1273) (even though his fingerprint was on one of them (TR 1013)).

He admitted he had earlier told a psychiatrist that he did not remember making a statement to Detective Eason at all (TR 1282), even though he now remembered talking to Eason (TR 1284), and signing the statement (TR 1246-47). He denied arm-wrestling Detective Eason; he "wasn't in no shape" to do so (TR 1284). He admitted that between the time he was taken to the hospital until he signed the confession over 6 hours later, no one "laid a hand" on him (TR 1283).

Finally, he conceded that the police cars coming down Sixth Street "probably would" have shined their lights directly into the field from where he contended the shots had been fired (TR 1290).

In rebuttal, Dr. Pack testified that he had examined Jones the morning of May 23, 1981, and had observed only minor injuries and no evidence of any neurological injuries (TR 1300). Contrary to Jones' testimony, Dr. Pack did not find that the top of Jones' head was swollen or bleeding (TR 1300). Also in rebuttal, Detective Japour testified that he gave Jones his' Miranda warnings that morning (TR 1306-07). According to Japour, Jones, rather than being "all whipped up," was smug and belligerent (TR 1307). Jones stated he knew his rights (TR 1308). When asked to sign a waiver, Jones told Japour: "I've already told you one time I know what my fucking rights are and I ain't signing a fucking thing to prove anything to you" (TR 1308).

B. Jones' Alleged Newly-Discovered Evidence

Attached to Jones' November 1991 motion for postconviction relief were several affidavits from alleged newly-discovered witnesses (App. 1-11). In addition, contending his investigation was "ongoing," Jones included in his brief on appeal from the first denial of this postconviction motion, copies of additional affidavits and reports not attached to the motion. Initial Brief of Appellant, case no. 78,907 at pp 73-74 and 82-84. These affidavits and reports are summarized in this Court's opinion. 591 So.2d at 914.

The motion was originally denied by the trial court based on the legal insufficiency of the motion under the then-prevailing

legal standard. On appeal, this Court adopted a new legal standard for addressing claims for relief based on newly-discovered evidence, and remanded the case to the trial court for an evidentiary hearing. 591 So.2d at 916. At the subsequent hearing, there was no stipulation concerning the admissibility of any affidavits, and none were admitted in evidence. See cf., T 9-26 and 40-41 (discussion of the possible expense of bringing Bobby Hammond from California to testify); T 27-34 (discussion of the necessity for orders for transporting the inmate witnesses to the evidentiary hearing) and T 48 (implicit acknowledgment of both parties that case would be decided on basis of "evidence submitted by the defendant at this hearing").

The following witnesses testified at the evidentiary hearing:

Daniel Cole and Sharon Denise Reed were boyfriend and girlfriend at the time of the shooting (T 66, 126). They were walking home from the Blodgett homes area sometime after midnight (T 67-8, 126-27). Cole testified that just before reaching the intersection of 4th and Madison, he heard a shot. They paused for a few minutes and saw someone running down Madison towards them (T 100-101). (Madison is one block east of Davis; 4th is two blocks south of 6th (T 128-29)). According to Cole, they proceeded down 4th Street one-half block before the man reached the intersection of 4th and Madison (T 103). Cole recognized the running man as Glenn Schofield and saw he was carrying a rifle or a shotgun (T 74). Reed testified somewhat differently. According to her, she and Cole were at the intersection of 4th and Madison when they heard the shot (T 150). A few seconds

later, Schofield ran by in front of them as they were still crossing intersection (T 153-56, 158). Both Reed and Cole claimed they told no one except Reed's mother about this for some 10 years because they were afraid of Schofield (even though he was incarcerated shortly after the murder) (T 142, 108-09). Reed admitted she was a friend of Leo Jones and that she spoke up after 10 years of silence because she read that Jones was about to be executed (T 144). Cole denied knowing Jones (T 89), but admitted having five felony convictions (T 92).

Reed's mother Martha Bell testified that Reed telephoned her after the murder and told her about having seen Schofield running down the street carrying a gun (T 180-81). Bell acknowledged that she was close friends with the Jones family and talked to them on a daily basis but said nothing to them about this (T 192-194).

Patricia Owens testified that she was Schofield's girlfriend in 1981 (T 210). She saw Schofield briefly early Sunday morning after the murder (T 210). The next morning, she saw him again and he told her that if anyone asked, he had been with her (T 215). His response to her inquiry about the police officer was, "do I think he was going to say anything to go to prison for the rest of his life" (T 216). Later, when he got out of prison in 1989, Schofield

> would talk about the killing of the police officer, that - what he did and who he will do it to, you know. He talked about it a lot. (T 219).

Asked if Schofield mentioned Leo Jones, Owens said yes and that Schofield had said

> that he wasn't going to make anytime for it, that he wasn't and that nobody was going to bother him you know. (T 220).

When asked if Schofield told her how the police officer had been killed, Owens stated:

> He would talk about it and say that he was shot through his window or windshield or something of this sort and he just went on and on. (T 220).

On cross-examination, Owens confirmed that Schofield had left certain depositions with her that contained information about the shooting, including allegations about Schofield's possible involvement (T 235-36). She admitted that she only mentioned any of this information after she and Schofield had broken up (T 239). She claimed she had not came forward sooner because she was afraid of Schofield (T 241), but admitted she had not been afraid to claim for herself some $30,000 that Schofield contended was his (T 243).

Jones presented the testimony of five prison inmates who claimed to have knowiedge that Schofield confessed to killing Officer Szafranski: Frank Pittro, Franklin Delano Prince, Michael Richardson, Andrea Hicks Jackson, and Donald Perry.

Andrea Jackson did not claim to hear any confession herself. She did state that she met Glenn Schofield's sister Barbara in prison (T 252). In the fall of 1991, Andrea Jackson, Barbara Schofield and several others were playing cards and watching television (T 253). When they heard the news that Leo Jones' death warrant had been signed and that he was close to being executed, Barbara commented that "they were executing the wrong man", because her brother had told her he did it (T 254). Andrea

Jackson admitted on cross-examination that she was on Death Row herself for killing a police officer (T 259).

Michael Richardson testified that, contrary to prior statements to a state prosecutor, Schofield had never told him he had killed a cop (T 315). Richardson had made his earlier statements in an attempt to further his own plea negotiations and because Leo Jones was his friend (T 315, 320, 333-34). His prior statements were a "hoax" and Glenn Schofield "had never confessed murder" (T 327-28). Richardson admitted that he had been convicted of "several" felonies, but he could not recall "right off" how many there were (T 336).

Frank Pittro testified that he talked to Glenn Schofield while they both worked in the kitchen together at UCI in 1985 (T 271). According to Pittro, Schofield said he had shot a police officer with high-powered rifle from inside a house and left out the back way (T 272-73). Schofield did not say whether Leo Jones was also involved (T 273), but did state that Jones was on Death Row for the crime (T 272). Schofield did not tell Pittro what he had done with the weapon. Pittro testified that he did not tell anyone about this for 6 years because he did not think anyone would believe him (T 296-97). He admitted that he had nine prior felony convictions (T 275), including one for forgery resulting from his filing a forged document in a federal habeas corpus proceeding (T 287-289, 291).

Donald Perry was another inmate who testified. In 1992, Perry testified, he saw Schofield in a holding cage at the Department of Corrections Regional Medical Center at Lake Butler (T 381, 383). Perry asked him why he didn't tell the truth about

Leo Jones, and Schofield answered "I done it. . . I killed the cop" (T 385). According to Perry, Schofield was afraid he would be prosecuted if he told the prosecutor the truth, (T 385). Schofield provided no details of any kind about the murder other than he supposedly used a "30-30" (T 395).

Perry admitted he has "about two" felony Convictions, including one for first-degree murder, and is serving a life sentence with a mandatory 25-year minimum (T 387, 391). He denied knowing Leo Jones or giving Jones a "high sign" when he entered the courtroom (T 387), even though he is "on confinement . . . right close to Death Row", and has talked to at least one death-row inmate about the case (T 393).

Finally, prison inmate Franklin Delano Prince also testified. Sometime, probably in 1986, Prince was in a conversation with a group that included "a couple" of correctional officer5 about the Leo Jones case, which had recently been discussed in the newspaper (T 399-400, 408). Schofield walked up (T 400), and "told the fellow that he didn't know what he was talking about, that he had did the crime" (T 408). Schofield provided no details about how this occured (T 424). Prince denied being a friend of Leo Jones until he was reminded that he had told Detective Housend that he was (T 418-19). Then he admitted having a "relationship" with Jones since 1974 (T 421). In addition, he had gone to school with Leo Jones' brother "Jitt" (T 422). Prince also denied telling Detective Housend that he could not talk about the case until CCR told him what to say (T 419). (Detective Housend testified to the contrary in rebuttal, i.e. that Prince refused to talk until CCR

told him what to say (T 521)). Prince admitted having eight felony convictions, including first-degree murder (T 417-18), and confirmed that he is presently serving a total sentence of 390 years (T 426). Prince explained why he had waited six years to report Shofield's statement:

> Because normally in the institution when the guys be talking, I let it go. . . [G]uys that boosting themselves up, that type things do happen. . . I think it gives, them some type of self-esteem, Judge. I really do. Some kind of false self of themselves. , . .
>
> [B]ut [w]hat really made me come forward, I read it in the paper. . . I believe that . motivated me to just go forward with it. (T 431).

Jones also called Judith Dougherty, an attorney for CCR(T 374 et seq), and Donna Harris, an investigator for CCR (T 436 et seq). Dougherty travelled to Jacksonville in 1988 to investigate this case, but was unable to develop any specific leads (T 375-76). Harris testified that she began investigating the case in 1991 and discovered witnesses Pittro, Perry, Prince, Jackson, Richardson, Willie, Owens, Reed, Cole, Dixon and Brown (T 439-54). Harris could not recall whether Prince had told her that correctional officers had been present when Schofield made the admissions that Prince allegedly heard (T 458). She could not recall making any efforts to locate these correctional officers (T 459-60). Harris agreed with Jones' assertion in his November 10, 1991 petition that trial counsel could and should have located Schofield's girlfriend Patricia Owens (nee Ferrell), Katherine Dixon (girlfriend of Schofield's close friend Tony Brown), and Artie Hammonds (Bobby Hammonds' brother)(T 474-476). (The "s" on the end apparently is optional.)

It is notable that Jones originally planned to call Stanley Thomas as a witness; however he, like Michael Richardson, recanted his earlier story. As recounted by counsel for the defense, Thomas had told defense counsel that Schofield had bragged about having done "it" and "put it off on somebody;" that Schofield, not Jones had committed the crime (T 481). However, Thomas also had told defense counsel that he had not talked to the state attorney, and defense counsel had just learned from the state that that was not true (T 482). Counsel for the state explained that he had talked numerous times to Thomas, who had initially stated that Schofield had told him that although Schofield had "got the gun" for Jones, Jones had done the shooting (T 484). Thomas also told the state attorney that Jones' mother and sister were paying Schofield to make statements in prison "to take the rap for this." The State attorney reported that Thomas had said that the state could record telephone conversations between himself and the Jones family; the state did so and learned that "Thomas was trying to set us up and have other people . . . talk on the phone as if they were the Jones family" (T 485). The state decided not to use the witness; based on this report, counsel for Jones decided not to either (T 485).

Jones also did not call Schofield himself as a witness, notwithstanding that Schofield was "sitting back there . . . ready to testify" (T 478, 499). The Court addressed this issue, noting that under Florida rules of evidence, admissions against penal interest were admissible only if the declarant is unavailable, and the defense had offered nothing to show that Schofield was unavailable (T 505-507). Counsel for the defense responded that

he did not know whether Schofield "would testify here at this hearing or not" (T 507). But, counsel contended, "we all know what Mr. Schofield will say if he takes the stand. He's going to say, it's a lie, I never said it, I never did it. We all know that." (T 508). Therefore, counsel for the defense was not going to call Schofield (T 508). The State, noting once again that "Mr. Schofield is sitting right back there," argued that it was defendant's burden to satisfy the evidence code and that the defense was making, presumably, "a strategic decision" not to call Schofield (T 511-512).

Jones also presented additional exhibits that were excluded by the court either on hearsay grounds or because they clearly were not newly-discovered or both (T 362-63, 488-97).[1]

In rebuttal, the State presented the testimony of Detective Housend, who testified that Franklin Delano Prince had told him that Leo Jones was a personal friend of his (TR 520) and that

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[1] These included: (1) An affidavit by Stanley Willie who stated that Schofield told Willie that Leo Jones was not the killer. Since Schofield did not claim to Willie that he (Schofield) was the killer, Schofield's statement to Willie was clearly not against his penal interest and fits within no other exception to the hearsay rule; (3) Police incident reports and case activity summaries that were known and availabie at the time of the trial and are therefore not newly-discovered (and also are hearsay); (3) A statement from a witness whose name was on the original discovery list at trial to the effect that he heard footsteps after the shooting between Jones' apartment and the next door. This was known at trial and therefore is not newly-discovered; (4) Other trial documents showing that Schofield was on the witness list for both the defense and the state and that he had been subpoenaed to testify before Jones' grand jury; and (5) A transcript of a police disciplinary hearing and a copy of a reported appellate opinion which reflect on Officer Mundy's credibility in unrelated cases at a much later time.

Prince could not talk to Housend until "CCR told him what to say" (TR 521).

C. The Lower Court's Rulings

In a 61-page order, the trial court reviewed the evidence presented to determine first, how much of the proffered evidence qualified as newly-discovered; second, how much of the newly-discovered evidence would be admissible; and finally, whether the newly-discovered and admissible evidence would probably have resulted in an acquittal of Leo Jones if it had been introduced at trial (PC-R2 206-269).

The trial court determined that any statements by Katherine Dixon, Paul Marr, Linda Atwater, and so much of Patricia Owens' testimony as related to statements Schofield made to her soon after the murder did not qualify as newly-discovered evidence because it all could have been discovered earlier through the use of due diligence (PC-R2, 224-25). The court determined that the testimony of Daniel Cole, Sharon Denise Reed, Andrea Hicks Jackson, Frank Pittro, Michael Richardson, Franklin Delano Prince, Donald Perry, and so much of Patricia Owens' testimony as referred to statements made by Schofield after his release from prison in 1989 qualified as newly-discovered (PCR2, 228).[2]

The court determined that none of Schofield's alleged out-of-court "confessions" were admissible under §90.804(2)(c), Fla. Stat. (1991) as admissions against penal interest because

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[2] The court also found the testimony of Sharon Denise Reed's mother, Martha Bell, to be newly-discovered, but admissible only to rebut an inference of recent fabrication. Matha Bell had no personal knowledge of Schofield's possible involvement.

Schofield was available to testify (PC-R1 233). In addition, the statements lacked corroboration (PC-R2 266).

The court ruled that the enforcement of the requirements of §90.804(2)(c) does not violate due process or unconstitutionally impair Jones' right to present a defense (PC-R2 234-251).

The court concluded that the admissible newly-discovered evidence was not of such quality that, had it been introduced at Jones' trial, it probably would have resulted in his acquittal (PC-R2 284-85). Moreover, the court concluded that even if Schofield's out-of-court confessions were admissible, t-hey would not have probably resulted in an acquittal had they been introduced at trial, because the "confessions" were "fraught" with credibility problems, were lacking in corroboration, and did not create any reasonable doubt about the validity of Jones' confession to police and other evidence connecting him to the crime (PC-R2 285-87).

D. Related Background Matters

The foregoing is presented as an accurate summary of the evidence presented at trial and offered at the instant 3.850 hearing on the newly-discovered-evidence claim, along with the trial court's ruling on the claim. However, because Jones has devoted a considerable portion of his Statement of Facts discussing the validity of Jones' confession (Initial Brief of Appellant at pp. 3-13), as well as police reports and other matters--including affidavits--not admitted in evidence indicating that Schofield was and is a suspect (Initial Brief of Appellant at pp. 16-18, 19-20, 28), some additional discussion of the background of this case is in order.

It is little wonder that Jones attempts to cast doubt on the validity of his confession, since nothing he offers by way of newly-discovered evidence of his alleged innocence in any way negates his own confession. This voluntariness issue, in fact, has been hashed and rehashed, and has always been resolved adversely to Jones' claim that the confession was coerced or was otherwise inadmissible. Hammond testified at the pre-trial hearing on the motion to suppress about the alleged physical abuse of Jones by police, while Jones himself testified at trial about the alleged abuse. This Court held on direct appeal that Jones' confession was properly found to have been freely and voluntarily given, and that Jones' "assertions that he was physically abused prior to giving his statement cannot be substantiated." Jones v. State, supra, 440 So.2d at 574.

Jones next raised the confession issue via an ineffective assistance of counsel claim in his initial 3.850 motion. Jones contended that his trial attorney was ineffective for introducing Hammond's physical-abuse testimony only at the hearing on the motion to suppress and not at trial. This Court agreed that trial counsel's decision "not to call the unpredictable Bobby Hammond as a witness" was a reasonable tactical decision. Jones v. State, supra, 528 So.2d at 1174.

Jones next raised several issues concerning his confession in his federal habeas corpus petition. The Eleventh Circuit affirmed the denial of habeas relief, holding: (1) Jones' cross-examination of Hammond was not unconstitutionally limited because his trial attorney could have called Hammond as a defense witness to elicit testimony about the alleged physical abuse by police,

Jones v. Dugger, supra, 928 F.2d at 1025; (2) trial counsel's tactical decision not to call Hammond as a defense witness indicates that further examination would not have been helpful, id. at 1026; (3) Jones' confession was not obtained in violation of his right to counsel, id. at 1026-27; and (4) Jones had offered nothing new to contradict the state court finding that his confession was voluntary or to support his "allegations of police coercion and brutality." Since the Court would not grant relief "based on mere naked allegations of such police wrongdoing," it concluded "that Jones' confession was not involuntarily made." Id. at 1027.

Jones quotes extensively from the pre-trial deposition testimony of Bobby Hammond and cites "similar" pre-trial testimony of Bobby Hammond at the hearing on the motion to suppress. Brief of Appellant at pp 3-10. Obviously, he offers nothing newly-discovered here, as the trial court recognized when it refused to continue the proceeding until Hammond's testimony could be obtained, and declined to consider the post-hearing proffer of Hammond's videotaped deposition (T 361) (PC-TR2 278).

As for Arty Hammonds, Jones' own witness testified that he was not a newly-discovered witness (T 476), and Jones did not present his testimony at the hearing below, nor obtain a stipulation to the admissibility of the affidavit attached to his newly-discovered-evidence motion. The same goes for the affidavits of Jones' mother and attorney William White, which he quotes at pp 12 and 13 of his Brief. Neither of these two affiants testified at the hearing, nor were their affidavits admitted in evidence.

In fact, Jones has offered no newly-discovered evidence pertaining to the voluntariness of his confession, and this entire discussion in his brief is an irrelevant digression. See Routly v. State, 590 So.2d 397, 401 (fn. 5) (Fla. 1991) ("Absent stipulation or some other legal basis, we cannot see how the affidavits can be argued as substantive evidence.")

The trial court's rulings on Jones' proffer of defense exhibits have been discussed previously. See footnote 1. That Schofield might have been a possible suspect is not newly discovered. In fact, Jones has previously contendedthat his trial attorney was ineffective for failing to investigate and present evidence that Schofield was the person who murdered officer Szafranski. 528 So.2d at 1174, 1175; 928 F.2d at 102'7. It is notable that Jones' trial attorney testified in 1986 that: "Almost everybody in that section of Jacksonville was aware of this case, was aware of on the street as to -- that Leo Jones was in trouble. This Schofield story had circulated. That is the reason I went to St. Augustine to see Schofield, because I knew where he was. And certainly, if any of these people had any knowledge that they're now testifying to, they could have gotten hold of anyone of those members of that family, I would have come to them or they could have called me. That's why I don't believe any of that existed." Transcript of Jones' original 3.850 motion hearing, p. 478.

Although some theory or other concerning Schofield's possible involvement has been brought up before this hearing, the alleged manner of Schofield's involvement has varied over the years and from one proffered witness to the next,

In 1986 Homer Lee Spivey testified that he and Phillip Anderson were drinking heavily in their car parked in an alley between the bar and Jones' apartment building. As they were cleaning up beer that Spivey had spilled in the car, a shot rang out from between the two buildings. Spivey saw "all these cops going down the street," and hid in the car. Transcript, original 3.850 hearing at pp 123-140. Anderson testified that he heard the shot between the two buildings also, and soon thereafter saw a man come from this area and .run to a car "right in front of the phone booth," where he stayed until after all the police left, when the car drove away, with a woman driving. Transcript, original 3.850 hearing at pp 172-200.

Marion Manning testified at the 1986 hearing that she was Schofield's girlfriend in 1981, and that on the night of the murder, she and Schofield were supposed to go to a club. She found him at 4th and Davis, but he was talking to "some guys" and was not ready to go. He instructed her to go up Davis Street to look for his brother. When she returned from that errand, Schofield was not there, and "all the police" were at 6th and Davis. She circled the block for five or six minutes, until Schofield came from Lee Street (which is one block west of Davis), and jumped in the car, stating that Leo Jones had shot somebody at 6th and Davis. Transcript, original 3.850 hearing at pp 111-123.

Prison inmate Paul Alan Marr testified at the 1986 hearing that Schofield had told him that he had killed the police officer; according to Marr, Schofield said that he had gone upstairs in an apartment building, retrieved a rifle from a gun

case which contained three firearms, gone downstairs, shot the officer from downstairs in the apartment, gone back up the stairs, wiped the gun down, placed it back in the gun case, and fled the area. Transcript, original 3.850 hearing at pp 359-60.

Linda Atwater stated in an affidavit attached to the latest 3.850 motion that she was at Jones' apartment sometime after midnight borrowing money from Jones, who was her boyfriend. As she was leaving, going down the stairs, Schofield passed her, running upstairs, carrying a rifle or shotgun. She asked him why he was running, and he answered, "Them crackers are after me." App. 2.

Katherine Dixon stated in an affidavit attached to the instant 3.850 motion that Schofield failed to meet her and her boyfriend in the Davis Street area as planned the night of the murder, but that when whe woke up the next morning, she saw a rifle in her closet which her boyfriend identified as a 30-30. App. 3.

So, depending on which theory is being advanced by the defense at any given moment, Schofield left Jones' apartment either unarmed, or with a pistol, or with a rifle; he shot officer Szafranski either from the apartment building or from the vacant lot next door; he either disposed of the rifle by returning to the apartment and replacing the rifle under Jones' bed (presumably, while Jones was not looking), or he carried it with him as he ran down Madison; he either ran to a car parked right in front of the murder scene and hid there with an unidentified woman until the police left, or he ran down Madison carrying his rifle, or he was over on Lee Street without the

rifle claiming that Leo Jones had shot someone, or he left the rifle at Catherine Dixon's apartment on North Liberty.

SUMMARY OF ARGUMENT

Jones has not offered newly-discovered admissible evidence that "probably" would have caused an acquittal if it had been introduced at trial. What he mostly has offered is inadmissible and unreliable hearsay testimony from multi-convicted felons serving lengthy sentences, some of whom recanted their "Schofield confessed" stories even before they could be presented at the newly-discovered-evidence hearing. All were friends of Leo Jones, but not one of them bothered to report their information for years after supposedly learning it.

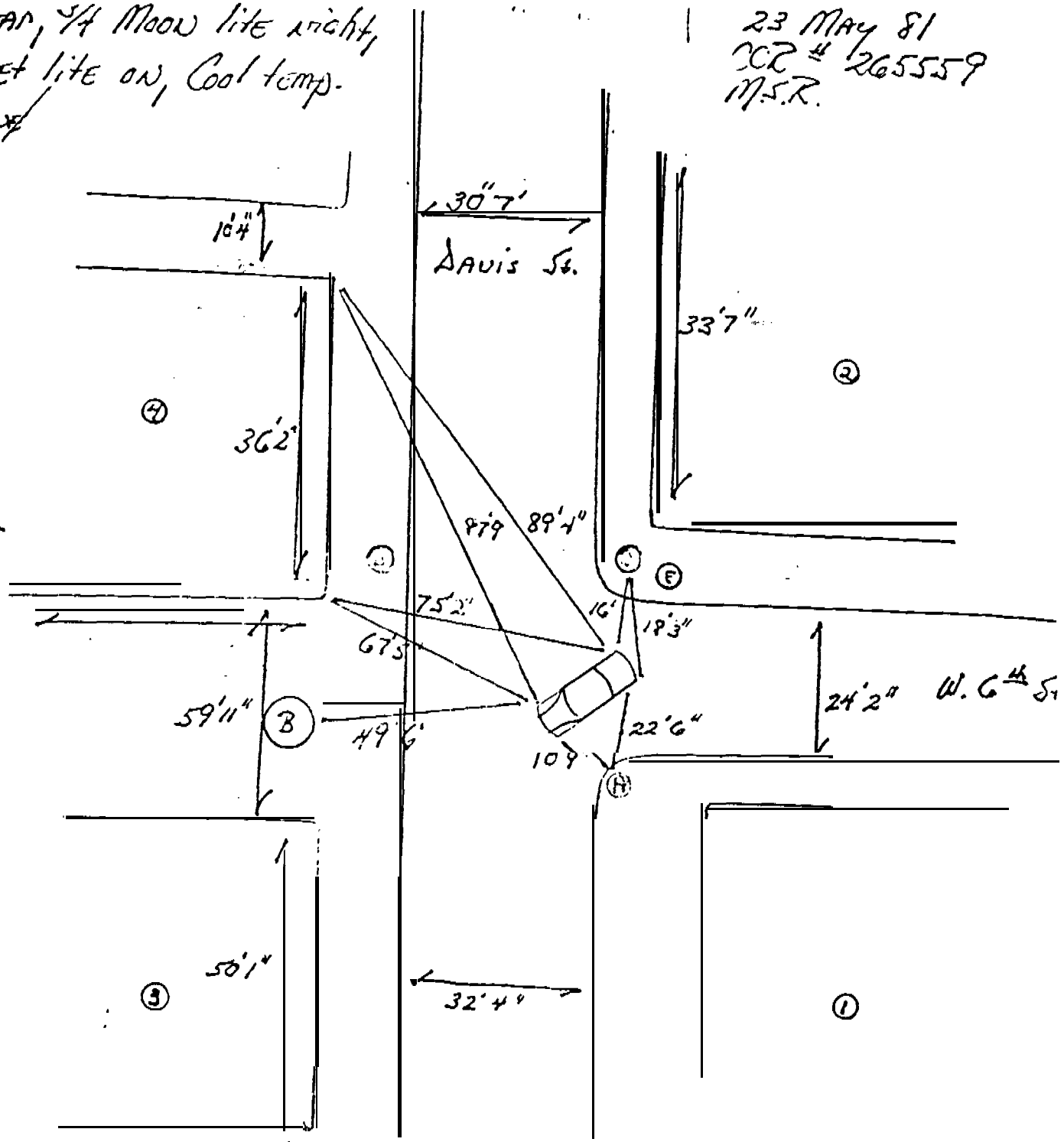
The testimony and reports of Schofield's alleged confessions to prison inmates is inadmissible hearsay, not coming within the declarations-against-penal-interest to the hearsay rule because Jones has not shown that Schofield himself was unavailable to testify; in fact, the record shows the contrary. Moreover, no sufficient corroboration of this hearsay testimany has been presented, and the witnesses simply are not credible.

A defendant's right to present a defense does not mean that a defendant may ignore valid state evidentiary rules, or present unreliable hearsay testimony. Chambers v. Mississippi supports the exclusion of the proffered inmate testimony. The problem addressed in Chambers was that the State of Mississippi had excluded reliable hearsay because Mississippi did not have an exception to the hearsay rule for declarations against penal interest, and the declarant was unavailable to the defendant through the operation of another Mississippi evidentiary rule, so

EXHIBIT “B”

Clear, ¼ Moon lite night, Street lite on, Cool temp.
Scene

23 May 81
SC # 265559
M.S.R.



SYMBOLS ⊙=ENTRANCE ⊖=ELEC OUTLET ⊏=SWITCH ON ◁=PHOTO TAKEN FROM HERE
⊗=EXIT ⊥=LAMP ⊐=SWITCH OFF ℄=CENTER LINE

1. = House 1600 Davis
2. = Shop 1552 Davis
3. = Store 1607 Davis
   Apt. 1555 Davis
5. =
6. =
7. =
8. =

A. = Street Sign
B. = Tree
C. = Tele pole with light
D. = Tele pole
E. = Stop Sign
F. =
G. =

DIRECTION: S, E, W, N
SCALE: 1/4" =
SCENE USED AS:

OBSERVATIONS & MEASUREMENTS MADE:
DATE: 23 May 81 TIME: 1:30 AM/PM
BY: M.S. Richardson
ASSIST BY: B Hayes
DRAWING NO. OF PART
DRAWN BY: MS Richardson