

IN THE SUPREME COURT OF FLORIDA

CASE NO. _____

WILLIAM EARL SWEET,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

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

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This appeal is from the denial of William Sweet's motion for post-conviction relief by Circuit Court Judge Frederick B. Tygart, Fourth Judicial Circuit, Duval County, Florida. This proceeding challenges both Mr. Sweet's conviction and his death sentence. References in this brief are as follows:

"R. ____." The record on direct appeal to this Court.

"PCR. ____." The post-conviction record on appeal.

All other references will be self-explanatory or otherwise explained herewith.

CERTIFICATE OF TYPE SIZE AND STYLE

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REQUEST FOR ORAL ARGUMENT

The resolution of the issues in this action will determine whether Mr. Sweet lives or dies. This Court has not hesitated to allow oral argument in other capital cases in a similar procedural posture. A full opportunity to air the issues through oral argument would be appropriate in this case, given the seriousness of the claims involved and the stakes at issue. Mr. Sweet, through counsel, accordingly urges that the Court permit oral argument.

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STATEMENT OF THE CASE

A. INTRODUCTION

When the United States Supreme Court handed down their decision in Strickland v. Washington, the Court made it clear that every defendant was entitled to competent counsel in order to ensure that the state's case was subjected to a fair adversarial testing. Based on the facts developed at the evidentiary hearing below, it is clear that William Earl Sweet's counsel, Mr. Charlie Adams, did not competently represent him in either phase of his capital trial.

Mr. Sweet was convicted and sentenced to death for the murder of Felicia Bryant. He was also convicted of attempted murder in the shootings of Marcine Cofer, Sharon Bryant, and Mattie Mae Bryant in the same incident that resulted in Felicia Bryant's death. The State's theory of this case was that Marcene Cofer, an admitted drug dealer, was the intended victim because she was previously the victim of an assault and robbery in her home during which three men entered her apartment, hit her on the head with a gun, beat her, and stole money, jewelry and cocaine. The State suggested that Mr. Sweet was involved in that incident and that he planned to kill Ms. Cofer so that she would not identify him.

The murder occurred in Ms. Cofer's apartment at about one o'clock in the morning on June 27, 1990, where Felicia and Sharon Bryant were visiting. Felicia and Sharon, who were twelve and

thirteen years old at the time, were watching television while Ms. Cofer slept. They heard noise outside her front door and went to wake her up. Ms. Cofer told them not to worry and went back to sleep. When the noises continued, the girls again woke Ms. Cofer. Ms. Cofer and Sharon Bryant both looked out the peephole in the front door and saw a man standing outside. Ms. Cofer became frightened and told Felicia to knock on the wall to summon her mother who lived in the next apartment.

Mattie Mae Bryant heard the knock and came down to Ms. Cofer's apartment, entering through the front door. She had earlier seen two men outside Ms. Cofer's front door when she looked out a window in her apartment. They planned to leave the apartment together and go to the Bryant's apartment. Ms. Cofer wrote a note to her boyfriend and got her gun. Mrs. Bryant held a knife that she had brought from her own apartment for protection. They lined up in front of the door preparing to leave. Felicia Bryant was in front and she opened the door. As she did so, a man whose face was disguised pushed the door open, entered the apartment and began shooting. Mrs. Bryant did not see the man's face. Sharon Bryant testified that she did not see his face but that she saw a flash of a ring that she was able to identify as the same ring she had seen on the man outside the door. Ms. Cofer saw the man's eyes and nose. Felicia Bryant was fatally shot. Ms. Cofer, Mrs. Bryant, and Sharon Bryant were all wounded.

Ms. Cofer was shown a photo line-up at the hospital that night and she identified Mr. Sweet. Sharon Bryant also chose Mr. Sweet from a photo line-up. Aside from the identifications of these two witnesses, the State presented Manuella Roberts, a friend of Mr. Sweet, who testified that he was joking around about being involved in the robbery at Ms. Cofer's apartment. She admitted that she did not know whether he was involved. Solomon Hansbury also testified for the State that Mr. Sweet made incriminating statements at the jail. He admitted that he received a deal from the State in exchange for his testimony. The State presented no physical evidence connecting Mr. Sweet to this crime.

Post-conviction counsel for Mr. Sweet has presented un rebutted evidence regarding his trial counsel's deficient performance at both the guilt/innocence and penalty phases of his trial. Despite readily available evidence casting substantial doubt on the State's evidence and its theory of prosecution, Mr. Adams inexplicably failed to challenge the State's case against Mr. Sweet. And at the penalty phase, he presented only one witness, Mr. Sweet's sister, despite the availability of other witnesses who could chronicle Mr. Sweet's deprived childhood. Mr. Sweet's trial attorney also failed to secure a mental health expert to assist at the penalty phase despite the evidence there was a history of mental illness in Mr. Sweet's family as well as compelling mitigation that could have been presented and

explained to the jury with the assistance of an expert. The family members who testified at the evidentiary hearing demonstrate that significant mitigation evidence was available if only Mr. Adams had made the slightest effort to investigate his client's background.

While Mr. Adams admitted that he labored under the pressure of chronic illness and an unmanageable caseload due to his acceptance of conflict appointments throughout the Fourth Judicial Circuit, no other factor had a greater impact on the outcome of Mr. Sweet's trial than his attorney's inexperience. Mr. Adams had never before tried a capital case and admitted that he did not even know how to use an investigator. Despite his own lack of capital experience, he inexplicably recruited a civil rights lawyer, also with no death penalty experience, to act as his second chair. The investigator who briefly worked on Mr. Sweet's case until the money ran out did not even know that Mr. Sweet was facing the death penalty.

The effects of Mr. Adams' inexperience permeated Mr. Sweet's trial. He was unqualified to direct his investigator and never asked his co-counsel to do anything in preparation for the penalty phase. His inexperience also resulted in insufficient funds, because he simply did not know how much money to request from the court, which in turn resulted in a cursory investigation that failed to yield any results. Notably, Anthony McNish, whose testimony would have cast doubt on the State witnesses' identification of Mr. Sweet, was

discovered by Mr. Sweet himself, and even then Mr. Adams' inexperience caused a glitch -- the witness was improperly subpoenaed, did not show up to trial despite his warning to Mr. Adams that he lacked transportation, and as a result, the jury that convicted Mr. Sweet never heard his testimony.

While Mr. Adams' inexperience may explain why the defense portion of the penalty phase consists of ten transcript pages, it does not excuse his failure to present guilt phase evidence that supported his theory that Mr. Sweet was innocent and had been misidentified by the State's witnesses. He failed to investigate evidence of other suspects, did not recognize the possibility of Marcine Cofer's boyfriend being a suspect, and failed to present Jessie Gaskins whose testimony would have rebutted the State's evidence against Mr. Sweet. These failures, particularly in light of the questionable identification testimony of the State's witnesses, prove that Mr. Sweet was prejudiced by Mr. Adams' deficient performance.

B. THE TRIAL

Mr. Sweet was convicted on the testimony of Marcine Cofer and Sharon Bryant who both testified that they saw Mr. Sweet through a peephole. Ms. Cofer testified that she had seen Mr. Sweet "about three times" in the neighborhood and that she recognized him when she looked through the peephole in her front door. (R. 509-10). Sharon

Bryant stood with Ms. Cofer and also looked out the peephole. (R. 616). In contradiction to Ms. Cofer's testimony that she recognized the man as Mr. Sweet, Sharon Bryant testified at her deposition that Ms. Cofer told her she did not know the man. (R. 619). Sharon Bryant testified that she looked at the man for six or seven seconds; however, her description reveals that she remembered more about his clothing and accessories than his actual appearance:

I saw a built man, he was dark. He had a low haircut. He had on a white T-shirt. He had rings on his fingers and a beaded necklace with a cross on the end.

(R. 622).¹ Miss Bryant admitted that she did not look directly at his face and could not provide any details of his appearance aside from his haircut. (R. 670-71). She did notice that he was wearing jeans and had a ring with red, blue and turquoise on it. (R. 623-24). Miss Bryant noticed the man's ring because he had his hand raised covering part of his face. (R. 624).

After they looked at the man through the peephole, he left. (R. 625). Ms. Cofer then sent Felicia Bryant to get the girls' mother who lived in the next apartment. (R. 625). Mattie Mae Bryant came to the apartment and Ms. Cofer let her in. (R. 626). Ms. Cofer then went to the kitchen to write a note for her boyfriend (R. 515). She

¹Detective Parker testified that Miss Bryant did not mention the beaded necklace when she first described the shooter. (R. 900). She apparently added this detail only after seeing a photograph of Mr. Sweet wearing such a necklace.

got her gun and the women and girls lined up to leave the apartment. (R. 515). When they opened the door, a man came in the apartment shooting. (R. 515). The man who entered the apartment had a piece of clothing covering his face. (R. 517). Ms. Cofer testified that she saw only his eyes and his nose. (R. 527). Sharon Bryant admitted that she did not see his face. (R. 665). She saw only the flash of his ring and believed that she recognized him by his clothing and the ring on his finger as the same man who was at the door earlier. (R. 629, 665). When the man came in the door, Sharon Bryant was standing behind her sister Felicia and her mother; she turned and ran when the man started shooting and was shot in the buttocks. (R. 665, 667). Miss Bryant was asked whether she could identify Mr. Sweet as the shooter:

A I identified the clothing.

Q You identified a pair of jeans and a white T-shirt?

A Yes.

Q That's all you identified?

A Yes.

(R. 673).

The State's theory of this case was that Mr. Sweet and two other men assaulted Ms. Cofer on June 6th and stole her jewelry, money and cocaine and that Mr. Sweet wanted to kill Ms. Cofer so that she would not identify him. Ms. Cofer had already identified two of

the men who robbed her, and on the night of this incident she had looked at more photographs of suspects. (R. 533). She saw Mr. Sweet on the street near her apartment when she was standing outside talking to a detective. (R. 532). Ms. Cofer did not tell the detective that Mr. Sweet was the third man who was involved in the robbery, indicating that she did not recognize him and that he would not have a motive to kill her.

Mattie Mae Bryant testified that she did not get a good look at the shooter; she was only able to remember that he was tall and black. (R. 732). She only saw him for "a split second" and believed that he had a mask over his face. (R. 766). Mrs. Bryant admitted that she has "bad eyes" and was not wearing her glasses that night. (R. 769). Before she was called downstairs by her daughter, Mrs. Bryant looked out her window and saw two men outside Ms. Cofer's apartment, and she heard one of them call Ms. Cofer's name. (R. 739).

The State corroborated the testimony of these witnesses with Solomon Hansbury, a jailhouse snitch who later admitted that he lied at Mr. Sweet's trial, and Manuella Roberts. Mr. Hansbury testified that he was in the jail with Mr. Sweet and that Mr. Sweet asked if he knew a girl named Marcine. (R. 943). Mr. Hansbury said that he did not and Mr. Sweet "said that's what he's supposed to have been in for." (R. 943). Mr. Sweet also said that he "thought Funky Larry was

going to get the blame for this" and that he "did all this shit for nothing because if I knew this was going to happen, I would have killed them all." (R. 943). When Mr. Sweet referred to Marcine, Mr. Hansbury did not know whether he was saying that he had done that crime or only had been accused of doing it. (R. 944). Mr. Hansbury admitted that he had a pending escape charge and that in exchange for his testimony he would get time served rather than a consecutive year on the escape charge. (R. 952). Manuella Roberts testified that she knows Mr. Sweet and had heard him joking about the robbery of Marcine Cofer. (R. 912). She also testified that Mr. Sweet frequently jokes around and exaggerates and that she did not know whether he was being serious about the robbery. (R. 913, 916).

Officer Jeffery Lawrence of the Jacksonville Sheriff's Office testified that Mr. Sweet had jewelry in his pockets when he was arrested. (R. 852). Sharon Bryant testified that she looked at pictures of this jewelry at the police station and recognized the ring she saw on the man at the door whom she observed for several seconds through the peephole. (R. 655-56).

The defense presented one witness: Dr. Steven Lay who testified that Marcene Cofer had cocaine and marijuana in her system on the night of the shooting. (R. 992). He admitted that he could not say when she had taken the drugs. (R. 993). This evidence was cumulative to the State's evidence because Ms. Cofer had already

explained on direct examination that she was a drug dealer at the time and that she would have had cocaine in her system from handling the drug during sales. (R. 534). In rebuttal, the State presented Officer Chester Potter who testified that when he interviewed Ms. Cofer on the night of the shooting she was not under the influence of drugs. (R. 1007).

The defense had subpoenaed another witness, Anthony McNish,² whom even the State referred to as "an eyewitness," but he did not show up to testify. Mr. Adams admitted to the court that he had anticipated problems with the witness; he explained: "I went to pick him up yesterday afternoon and I thought I was going to lose him because of the fact somebody said he didn't live there anymore." (R. 924). He admitted that he did not have an investigator to assist him by getting witnesses to court. (R. 924). He told the court that he had spoken to Mr. McNish the night before and that "he felt like he didn't want to come." (R. 925).

When Mr. McNish was still not present at the conclusion of Dr. Lay's testimony, Mr. Adams told the court what the substance of his testimony would have been. (R. 997-98). Mr. Adams requested a thirty-minute recess to attempt to find Mr. McNish. (R. 998). After the recess, Mr. Adams told the court that he had gone to McNish's

²Mr. Adams' lack of familiarity with this case and the witness who could have exonerated Mr. Sweet is reflected in his repeated references to him as "Arthur" rather than "Anthony." (R. 924).

apartment and his grandmother's house but did not find him. (R. 1001). He told the court that he spoke to a young boy at Mr. McNish's apartment who did not know where McNish was. (R. 1002). Mr. Adams told the court that he also spoke with McNish's grandmother and was told that he had not been there that day. (R. 1002). The court found that Mr. Adams had made "extraordinary efforts" to find the witness. (R. 1002). Mr. Adams did not object to proceeding without the witness.

Mr. Sweet was found guilty of first-degree murder, three counts of attempted first-degree murder, and armed burglary. (R. 1170).

The defense presented³ one penalty phase witness --Deone Sweet, Mr. Sweet's sister.⁴ She testified that she and her brothers grew up without a father but that their childhood was "normal." (R. 1242). Ms. Sweet testified that their mother was an alcoholic "on and off" but that this did not affect the children. (R. 1245). From the time he was thirteen or fourteen, Mr. Sweet was raised by his sister who was a single mother and still a teenager herself. (R. 1245). Mr. Sweet was a good uncle to Ms. Sweet's child but he did not try to

³The State's penalty phase evidence focused on proving that Mr. Sweet had three prior felony convictions.

⁴At the conclusion of the State's evidence, Mr. Adams requested a recess "so we can see who our witnesses are out there?" (R. 1241). Apparently, Mr. Adams did not even know at this point whether he had any penalty phase witnesses and who they might be. The court gave him a ten minute recess to prepare for Mr. Sweet's penalty phase.

help her financially. (R. 1246). Ms. Sweet's testimony comprises five transcript pages.

Mr. Adams' closing statement, which is also only five pages long, was not an impassioned plea to save his client's life. It was not a summary of compelling mitigation evidence that could have persuaded the jury to recommend life. It was a rambling, almost incoherent, statement that only briefly addressed the issue of mitigation. Mr. Adams began by attempting to cast doubt on the State's guilt phase evidence and the reliability of the eyewitnesses. (R. 1265-66). He then argued that the State had not proved that Mr. Sweet had committed any prior violent felonies, despite the testimony of a victim and eyewitnesses to those prior crimes. (R. 1266-67). For what amounts to one page of the transcript, he addressed Mr. Sweet's childhood -- the fact that he did not know his father, was essentially raised by his sister, and that he was not a discipline problem for her. (R. 1269). He concluded by expressing his personal opinion that the aggravating factors (cold, calculated and premeditated and avoid arrest) do not apply; he did not refer to any evidence to support this opinion. (R. 1269). The jury recommended the death penalty by a vote of ten to two. (R. 1278).

Mr. Adams presented no evidence at the sentencing hearing before the judge. He made a brief argument, summarizing the evidence of Mr. Sweet's childhood that was contained in the presentence

investigation report. (R. 1288-90). The court found the following aggravating circumstances: prior violent felony convictions; avoid arrest; during commission of a burglary; and cold, calculated, and premeditated. (R. 1309-10). The court found no statutory mitigation but did find that the lack of parental guidance was a nonstatutory mitigating factor. (R. 1310). Mr. Sweet also received four consecutive life sentences on the attempted murder and armed burglary charges. (R. 1313-15).

C. THE EVIDENTIARY HEARING

Solomon Hansbury testified for the State at Mr. Sweet's trial and corroborated the eyewitness testimony of Marcene Cofer and Sharon Bryant by testifying that Mr. Sweet confessed to him. Mr. Hansbury admitted at the evidentiary hearing that he lied at Mr. Sweet's trial and that he received a benefit from the State in exchange for his false testimony. (PCR. 1909-10). When asked to explain the truth, he answered:

There is no truth. I don't know the truth, you know. What I said in the trial was something that it was like stuff that I had heard, you know. Earl never told me nothing. He never told me anything, you know. When I met Earl in the holding cell it was like him talking to somebody else and he was like, yeah, man, I just can't believe they came and got me talking about a murder for something I don't know nothing about.

(PCR. 1910). At the time of Mr. Sweet's trial, Mr. Hansbury was facing an escape charge, and he knew that if he offered evidence against another inmate, he could help himself. (PCR. 1910). Mr.

Hansbury did not even know the name of the victim, and the little that he did know about the case did not come from Mr. Sweet. (PCR. 1911). In exchange for his cooperation on this case, Mr. Hansbury did not serve any time on the pending escape charge. (PCR. 1913). At the evidentiary hearing, Mr. Hansbury explained that he had not told anyone since the trial that he lied against Mr. Sweet (PCR. 1915).

In addition to this newly discovered evidence of Mr. Sweet's innocence, post-conviction counsel presented evidence of ineffective assistance of counsel at both the guilt and penalty phases of Mr. Sweet's trial. Charles Adams, Mr. Sweet's trial lawyer, testified to his total lack of experience in capital litigation and admitted that although he believed that Mr. Sweet was innocent, he did not investigate the possibility of other suspects. He also admitted that he conducted no investigation for the penalty phase and even failed to use the records that had been obtained by the public defender's office before he got the case. Lindsey Moore, a federal civil rights lawyer, testified that he agreed to work on the case only because Mr. Adams seemed so overburdened and that his participation was supposed to be limited to the cross-examination of a few State witnesses. He was completely unprepared to present the testimony of the only penalty phase witness.

Charles Abner, the investigator who briefly worked on the case, testified that his work was hampered by Mr. Adams' failure to get

more money from the court and that during the time he worked on the case he did not even know that Mr. Sweet was facing the death penalty. Two mental health experts testified that there is substantial mitigating evidence in this case that should have been presented to the jury. One of these witnesses, who was the State competency expert at trial, testified that in any capital case there should be a team of mental health experts working on mitigation issues. Post-conviction counsel also presented three witnesses who testified about Mr. Sweet's childhood, presenting compelling mitigation evidence that was never heard by the jury that sentenced him to death. Finally, Bill Salmon, an expert in capital defense litigation analyzed the evidence presented in post-conviction and the performance of Mr. Sweet's trial lawyers, and offered his expert opinion that Mr. Adams was ineffective at both the guilt/innocence and penalty phases and that Mr. Sweet was prejudiced by his incompetent performance.

Lindsey Moore, a federal civil rights lawyer with no capital experience, agreed to assist Charles Adams on Mr. Sweet's case because Mr. Adams "was kind of overburdened by the work he had." (PCR. 1455). He explained that "the Court was calling [Adams] and continually appointing him to cases while he was trying a capital case." (PCR. 1455). Mr. Adams approached him about cross-examining some witnesses, and he agreed to help in that limited capacity. When

he agreed to assist at Mr. Sweet's trial, Mr. Moore "went into the case with the understanding that about two or three witnesses [he] was supposed to cross examine and that was the extent of [his] involvement." (PCR. 1455).

Despite Mr. Moore's understanding of his limited role at Mr. Sweet's trial, he later learned that Mr. Adams expected him to present the testimony of Mr. Sweet's sister Deone, the only defense witness to testify at the penalty phase. Mr. Moore explained that he and Mr. Adams went out looking for Ms. Sweet during a recess. (PCR. 1463). When they returned to court, Mr. Moore first learned that Mr. Adams expected him to present the witness's testimony. He explained:

A And when the Court resumed that day for the first time I learned that I was to examine her but I had never seen her before.

Q Okay. You had never talked to the lady?

A Never talked with her.

Q And you did not prepare her to testify in any way, shape or form?

A I had never seen her.

Q Did you know what questions you were going to ask her?

A No.

Q How did you determine what questions to ask her?

A Played it by ear.

Q So you shot from the hip?

A Right.

(PCR. 1463-64).

In addition to being unprepared to examine the one penalty phase witness, Mr. Moore testified that he and Mr. Adams had not even discussed the penalty phase. (PCR. 1462). Mr. Moore did not investigate or obtain any school, mental health, medical or foster care records detailing Mr. Sweet's childhood. (PCR. 1462). He also did not examine Dr. Miller's report to determine whether it contained potentially mitigating evidence. (PCR. 1465). Despite his concern that Mr. Sweet suffered from mental impairments that might render him incompetent, Mr. Moore did not attempt to have a mental health expert appointed who could testify at the penalty phase. (PCR. 1465). Mr. Moore also testified that he did not attempt to present evidence supporting the mitigating factors and that he did not try to argue that they applied to Mr. Sweet. (PCR. 1465-66). Mr. Adams' failure to develop a penalty phase strategy with his co-counsel is manifested in Mr. Moore's failure to fully develop the mitigating evidence that was available from the one witness that was presented. Her testimony is only five transcript pages in length and contains none of the compelling detail that was elicited at the evidentiary hearing.

Because he thought that his involvement was limited to cross-examining two or three State witnesses, Mr. Moore was not involved in any other aspect of the case. He did no research regarding potential mitigating evidence, he did not attempt to locate or interview other

suspects, and he did not otherwise assist Mr. Adams in developing evidence. (PCR. 1459, 1462). Mr. Moore also does not remember ever reviewing an investigation report from Charles Abner. (PCR. 1461). Mr. Moore also remembered one of the most serious mistakes at Mr. Sweet's trial: the failure to secure the presence of Anthony McNish. He remembered that they did not have an investigator at the time of trial to attempt to locate him. (PCR. 1460). He also remembered that during trial, the Court gave Mr. Adams a thirty-minute recess to attempt to find Mr. McNish and that Mr. Adams was unsuccessful. (PCR. 1460). When the search was unsuccessful, however, neither Mr. Moore nor Mr. Adams resorted to the available remedies: they did not request a *capias*, an order to show cause, or a continuance. (PCR. 1461). Mr. Moore could not explain why he and Mr. Adams failed to get Mr. McNish to trial and why they failed to properly remedy the situation when he could not be found.

While Mr. Moore agreed only to cross-examine a few witnesses in order to relieve Mr. Adams' burden, once the trial started he participated much more fully. Mr. Moore remembered that he argued several motions for which he was not prepared and was even being handed cases by Mr. Adams in the middle of an argument. (PCR. 1456). Aside from cross-examining the witnesses he had prepared for, Mr. Moore admitted that he was neither competent nor qualified to do the work he did on Mr. Sweet's case. (PCR. 1469). Mr. Moore was later

disbarred by the Florida Bar Association. (PCR. 1469).

Charles Abner, the defense investigator who worked on Mr. Sweet's trial, confirmed that Mr. Adams' representation was ineffective. He testified that he, like Mr. Adams, had never worked on a capital case before. (PCR. 1442). While he has worked on both criminal and civil cases, most of his experience is in the area of insurance fraud. (PCR. 1436). During the time that he was working on Mr. Sweet's case, Mr. Abner did not even know it was a capital case. He testified that after almost a year had passed, he contacted Mr. Adams and asked what had happened to Mr. Sweet. (PCR. 1442). When Mr. Adams told him that Mr. Sweet had received a death sentence, it was the first time that Mr. Abner had even known that was a possibility. (PCR. 1442).

Because Mr. Adams failed to inform his investigator that he was working on a capital case, it is no surprise that Mr. Abner did not investigate possible mitigation. He testified that Mr. Adams never asked him to investigate Mr. Sweet's family background, his substance abuse history, his school or juvenile history. (PCR. 1443). Mr. Abner did not even interview Mr. Sweet as part of his investigation; he explained that he does not like going to the jail where Mr. Sweet was incarcerated before his trial. (PCR. 1450).

Despite his complete failure to investigate possible penalty phase evidence, Mr. Adams did not efficiently focus his

investigator's efforts on the guilt phase issues either. While he testified that his theory of defense was innocence and misidentification, Mr. Adams did not instruct Mr. Abner to investigate other suspects. (PCR. 1445). Mr. Abner explained that his instructions were "to go into the area of Third, Liberty, Market to try to locate some witnesses to try to find out what happened that night." (PCR. 1443). Despite the seriousness of the case and the dire consequences for Mr. Sweet, Mr. Adams and Mr. Abner "didn't go into any deep specific[s]" about the case. (PCR. 1438).

A major obstacle to conducting an adequate investigation was that Mr. Adams did not have enough money to pay Mr. Abner for his work. Mr. Abner testified that he worked on Mr. Sweet's case "off and on [for] about a week-and-a-half." (PCR. 1438). He admitted that "didn't accomplish a whole lot" because Mr. Adams was "running out of money." (PCR. 1439). Mr. Abner recalls that he spoke with Mr. Adams about the money situation and told him that he could "come up with some more witnesses" if he had more time to investigate but that he "had other work on hand that needed [his] immediate attention." (PCR. 1440). He remembers that Mr. Adams provided either three or five hundred dollars for all investigative expenses. (PCR. 1440). Mr. Abner testified that the minimum amount needed to adequately investigate a capital case is five or six thousand dollars. (PCR. 1441). He explained that "[i]f [Adams] wanted just one or two

witnesses located then 3- to \$500 would suffice." (PCR. 1440). Mr. Abner testified that there were sufficient leads in the case to develop an investigation, but that his efforts were essentially shut down before they started due to Mr. Adams' failure to secure adequate funding. (PCR. 1451). All that Mr. Abner could recall doing during his time on Mr. Sweet's case was speaking to "one young lady" who was going "to lead [him] to someone else who had some information." (PCR. 1439). Due to the lack of money, Mr. Abner never found that person who was supposed to have some information.

Charles Adams confirmed the testimony of his investigator and co-counsel. He explained that Mr. Sweet's trial was his first death penalty case and that he had no experience working with an investigator. (PCR. 1765, 1768). Due to his inexperience, Mr. Adams did not even know whether five hundred dollars would be enough to thoroughly investigate a capital case. (PCR. 1768). He testified that Mr. Abner's investigation was so insignificant that he did not recall either talking to him or reading any investigation reports. (PCR. 1770). He remembered that the investigation yielded no results and Mr. Adams could not remember anything that Mr. Abner did that helped him represent Mr. Sweet. (PCR. 1771). When he realized that insufficient money from the court was hindering the investigation and his representation of Mr. Sweet, Mr. Adams moved for a continuance. (PCR. 1774). He did not, however, request more money from the court.

(PCR. 1776).

Mr. Adams' inexperience and the lack of money for investigation were not the only obstacles in this case. Mr. Adams' performance was also hindered by his illnesses. He had both pneumonia and bronchitis during the time leading up to Mr. Sweet's trial. (PCR. 1777). In one motion for continuance, Mr. Adams informed the court that during March and April he was only in his office eight to twelve times. (PCR. 1777).⁵ His health problems prevented Mr. Adams from adequately preparing for Mr. Sweet's trial, and at a pretrial hearing in April he could not provide a witness list for the court because he had no witnesses, nor could he discuss his plan for the trial. (PCR. 1778). Because he was unable to prepare on his own, Mr. Adams asked Lindsey Moore to be his second chair; he knew that Mr. Moore, like himself, lacked capital experience. (PCR. 1780). Mr. Moore filed his notice of appearance only two weeks before the trial was scheduled to begin. (PCR. 1780). Although Mr. Adams considered himself primarily responsible for representing Mr. Sweet, Mr. Moore cross-examined several State witnesses, did half of the guilt phase closing argument, and presented the only defense witness at the penalty phase. (PCR. 1781-82).

Mr. Adams testified that his theory of defense was that Mr. Sweet was innocent and was been the victim of misidentification by

⁵Mr. Sweet's trial began on May 20, 1991.

the State's witnesses. (PCR. 1783). He admitted that evidence of other suspects could have helped him prove this theory; however, he presented no guilt phase evidence regarding other suspects. (PCR. 1785, 1800). He also admitted that a police report indicating that a State witness described the suspect as weighing 250 pounds, while Mr. Sweet weighed about 180 or 190 pounds, would have been useful to cross-examine the State witness at trial. (PCR. 1785-86). Mr. Adams did not explain his failure to use this report at trial.

On the subject of Anthony McNish, Mr. Adams provided additional testimony revealing his deficient representation of Mr. Sweet. He remembered that Mr. McNish had seen three men outside the victim's apartment and that Mr. Sweet was not one of the men. (PCR. 1786). Mr. Adams remembered talking to Mr. McNish several times and even remembered looking for him during Mr. Sweet's trial. (PCR. 1786). Mr. Adams did not ask his investigator to transport Mr. McNish to trial and at the time of the hearing he denied that Mr. McNish ever told him he needed assistance. (PCR. 1792, 1801). Mr. Adams admitted that he wanted Mr. McNish to testify but could not explain why he did not seek any of the available remedies from the court when Mr. McNish did not show up. (PCR. 1791).

Mr. Adams testified that he never considered Dale George to be a suspect in this case. (PCR. 1794). He did remember that Mr. George had taken the clip out of Marcene Cofer's gun and that he supplied

the State with their theory of prosecution against Mr. Sweet and that this theory embraced two powerful aggravating factors. (PCR. 1794-95). Mr. Adams also admitted that he had documents in his file indicating that Mr. George had been accused of domestic assault against Ms. Cofer. (PCR. 1796). When confronted with all of these facts at the evidentiary hearing, Mr. Adams conceded that he "may have" considered Mr. George a suspect and that presenting him as a witness would have been consistent with his theory of defense. (PCR. 1797). However, he did not pursue this possibility at the time of Mr. Sweet's trial. Mr. Adams also recalled that Jessie Gaskins was listed by the defense as a potential witness. (PCR. 1797). At his deposition, Mr. Gaskins testified that a man wearing a ski mask forced him to knock on Marcene Cofer's door on the night of the shootings. (PCR. 1798). Mr. Gaskins did not say that the man was wearing any jewelry. (PCR. 1798). Mr. Adams agreed that Mr. Gaskins' description is different from that of Ms. Cofer and Sharon Bryant, which did not mention a ski mask and included mention of very distinctive and noticeable jewelry. (PCR. 1798). Mr. Adams excused his failure to call Mr. Gaskins as a witness by explaining that Mr. Gaskins said that he saw Mr. Sweet on television when he was arrested and that he told his wife that Sweet looked like the man who pulled the gun on him outside Ms. Cofer's apartment. (PCR. 1799). However, the actual statement Mr. Gaskins made to his wife was that the Mr.

Sweet had the "same build" as the man with the gun but that he could not positively identify him. (PCR. 1800).⁶

Mr. Adams also testified about Mr. Sweet's penalty phase. Mr. Adams did not request a defense mitigation expert, and his entire penalty phase preparation seemed to be limited to talking to Deone Sweet, Mr. Sweet's sister. (PCR. 1804-05).⁷ Mr. Adams thought he may have talked to Mr. Sweet's mother, girlfriend and foster mother, but his records do not reflect any of these conversations. (PCR. 1805-06).⁸ Mr. Adams offered different explanations for his failure to present Mr. Sweet's mother as a witness: he testified that he told her when the trial was and that it was Deone Sweet who told him that her mother would not be coming to Jacksonville to testify, but he also relied on the excuse that Mr. Sweet did not want his mother to testify, implying that he was deferring to his client's wishes. (PCR.

⁶In addition, as Mr. Salmon explained, Mr. Gaskins' statements made to his wife when he saw Mr. Sweet on television were inadmissible hearsay that should not have prevented Mr. Adams from calling him as a witness. (PCR. 1942).

⁷Ms. Sweet testified that, in her opinion, these conversations with Mr. Adams had little to do with trial preparation. She explained that meeting with Mr. Adams "was mostly like friends . . . he talked more like Earl's friend, you know Earl's girlfriends and his hangout and stuff." (PCR. 1720).

⁸Mr. Sweet's mother and foster mother testified that they were not contacted by Mr. Adams and that they would have been willing to help Mr. Sweet if they had been contacted. (PCR. 1690, 1744).

1827).⁹ Mr. Adams testified that he did not provide any background materials to the court-appointed competency expert and could not remember whether he had ever spoken to him about Mr. Sweet. (PCR. 1804). Despite the fact that he had both an investigator and co-counsel helping him on this case, Mr. Adams did not instruct either to do anything in preparation for the penalty phase. (PCR. 1806-07). It was not until the day of her testimony that Mr. Moore met Deone Sweet, whose testimony he presented. (PCR. 1806).

In regard to documentary evidence, Mr. Adams testified that he possibly had some school and jail records. (PCR. 1808).¹⁰ He remembered that before he got the case, the public defender's office tried to get records from the department of health and human services, but Mr. Adams did not know whether he ever followed up on that or not. (PCR. 1808). In fact, there were substantial records documenting Mr. Sweet's deprived childhood in the file when Mr. Adams got the case but he did not attempt to use them at the penalty phase. (PCR. 1808). He could not explain why he did not use the records that were available to him and only guessed that "there may be something in the records that say something else that I thought might

⁹Although he is certain that he spoke with his client's mother, Mr. Adams could not recall whether he discussed Mr. Sweet's childhood, her alcoholism and her abandonment of her children during the conversation. (PCR. 1843).

¹⁰These jail records contain the names of four siblings of Mr. Sweet who were available to testify on his behalf. (PCR. 1842).

hurt me rather than help." (PCR. 1810).¹¹ He admitted that he would probably use Mr. Sweet's school records if he were to do the trial today, and blamed his failure to use them on his "inexperience." (PCR. 1810).

In addition to failing to present the documents that had been obtained by the public defender's office, Mr. Adams also neglected to seek additional records that would have constituted mitigation. He did not get records that would have documented a history of mental illness in Mr. Sweet's family although he admitted that "if I knew about it then and I thought that would help I would have tried to obtain it." (PCR. 1811). He again blamed his failure to do this on the fact that this was his first capital case and he was inexperienced. (PCR. 1811). He also admitted that he did not try to get any records from the department of health and human services although he knew that Mr. Sweet had been in foster care. (PCR. 1812). He also failed to document that Mr. Sweet was prescribed Ritalin as a child, suffered from spinal meningitis, and suffered a serious head injury as a child. (PCR. 1812). In regard to spinal meningitis, Mr. Adams admitted that he does not know what effect that can have on a

¹¹Mr. Salmon explained that a failure to not present available mitigation is not a strategic decision and that the goal at the penalty phase may be to give the jury anything on which to base a life recommendation. Mr. Adams did not decide to forego some evidence in favor of more powerful mitigation; rather, he failed to present available mitigation, in the form of State records that would have been unimpeachable, for no apparent reason.

child's brain. (PCR. 1812). Mr. Adams also failed to obtain any evidence regarding Mr. Sweet's mother's alcoholism, believing that Deone Sweet's testimony on that subject was sufficient. (PCR. 1813). Again, although he knew that Mr. Sweet's mother frequently abandoned her children, he did not attempt to document that through HRS records. (PCR. 1814).

Mr. Adams repeatedly blamed his failures on his inexperience with capital cases and admitted that all of the evidence that was available if only he had investigated would have been helpful during Mr. Sweet's penalty phase. (PCR. 1814). Despite his lack of experience with death penalty cases, Mr. Adams was aware that he could present virtually anything about Mr. Sweet's background or character at the penalty phase and he admitted that the trial judge did not try to limit or restrict the presentation of mitigation. (PCR. 1815). Mr. Adams admitted that Dr. Miller's competency report contained mitigation evidence on the following subjects: spinal meningitis as a child; an alcoholic mother; years spent in foster care; delinquency and dependency in childhood; mental illness among Mr. Sweet's brothers; drug use at an early age. (PCR. 1816). Mr. Adams did not use this report at either the penalty phase or the sentencing hearing before the judge. (PCR. 1817).

Mr. Adams admitted that all of the available mitigation could have made a difference at the penalty phase because it could have

negated the cold, calculated, and premeditated aggravating factor. (PCR. 1818). He agreed that the same evidence could also have had an impact on the avoid arrest aggravator. (PCR. 1818). Mr. Adams was also "quite sure" that a mental health expert's testimony that Mr. Sweet had diminished capacity and could not conform his conduct to the law would have changed the presentation of evidence to the jury. (PCR. 1819).

Other evidence that was presented at the evidentiary hearing demonstrates that trial counsel was ineffective. Mr. Sweet's foster mother and biological mother both testified that they were available to testify at Mr. Sweet's trial but that Mr. Adams never asked them to testify. (PCR. 1690, 1744). Their hearing testimony reveals that they could have provided compelling testimony relevant to mitigation that the jury never heard. Deone Sweet, Mr. Sweet's sister, also testified at the evidentiary hearing. Although she testified briefly at Mr. Sweet's trial, her hearing testimony reveals that Mr. Adams' failure to prepare her for the trial, and his last minute decision to delegate her questioning to his co-counsel, resulted in an inadequate examination that failed to elicit evidence pertinent to mitigation. Due to trial counsel's failure to present two of these witnesses and his failure to prepare the other, the jury was deprived of relevant mitigation evidence that could have changed their recommendation.

Emily Shealey, Mr. Sweet's foster mother, testified that

William Sweet came to live with her family when he was eight years old. (PCR. 1687). William had been in another foster home, but the mother of that family essentially evicted him. Mrs. Shealey explained: "this lady said she didn't want him there, she couldn't stand him being there any more. So she told them she was going to sit his clothes outside. So they just closed her home out and brought him to me." (PCR. 1691). When he arrived, William came with only a few articles of clothing and no other possessions. (PCR. 1687). William told Mrs. Shealey that his biological mother drank a lot and did not take care of him. (PCR. 1687). Mrs. Shealey testified that William initially had some problems at school, but that when he was given Ritalin for his hyperactivity he was able to control his behavior and did better in school. (PCR. 1688). William did very well at Mrs. Shealey's home and got along with her son as though they were brothers. (PCR. 1689). After two years, William was returned to his biological mother's custody. (PCR. 1689). Mrs. Shealey explained that William did not want to leave and that he often returned to visit Mrs. Shealey and her son. (PCR. 1689).

Bertha Mae Sweet, Mr. Sweet's biological mother, provided more details about Mr. Sweet's childhood. Mrs. Sweet testified that Mr. Sweet was raised without a father because his father acknowledged only his first three sons while he never acknowledged William and his sister Deone. (PCR. 1723). Mrs. Sweet testified that although her

marriage was good in the beginning, her husband liked to fight and he would routinely beat her. (PCR. 1723). She finally left her husband when one of his beatings caused her to have a miscarriage. (PCR. 1724). Even after this incident, it was at the suggestion of a bystander that she finally left him; she explained that when she returned from the hospital, the landlord "suggested that Powell was beating me so bad and so much that he eventually was going to kill me, said it would be best if you just get out of here and I left." (PCR. 1723). During attempted reconciliations with her husband, Mrs. Sweet became pregnant with Deone and then William. (PCR. 1725). However, they did not resume their marriage, and Mr. Sweet never acknowledged his last two children. (PCR. 1725).

Although Mr. Sweet's father was not involved at all in his life, Mrs. Sweet did have a series of boyfriends who played a role in his childhood. (PCR. 1723). These boyfriends beat her in front of her children. (PCR. 1729). Mrs. Sweet, in turn, beat her children, usually when she "was on [a] drunken stoop" and her emotions got "out of whack with them." (PCR. 1729). Mrs. Sweet did have one boyfriend, Esau Brown, who was good to the kids and she remembered that during her relationship with him, "it was like a real family." (PCR. 1730). However, this relationship also became violent and ended. Mrs. Sweet testified about the incident that caused her to leave Mr. Brown:

A When he beat me that's when it was all over, when I left and that was when I came to Jacksonville.

Q You left, do you remember hiding from Esau?

A Yes.

Q And why were you hiding from him?

A Because he had beat me up real bad and he said he was going back home and get something and come back and kill me and I hid.

(PCR. 1730-31). Mrs. Sweet regretted having to leave Mr. Brown because the children loved him and called him "daddy" which they had never done with her other boyfriends. (PCR. 1731).

Mrs. Sweet also confirmed Mrs. Shealey's testimony about her alcohol addiction and inability to parent her children. Mrs. Sweet admitted that she drank up to a pint of alcohol and a six-pack of beer each day when she was pregnant with William. (PCR. 1727-28). She received no prenatal care until her seventh month of pregnancy when she lost her job because she fell and suffered an injury on the job. (PCR. 1727). At that time, a friend suggested welfare and Mrs. Sweet received some medical care. (PCR. 1727). Mrs. Sweet testified that within two years of leaving her husband she was not a good mother because "drinking sort of took over, had top priority." (PCR. 1725). Drinking was so important to Mrs. Sweet that she would leave her children so that she could go out "partying" and would even hide when they came looking for her. (PCR. 1732). Sometimes, though, Mrs. Sweet would take William with her when she went out drinking and when he was only two or three years old she gave him beer to drink.

(PCR. 1735). She also took him out to pornographic movies. (PCR. 1735).

When William was about seven years old, he and his siblings were taken away by the department of health and human services. (PCR. 1734). When she was given custody of her children about two years later, Mrs. Sweet admitted that she was not ready to have them back. (PCR. 1737). She explained:

A I had been in treatment for a year, and HRS worker, she came and she -- we talked. She would bring them to visit in the afternoon, and she said that she was going to give them to me one at a time, one, she was going to start off with the oldest which was Deone and then another one and then another one. And then she wanted me to be able to adjust. And finally when she brought them and she just left them.

Q All of them?

A All of them, all three of them.

Q At the same time?

A Yes, because my thing to get prepared was like to have grocery, have the proper bedding for them and get a rapport with them. But she just brought them and she said, "I think you're ready for the children, Miss Sweet," and she left them.

(PCR. 1737). There was some discussion of terminating her parental rights and putting the children up for adoption, but Mrs. Sweet testified that "evidently I said what they wanted to hear" and she regained custody of her three youngest children. (PCR. 1738).

However, Mrs. Sweet was still not prepared for the responsibilities of parenthood, and she started drinking again after her children were returned to her. (PCR. 1738). She also ignored

William's medical needs when she stopped giving him the Ritalin that he needed to control his behavior. She explained: "He was like he was just off into another world just sit in the corner, just sit still just like he was drugged out or something, you know. I didn't understand it, I just couldn't stand to see him like that because he was busy, busy child." (PCR. 1739).

Mrs. Sweet also testified about childhood illnesses that William suffered. He had spinal meningitis which was discovered only after Mrs. Sweet took him to the hospital four times. (PCR. 1733). She explained that she knew William was sick because he was busy child who never sat still, but when he got sick "he would get on the couch and he would lay his head on the arm of the couch and hold his head back and would just stay in that position . . . and he wouldn't talk." (PCR. 1733). He was like this for four days until the hospital finally examined him and diagnosed spinal meningitis. (PCR. 1734). William also suffered a head injury when he was three-and-a-half years old. (PCR. 1734). Mrs. Sweet explained how the accident occurred: "he was standing up on a banister at the apartments some friends that we was visiting, . . . and he went to reach and fell over on the concrete." (PCR. 1734). He landed on his head on the concrete. (PCR. 1734).

Mrs. Sweet later abandoned William in Texas with a man she had met. She was planning to move to Texas with this man and took

William with her while they looked for a place to live. (PCR. 1740). Mrs. Sweet returned to Jacksonville without William to get a truck and pack her belongings. (PCR. 1740). While she was back in Florida, however, she changed her mind about moving to Texas. She explained that she "got sober or maybe dry for a period" and looked at pictures of herself in Texas and realized that she was not happy and should not move there. (PCR. 1740). She was also bothered by something that her boyfriend had said to her in Texas: "He told me when I was -- `When I get you out here you'll be a long way from your family, and I can handle you then.'" (PCR. 1740). Although she felt intimidated by this ominous threat, Mrs. Sweet felt no such trepidations about leaving William alone with this man after she decided to remain in Florida. William was eventually returned to Florida "by some agency" because Mrs. Sweet's boyfriend refused to return William to her. (PCR. 1741). Mrs. Sweet abandoned William again when he was sent to the Dozier School for Boys and she moved to Miami without telling him before he was released. (PCR. 1742-43). She explained that she left Jacksonville without thinking of her children: "I just got away from it, just left." (PCR. 1743).

At Mr. Sweet's trial, his sister Deone Sweet's testimony comprises five transcript pages. The testimony at the evidentiary hearing contains compelling details and stories about Mr. Sweet's childhood that were never presented to the judge and jury that

sentenced him to death. This evidence was available to trial counsel; however, Mr. Adams' failure to interview Ms. Sweet and prepare her testimony resulted in a brief and superficial examination that failed to elicit mitigation evidence that was readily available.

Ms. Sweet confirmed her mother's testimony that her and William's biological father never acknowledged them and that Esau Brown was the first father-figure in their lives. (PCR. 1696). Because of the general instability of their lives, even Mr. Brown "was in and out." (PCR. 1697). Although Mr. Brown was the only person the children ever considered a father, his relationship with their mother became violent, probably because of alcohol. Ms. Sweet testified that there were "a lot of violent fights." (PCR. 1698). She remembered one fight in particular when Mr. Brown took "a nice, little, strong, wood table and I just remember seeing him going across her head with it." (PCR. 1698). Ms. Sweet also remembers leaving Mr. Brown when he threatened to beat up their mother after work one day. (PCR. 1699). She explained how they left him:

She told me to pack clothes and she hid under the bed at first, and then she told me to lock her up in the shed out back, and pack whatever clothes that we had or whatever cause I packed so badly, I think, I had, like, one shoe and one piece of an outfit. Then she told me to unlock the door and she went next door by the time he came home. And then we had to come over where she was and then the neighbors took us to the bus stop and that's when we came to Jacksonville.

(PCR. 1699-1700). Ms. Sweet was eight years old when this occurred.

(PCR. 1701).

Mrs. Sweet's other relationships were also violent. Ms. Sweet testified:

It was always fights, always fights. As a matter of fact, me and Nathaniel, my other brother, we was always having to jump into the fights to help her because we even got used to grabbing boards from outside. And we was -- we always fought men for getting them off of our mother and making them leave, stop hurting her.

(PCR. 1704). She and Nathaniel would not let William get involved in these attempts to protect their mother because he was too young, but he witnessed the violence. (PCR. 1704). Ms. Sweet also revealed that her mother's boyfriends would abuse her: "every once in a while some of them would try to be sexual with me if they had the opportunity."

(PCR. 1704). Again, it was alcohol that prevented Mrs. Sweet from protecting her children; Ms. Sweet explained that "[m]ost of the time they had been drinking and she would be done fell out so they come in the room at night while she asleep." (PCR. 1704).

Ms. Sweet also testified about the effect of her mother's alcoholism on her childhood. She explained that because of drinking, Mrs. Sweet "really sometimes she didn't perform as a mother." (PCR. 1702). As a result, Ms. Sweet, at a very young age, became the mother to her two brothers and also attempted to take care of her alcoholic mother. (PCR. 1702). Although she is only four years older than William, at an early age she became a mother to him; when she was only a teenager herself, William gave her a Mother's Day card and

told her, "you've been the mother to me." (PCR. 1705). Because this was the only life she had ever known, it seemed "normal" to her. (PCR. 1705).

Ms. Sweet also offered compelling testimony about her mother's absences from the home:

A Well, basically the one time that sticks out is when we went to the foster home and I couldn't find her. And, I think, food had ran out and, I think, the lights were off and I was trying to get her to come home because of her baby, you know, that's what we called him, he was baby to us. And my brother got in trouble, he threw a rock through somebody's window.

Q Which brother?

A Nathaniel. And the people was going to call the police as far as I knew, so I got scared and called a social worker. And when she came there and found my mother hadn't been there in like days, no food and the lights was off, she took us to a foster home.

(PCR. 1702-03). Ms. Sweet testified that she had to search for her mother on more than one occasion and remembered her mother trying to hide from her:

[W]e knew where she was even that day and she told the people tell us she wasn't there cause, I think, all three of us had made, like, a trip around there to get her cause we just knew she was in there . . . it was this house that we was going to get her from that they was in there drinking and, you know, she had spent the night, I think, a few times.

(PCR. 1703). Due to her mother's inability to care for her children, Ms. Sweet became close to a social worker from the department of health and human services who wanted to help the children. Ms. Sweet knew to call her when they were in trouble and explained that they

needed her so often that they "knew her like family." (PCR. 1709).

The children were placed in separate foster homes and only had occasional visits with each other. (PCR. 1708). Sometimes Mrs. Sweet would not show up for visits with her children, and other times she would be drunk for scheduled visits. Ms. Sweet explained: "when we didn't see my mother one day we all three went to where she was living and she was drunk and unprepared." (PCR. 1709). Even after the children were returned to their mother, she started drinking again although she initially tried to hide it. (PCR. 1709).

Ms. Sweet also recalled the occasions when her mother abandoned William. She confirmed her mother's story that when he was only about twelve years old she left him in Texas with one of her boyfriends when she returned to Florida. (PCR. 1710). Ms. Sweet was also the one to act as a mother to William when he was released from the Dozier School for Boys. She remembered that her mother had moved to Miami while William was away. (PCR. 1711). When William was released, he went to their home and found that his family was no longer there. (PCR. 1711). A neighbor told him where his sister was living and he moved in with her and her infant daughter. (PCR. 1711). At this time, when she was only nineteen, Ms. Sweet became William's legal guardian because their mother had completely failed to fulfill her parental duties. (PCR. 1712).

All of this testimony could have been presented at Mr. Sweet's

penalty phase. However, when Ms. Sweet testified, she did not know what kind of information could have helped her brother. She testified at the hearing that she did not remember Lindsay Moore, although he was the attorney who presented her testimony. (PCR. 1713). Mr. Moore did not discuss her testimony with her before the trial. (PCR. 1714). Ms. Sweet wanted to help her brother, but did not know how; she explained: "the only thing I knew was that I was the only witness to help his side, that's all I knew." (PCR. 1704). The attorneys who represented him at trial did not tell her what information they needed to help him; Ms. Sweet offered her own impression of her brother's trial: "the way that the trial was going it looked like there was no hope for Earl." (PCR. 1714). She explained that "it didn't look like it was anything being done. I'm no lawyer and I don't know anything about law but it wasn't anything being done." (PCR. 1715). She explained that although she met with Mr. Adams a few times before her brother's trial, "it wasn't really ever a case, it was mostly like friends, like, you know, meeting a new friend. And he talked more like Earl's friend, you know, Earl's girlfriends and his hangout and stuff." (PCR. 1720).

Another witness at the evidentiary hearing provided evidence that could have changed the outcome of the guilt phase of Mr. Sweet's trial. He was also available to trial counsel but was not presented due to counsel's ineffectiveness. Anthony McNish testified that he

was at the crime scene on the night of the murder. Mr. McNish's testimony proves that Mr. Sweet is not the man who killed Felicia Bryant and shot the other women in the apartment.

Anthony McNish was subpoenaed by the defense to testify at Mr. Sweet's trial. (PCR. 1872). The subpoena that was left with Mr. McNish's girlfriend did not state the date and time that Mr. McNish was required to appear to testify but only instructed him to contact Mr. Adams' office, which he did. (PCR. 1872). After getting the subpoena, Mr. McNish contacted Mr. Adams at his office and told him that he was willing to testify but also told Mr. Adams that he needed someone to take him to court. (PCR. 1873). He explained: "he knew I didn't have no transportation, so when I told him they told me don't worry about it but when he states don't worry about it it was like if you don't have no way I will make arrangement for somebody to come get you." (PCR. 1873). At the time he was expected to appear to testify, Mr. McNish was at home taking care of his young daughter. (PCR. 1873). Meanwhile, back at the courthouse, Mr. Adams got a thirty-minute recess to find this crucial witness. (PCR. 1791). He was unsuccessful and the testimony was never presented to the jury that convicted Mr. Sweet.¹²

¹²Mr. McNish disputes Mr. Adams' testimony that he tried to find Mr. McNish at his grandmother's house. Mr. McNish testified that he lived with his grandmother for nineteen years and that if anyone had come by looking for him or left a message he would have received it. (PCR. 1874). At the time that Mr. Adams was allegedly searching for

Mr. McNish did give a deposition in this case which alerted Mr. Adams to the importance of his testimony. Mr. McNish testified at his deposition that he was in the alley outside Marcene Cofer's apartment at the time of the murders, that he saw three men leaving the apartment, and that none of the three was Mr. Sweet. (PCR. 1866). His evidentiary hearing testimony is consistent and demonstrates how Mr. McNish could have changed the outcome of Mr. Sweet's trial. Mr. McNish saw three men in the alley outside Ms. Cofer's apartment. (PCR. 1863). One of these men was wearing a black mask. (PCR. 1902). As he started to leave the alley, he turned back and saw one of the men at the door to Ms. Cofer's apartment. (PCR. 1863). At that point, he left and as he exited the alley, he heard the gunshots. (PCR. 1863). Mr. McNish knows that Mr. Sweet was not one of the three men he saw because they were all about five feet, six or seven inches tall and stocky. (PCR. 1864). Mr. Sweet also has a much darker complexion than the three men Mr. McNish saw in the alley. (PCR. 1868). He also explained that Mr. Sweet has a distinctive walk that he could easily recognize. (PCR. 1867).

Mr. McNish would have been a credible witness to the jury because he is Ms. Cofer's cousin who had no reason to provide false testimony contradictory to her own. In addition, although he knows

him to testify, Mr. McNish was at the home of his children's mother taking care of them. (PCR. 1874). This is the location where he and Mr. Adams had previously met for an interview. (PCR. 1874).

Mr. Sweet from the neighborhood and could positively say that he was not one of the men he saw that night, he is not friends with Mr. Sweet and is therefore not motivated to provide false testimony in his defense. Mr. Adams testified that his theory of defense was that Mr. Sweet was innocent. Clearly, a witness who could testify that he saw three men at the crime scene at the time he heard gunshots fired is totally consistent with the theory of defense and should have been presented. Despite the meager investigation conducted on this case, Mr. McNish was known to the defense and available to testify.¹³ The only reason the jury did not hear his testimony is that Mr. Adams failed to send someone to pick him up and transport him to the courthouse even after Mr. McNish made it clear that he had no way of getting there on his own. Mr. Adams was ineffective for failing to arrange transportation for Mr. McNish, an available and cooperative witness whose testimony could have proven the defense theory that Mr. Sweet was innocent.

Bill Salmon was accepted by the court as an expert in capital defense law. (PCR. 1928). Mr. Salmon reviewed both the trial record,

¹³Mr. McNish became known to Mr. Adams as a potential defense witness, not as a result of investigation, but by chance. He happened to be at the courthouse on a day that Mr. Sweet and Ms. Cofer were also there. (PCR. 1869). When he heard Mr. Sweet say that he and Ms. Cofer were at court for the same case, Mr. McNish became curious and he told Mr. Sweet that he knew he was not guilty of that crime because he was there that night and had seen the shooters. (PCR. 1869). Mr. McNish agreed to talk to Mr. Adams about the case, which he did several times before trial.

Mr. Adams' file, police reports, and an affidavit from Lindsey Moore, as well as the evidence discovered during post-conviction. (PCR. 1929). He also listened to the evidentiary hearing testimony. (PCR. 1930). Applying the standard established by the Supreme Court in Strickland v. Washington, Mr. Salmon concluded that Mr. Adams' performance was constitutionally deficient at both the guilt and penalty phases of Mr. Sweet's trial. (PCR. 1931, 1944). Mr. Salmon is familiar with Mr. Adams' work on capital cases because he represented two of Mr. Adams' former clients on their direct appeals to this Court. (PCR. 1926).¹⁴ On Mr. Adams' three capital cases, he never presented a mental health expert at the penalty phase, never convinced a sentencing judge to find a statutory mitigating factor, and of the thirty-six jurors who made sentencing recommendations, only three recommended life. (PCR. 1951).

Mr. Salmon explained the particular areas that rendered Mr. Adams' performance deficient at the guilt/innocence phase of Mr. Sweet's trial. The most fundamental error was the failure to adequately investigate the case. (PCR. 1931). Mr. Salmon referred to

¹⁴In one of those cases, State v. Willie Miller, Mr. Salmon raised the issue of Mr. Adams' ineffectiveness although this issue will be considered on direct appeal only if there is a fundamental denial of the defendant's rights. In Mr. Miller's case, this Court granted a resentencing and found that Mr. Adams' performance was so fundamentally flawed during the penalty phase that it ordered that new counsel be appointed for resentencing. 733 So. 2d 955 (Fla. 1998).

this duty as "the single most fundamental aspect of providing effective assistance in a capital case." (PCR. 1931). This failure to investigate prejudiced Mr. Sweet because it resulted in Mr. Adams' failure to discover and present defense witnesses.

Mr. Salmon testified that the decision whether to call Dale George as a witness was "a close one," but that "he was an available suspect in the overall context of the defense that was available to Mr. Sweet. Mr. George should have been presented to the jury as an alternative suspect as the perpetrator of this crime." (PCR. 1935). Jessie Gaskins should also have been called by the defense because he could have given the jury "something to seriously think about with regard to in the first instance the identification of Mr. Sweet as the perpetrator of this crime and certainly the other thing we talked about, a lesser verdict, perhaps no conviction of first degree murder and perhaps also a carry over in the penalty phase." (PCR. 1941-2). Mr. Salmon testified that there is no possibility of disagreement on Mr. Adams' failure to call these witnesses because the decision whether to present their testimony could not be a strategic one in the absence of adequate investigation that would enable an attorney to make reasonable decisions. (PCR. 1974, 1971).

In regard to Mr. McNish, Mr. Adams was ineffective for failing to get the witness to court. Mr. Salmon explained that Mr. McNish was not even properly subpoenaed because the subpoena only directed

him to contact Mr. Adams' office -- it did not specify a time and date for him to appear in court to testify. (PCR. 1936). Based on his own experience with "street witnesses" like Mr. McNish, Mr. Salmon explained the importance of developing a relationship with them to ensure their appearance at trial. (PCR. 1937). Even when such a relationship has been established, it is still the attorney's responsibility to get such a crucial witness to court; he summarized: "know where he is and go get him." (PCR. 1993). Mr. Sweet was prejudiced by Mr. Adams' failure to get Mr. McNish to court because, even considering the State's evidence against Mr. Sweet, the outcome of the trial would have been different with his testimony. (PCR. 1938). Mr. Salmon explained:

Mr. McNish is in my opinion the witness who would present the strongest evidence of other suspects raising reasonable doubt as to the identification or the jury accepting the testimony that was presented to prove that Mr. Sweet was the perpetrator of this crime. It goes to the absolute heart of Mr. Sweet's defense.

(PCR. 1939). Mr. Salmon explained that Mr. McNish's testimony is particularly important because his relationship with one of the victims lends it additional credibility in comparison to that of the State's witnesses who had an inadequate opportunity to identify their assailant. Mr. Salmon explained that Mr. McNish "would have put the doubt to all of that testimony regarding the identification of the perpetrator of this crime and Mr. Sweet." (PCR. 1940).

Mr. Salmon also testified that the presentation of these three

witnesses at the guilt phase could have had an effect on the jury's penalty phase recommendation. He explained that "juries in capital cases are almost desperately looking for a way to do the right thing. Juries are probably swayed more powerfully by arguments and evidence and proof that gives them a way to avoid imposing or recommending imposition of the death penalty." (PCR. 1940). Mr. McNish's testimony, in particular, could have been the basis for either a lesser verdict or a life recommendation. (PCR. 1941).

Mr. Adams' failure to investigate and prepare this case was also reflected in his performance at trial. Mr. Salmon explained that this failure resulted in ineffective performance on "critical matters" such as challenging evidence sought to be introduced by the State and the failure to prevent the State from introducing prejudicial evidence such as Mr. Sweet's prior convictions. (PCR. 1933). Mr. Adams also failed to render competent representation to Mr. Sweet because his inadequate investigation resulted in a misunderstanding of the facts of the case that prevented him from presenting a viable defense to the jury. Mr. Salmon explained that all of these failures were reflected in Mr. Adams' weak and rambling closing statement which was "riddled" with objections.¹⁵

Mr. Salmon also testified that, in his expert opinion, Mr.

¹⁵All of the State's objections were sustained. (R. 1068, 1069, 1070, 1072, 1074, 1078, 1080).

Adams was ineffective at both the penalty phase and the sentencing hearing of Mr. Sweet's trial. (PCR. 1943-44). He based his opinion on the mitigation evidence that was never discovered by Mr. Adams, the testimony of the mental health experts, as well as the documentary evidence that was available to Mr. Adams but not presented. (PCR. 1944). He explained that effective use of this information could have attacked the aggravating factors relied upon by the State and supported statutory mitigating factors. (PCR. 1944). He explained:

[P]rimarily it's a combination of that mental health evidence and testimony that could have been presented, and I might also add would have been very effective to use against any mental health expert the State might have tried to put on to rebut witnesses called on behalf of Mr. Sweet and that of the family members describing it seemed to me almost from the time of Mr. Sweet's birth through his most formative ages, that being very young, five, six, teenager, was replete with circumstances that were highly mitigating directly related to Mr. Sweet's unfortunate behavior as an adult.

He never had a chance, and again that's the kind of evidence that in my opinion the jury is desperately seeking and want to have before they make their recommendation.

(PCR. 1946).

Mr. Salmon's opinion that Mr. Adams was ineffective at the penalty phase hinges on the same failure that plagued his performance in the guilt/innocence phase: failure to investigate and to present the available evidence. He explained the importance of investigation in a capital case: "[t]here comes a time in the trial of a first degree murder case where the state is seeking the death penalty that

the lawyer and his investigative staff have got to singularly make the decision on what's going to be presented." (PCR. 1947). Mr. Salmon noted that even if a client facing the death penalty objects, his attorney has a duty to investigate his background and history:

Not only have I dealt personally but have worked with many lawyers who have dealt with the problem whether they confront a client who often absolutely and sincerely says I do not want that particular piece of evidence presented, whether it be the mother, sister, mental health expert or mitigating evidence at all. That's not even -- that's not a ripple in the lake.

The lawyer doesn't -- the effective lawyer doesn't even listen to that. It makes no difference. He doesn't hear it. He uses it if anything as a challenge to do a better job on presenting mitigating evidence on behalf of his client at that phase of the trial, and it wasn't done at all.

(PCR. 1947). Mr. Salmon also testified that Mr. Adams was ineffective for failing to consult a mental health expert to testify about mitigation. (PCR. 1948). Mr. Adams' failure to investigate and to have Mr. Sweet evaluated by an expert precluded him from challenging the cold, calculated and premeditated aggravating factor, which he explained has a "very powerful" impact on the jury. (PCR. 1948).

Mr. Salmon's opinion that Mr. Sweet was prejudiced by his attorney's deficient performance at the penalty phase is supported by the testimony of two mental health experts -- Jethro Toomer and Ernest Miller, a forensic psychiatrist. Dr. Toomer testified that several statutory mitigating factors apply to Mr. Sweet's case and that with the help of a mental health expert, his trial attorney

could have rebutted the State's evidence offered in support of aggravating circumstances. (PCR. 1591-96). Dr. Miller was appointed by the trial court to determine Mr. Sweet's competence to stand trial. (PCR. 2019-20). He met with Mr. Sweet for one hour and did not evaluate him or his case for mitigation. (PCR. 2049). Although he has a different background and approach to these issues, Dr. Miller agreed with Dr. Toomer that there is mitigation in this case that should have been presented to the jury. (PCR. 2054-55). He also supported Mr. Sweet's claim that his trial counsel should have secured the services of a mental health expert to evaluate him for mitigation. (PCR. 2052).

Dr. Toomer evaluated Mr. Sweet and administered psychological tests, met with his mother and sister, and reviewed the reports and records documenting his childhood. (PCR. 1502-06, 1535-37). In regard to Mr. Sweet's childhood, Dr. Toomer testified that his mother's problems with alcohol and violent personal relationships "prevented her from being able to provide the appropriate nurturing and caring and support that is so desperately needed by everyone in terms of their early developmental years." (PCR. 1538). Dr. Toomer testified that although Deone Sweet did her best to take care of her brother, because she had experienced the same deficits in her developmental years, it was "extremely difficult . . . [for her] to try to compensate for those particular deficits." (PCR. 1539). Dr.

Toomer described Mr. Sweet's childhood as "a picture of early on [lack of] nurturance, deprivation, abandonment, emotional abuse." (PCR. 1542).

Mr. Sweet's school records reflect the instability of his environment, showing that in one school year alone the family moved five times; this in turn had an effect on both his attendance and performance at school. (PCR. 1540). His teachers described him as "impulsive," "easily distractible," and unable to control his behavior. (PCR. 1546). Mr. Sweet was "a victim of social promotion" so that he passed from one grade to the next despite his very poor performance and inability to learn. (PCR. 1546). Mr. Sweet's school records reflect a child "trying to cope with a dysfunctional environment." (PCR 1547). Dr. Toomer's opinion is supported by the fact that Mr. Sweet suffered a serious head injury as a child, was sick with spinal meningitis, stuttered, and was prescribed Ritalin. (PCR. 1547). Mr. Sweet had attention deficit disorder which is organic in origin and results in "poor impulse control, highly distractible, difficulty focusing, poor attention span, difficulty interacting with others." (PCR. 1548). All of these symptoms of the disorder would have been aggravated when Mr. Sweet's mother took him off the ritalin during crucial developmental years. (PCR. 1551).

Mr. Sweet's placement in foster homes is further evidence of the instability of his childhood that undermined his development; as

Dr. Toomer explained, the variety of placements show "a lack of stability from home which was not able to provide all of the necessities of structure." (PCR. 1541). Dr. Toomer also gave his opinion about the various programs that Mr. Sweet was involved in as a child and explained that "[t]he programs can only be of benefit . . . if they provide the first plank if you will in terms of the development of some foundation, and that is stability. It can't happen if you are constantly replicating some of the problems that got you there in the first place, a lack of stability, moving from one place to another, lack of continuity, lack of sameness and lack of predictability." (PCR. 1541). Because Mr. Sweet was transferred among programs and foster homes so frequently, the problems caused by the deficits of his home life were only aggravated. (PCR. 1551). Overall, his childhood environment, whether with his mother, foster families, or juvenile homes, "was not conducive to appropriate development . . . to foster those kinds of adaptive skills that one needs in order to function appropriately in society." (PCR. 1552).

Dr. Toomer explained the effect that Mr. Sweet's impoverished childhood had on his development:

Without the structure, the stability and safety it's impossible for individuals to develop those features quote unquote, those characteristics that we all take for granted that should characterize quote unquote normally functioning individuals, and I am talking about the ability to engage in higher order thought processes, the ability to modulate emotional expression, the ability to engage in long range planning, the ability to engage in suppletory processes, in

other words being able to compensate and delay gratification.
(PCR. 1535-36).

In the absence of stability in early childhood, "you are going to have an individual who is going to be impaired intellectually and who will spend . . . his or her life compensating" for the inability to reason abstractly. (PCR. 1536-37, 1554). All of the deficits encountered by Mr. Sweet during his childhood are "predictors . . . of psychological deficits" in adulthood. (PCR. 1542-43). Despite Mr. Sweet's chronological age, "emotionally and in terms of reasoning . . . [he] is at a much lower parallel chronological age." (PCR. 1555). The results of Mr. Sweet's intelligence tests demonstrate that he is in the low average range of functioning with particular weakness in abstract reasoning, comprehension, common sense reasoning, and social judgment. (PCR. 1556-57). The results of the Bender Verbal Motor Gestalt and Visual Motor Recall Test also yielded significant results demonstrating that Mr. Sweet falls just below the psychological deficit cut off and just above the cut off for organic damage. (PCR. 1561). There are other factors, or "red flags," indicating the presence of organic impairment: an alcoholic mother who drank during her pregnancy; history of stuttering; meningitis; fall on the head during early childhood; substance abuse; and prescription for ritalin. (PCR. 1563).

Dr. Toomer also testified about the aggravating and mitigating

circumstances in Mr. Sweet' case. He testified that the cold, calculated and premeditated aggravating circumstance does not apply. (PCR. 1591). He explained that "the totality of that early developmental trauma has served as a model for vacillation, erratic behavior, impulsivity, lack of control, inconsistency and the like." (PCR. 1592). Due to Mr. Sweet's inability to function in an abstract manner, when confronted with emotional upheaval and pressure to act, he acts without thinking so that "there is no premeditation. There is no abstract reasoning. There is no long term planning." (PCR. 1592).¹⁶

In regard to mitigating factors, Dr. Toomer testified that Mr. Sweet was unable to conform his behavior to the requirements of law. (PCR. 1595).¹⁷ Mr. Sweet's "behavior and his adaptive functioning [are] primarily impulsive. It's not based on premeditation [and] his history does not enable him to develop the mechanisms to be able to do that." (PCR. 1595). The personality disorder that Dr. Toomer diagnosed would support the mitigating factor that Mr. Sweet was under the influence of an emotional disturbance. (PCR. 1596). As Dr.

¹⁶Errors in the transcript of the evidentiary hearing prevent post-conviction counsel from fully presenting Dr. Toomer's testimony regarding the aggravating circumstances that were found in Mr. Sweet's case. See Argument VI.

¹⁷The evidentiary hearing transcript is marred by errors during Dr. Toomer's testimony regarding the mitigating factors that apply to Mr. Sweet's case. See Argument VI.

Toomer explained, Mr. Sweet's behavior is reliant on other people to the point that his independent functioning is compromised. (PCR. 1570).

Dr. Miller agreed with Dr. Toomer's opinion regarding the cold, calculated and premeditated factor. He explained that "at times of emotional override" he would act out impulsively. (PCR. 2042). Dr. Miller also testified that the facts of this case suggest that the crime was an impulsive act. (PCR. 2054). Regarding mitigating factors, Dr. Miller's testimony supported application of the extreme emotional disturbance mitigating factor. He explained that while there was no outside force creating a mental or emotional disturbance, Mr. Sweet's personality disorder, or "characterologic disturbance," itself supports this mitigator. (PCR. 2043). When asked whether Mr. Sweet could conform his conduct to the requirements of law, Dr. Miller answered that people with Mr. Sweet's personality disorder "are impulsive, they do not learn, they do not care what happens in terms of future because it's not considered. And so whether or not they conform is diminished capacity." (PCR. 2044).

Dr. Miller also testified about how Mr. Sweet's childhood and background could have been presented to the jury during the penalty phase. In his opinion as a psychiatrist, seventy percent of "who we are" is genetically predetermined. (PCR. 2050). In Mr. Sweet's case, his genetic predetermination was affected by his childhood of

abandonment and neglect by an alcoholic mother, as well as his own substance abuse. (PCR. 2050). Dr. Miller also explained how the juvenile placement that was intended to help Mr. Sweet actually had the opposite effect; he described the Dozier School for Boys, where Mr. Sweet was sent for *** years, as "a finishing school" where boys encounter more experienced criminals and leave more predisposed to criminal activity than when they arrived. (PCR. 2051).

Dr. Miller also testified that a mental health expert should be appointed in all cases and that optimally "a team" of experts from different mental health backgrounds should be involved. (PCR. 2052). When asked whether presenting some of the available mitigation might result in the jury also hearing some negative facts about Mr. Sweet, Dr. Miller responded: "I don't see what you would have to lose by presenting anything you could in terms of mitigation." (PCR. 2061).

SUMMARY OF ARGUMENT

1. Mr. Sweet was denied effective assistance of counsel at the guilt phase of his trial, in violation of the Sixth, Eighth and Fourteenth Amendments to the United States Constitution, when his trial attorney failed to investigate and present evidence of other suspects.

2. Mr. Sweet was denied effective assistance of counsel at the penalty phase of his trial, in violation of the Sixth, Eighth and

Fourteenth Amendments to the United States Constitution, when counsel failed to investigate and present to the jury and trial court ample mitigating evidence readily available at the time of trial.

3. The lower court erred in failing to consider the cumulative effect of the newly discovered evidence of Mr. Sweet's innocence with the evidence not presented at Mr. Sweet's trial due to trial counsel's ineffectiveness.

4. Mr. Sweet was denied a competent mental health evaluation, and trial counsel was ineffective for failing to investigate and provide the mental health experts with available background information and for failing to ensure that Mr. Sweet's mental health evaluation was competent.

5. The lower court erred in denying Mr. Sweet a hearing on several claims related to trial counsel's ineffectiveness and misconduct on the part of the state.

6. Mr. Sweet is being denied a meaningful opportunity to raise claims in this appeal due to an incomplete record and errors in the transcript of the evidentiary hearing.

ARGUMENT I

THE CIRCUIT COURT ERRED IN DENYING MR. SWEET'S CLAIM THAT HE WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AT THE GUILT PHASE WHEN HIS TRIAL ATTORNEY FAILED TO INVESTIGATE AND PRESENT EVIDENCE OF OTHER SUSPECTS.

A. INTRODUCTION.

Mr. Adams testified that his theory of defense was that Mr. Sweet was innocent and had been misidentified by the State's

witnesses. He conceded that evidence of other suspects and evidence that the State's witnesses were unreliable would have helped to support this theory; however, he did not use the available evidence to his client's advantage and failed to present the evidence that would have exonerated Mr. Sweet. As a result of Mr. Adams' failures, Mr. Sweet did not receive the fair adversarial testing to which he is entitled and the outcome of his trial is unreliable. The Supreme Court established in Strickland v. Washington, that "counsel has a duty to make reasonable investigations" and that strategic decisions not to present evidence can be made only after "thorough investigation of law and facts relevant to plausible options." 466 U.S. 668, 690-91 (1984).

Mr. Adams offered no strategic reason for his failure to present available evidence at the guilt phase and referred only to his own inexperience, his chronic sickness at the time of Mr. Sweet's trial, and his excessive caseload. These excuses have no relationship to a legitimate trial strategy. Mr. Adams' failure to investigate other suspects and to present the one witness who was handed to him by Mr. Sweet was deficient performance with no strategic justification. Mr. Adams' failure to properly direct his investigator and to secure adequate funds to investigate a capital case were the result of his own admitted lack of experience, not informed choices. Mr. Sweet has demonstrated that in light of the

questionable identification testimony of Marcene Cofer and Sharon Bryant, but for Mr. Adams' deficient performance -- his failure to consider Dale George as a suspect, to present the testimony of Jessie Gaskins and Anthony McNish -- the outcome of the trial would probably have been different. Mr. Sweet is entitled to a new trial.

B. TRIAL COUNSEL'S ERRORS.

Mr. Adams admitted that, due to his inexperience, he did not know how to use an investigator. Charles Abner's testimony confirms Mr. Adams' admission of incompetence. Because Mr. Adams failed to request more money from the court, Mr. Abner had only \$300 to \$500 to investigate this case. He estimated that approximately \$5000 and between 90 and 100 hours would be necessary to properly investigate a capital case. He worked on this case for only a week-and-a-half "on and off" and came up with no results; just as he developed a lead on a witness who knew something about the shooting, he ran out of money and stopped working on the case. During the time that he worked on the case, he had no contact with Dale George, Jessie Gaskins, or Anthony McNish. Lindsay Moore, Mr. Adams' co-counsel, also had no contact with Dale George, Jessie Gaskins, and Anthony McNish. He agreed to help Mr. Adams with the understanding that he would cross-examine a few State witnesses; he was apparently uninvolved in trial preparation or strategizing and did not know at the time of trial what information these witnesses could have provided in Mr. Sweet's

defense.

Mr. Adams admitted that in addition to his inexperience in capital defense work, his representation of Mr. Sweet was hampered by his excessive caseload, as he continued to accept conflict appointments while he worked on this case, and his chronic illness. He recalled that during a significant period of time before Mr. Sweet's trial he was in his office only 8 or 12 times and that at a pretrial conference in Mr. Sweet's case he had done no preparation for trial and could not even tell the court what witnesses he would be calling or what theories he might be arguing in Mr. Sweet's defense. Mr. Adams' lack of preparation for trial, regardless of his caseload and health problems, falls below the standard of professional performance established by Strickland. See Patton v. State, 25 Fla. L. Weekly S749 (September 28, 2000)(remanding for an evidentiary hearing on trial counsel's failure to investigate and develop evidence that would have constituted a defense); Overton v. State, 531 So. 2d 1382 (Fla. 1st DCA 1988)(ordering an evidentiary hearing on trial counsel's failure to investigate and prepare for trial which denied him the opportunity to present exculpatory evidence); Warren v. State, 504 So. 2d 1371, 1372 (Fla. 1st DCA 1987)(recognizing that trial attorney's failure to "interview an identified available witness whose testimony might exonerate her client can constitute ineffective assistance of counsel."). Although

he sought help in representing Mr. Sweet, Mr. Adams chose a lawyer equally inexperienced in capital defense; he could not remember any specific duties he delegated Mr. Moore, and he admitted that he retained primary responsibility for defending Mr. Sweet.

Mr. Adams' theory of defense was that Mr. Sweet was innocent; he admitted that evidence of other suspects would have assisted him in persuading the jury to acquit Mr. Sweet. He also acknowledged that a police report that was available to him with a description of the suspect that was markedly inconsistent with Mr. Sweet would have helped him to prove that Mr. Sweet had been misidentified. He could not explain his failure to use this report at trial. Due to three major errors, Mr. Adams' representation of Mr. Sweet was ineffective: the failure to consider Dale George a suspect; the failure to present the testimony of Jessie Gaskins; the failure to ensure Anthony McNish's appearance at trial.

Dale George was Marcene Cofer's boyfriend at the time of the shooting. She had previously filed several domestic violence petitions against Mr. George, alleging that he had assaulted her and threatened to kill her and that she feared for her safety. These reports were available to Mr. Adams. The evidence also showed that on the afternoon before the shooting occurred, Mr. George took the clip out of Ms. Cofer's gun. There was also evidence available to Mr. Adams that Mr. George was involved in drug dealing activity with

Ms. Cofer which could have provided an alternative motive for this shooting. It also should have been significant to Mr. Adams in his evaluation of this case that the State's theory of prosecution originated with Mr. George -- raising a red flag to an experienced trial attorney that a potential suspect was shifting the blame to another. However, none of this clicked with Mr. Adams, despite his belief in Mr. Sweet's innocence. When asked whether he considered Mr. George as suspect, he responded: "I just didn't make the connection with Dale George as all being a possible suspect in this case." (PCR. 1794). He agreed that casting suspicion on Mr. George would have been consistent with his theory of defense, but could not explain why he did not attempt to do so. After being confronted with the evidence implicating Mr. George, Mr. Adams admitted that if he had conducted an investigation and discovered this information, he may have considered Mr. George a suspect. Bill Salmon, who was accepted by the trial court as an expert in capital defense, testified that Mr. George should have been investigated as a potential suspect and presented at trial.

Jessie Gaskins was another witness available to Mr. Adams who was not independently investigated or presented at trial. His testimony would have been inconsistent with that of Marcene Cofer and Sharon Bryant -- the two State witnesses whom Mr. Adams believed had misidentified his client as the shooter. Mr. Gaskins would have

testified that he saw a man wearing a ski mask outside Ms. Cofer's apartment who forced him at gunpoint to knock on her door. At his deposition, Mr. Gaskins testified that the man he saw was not Mr. Sweet. He was not called as a witness, according to Mr. Adams, because he allegedly made an out-of-court, unsworn statement to his wife that when he saw Mr. Sweet on television, he looked like the man he saw at Ms. Cofer's apartment. However, at his deposition Mr. Gaskins testified that he could not identify Mr. Sweet as the man. Mr. Salmon soundly rejected the logic of this explanation: Mr. Gaskins' statement to his wife would not have been admissible at trial and should not have prevented Mr. Adams from calling him as a witness.

Mr. Adams' failure to secure the attendance of Anthony McNish at trial had the greatest impact on the outcome of this case. Mr. McNish would have testified that he saw three men in the alley outside Ms. Cofer's apartment door just before he heard the shots fired and that Mr. Sweet was not among them. His testimony would have been particularly credible to the jury because he knew Mr. Sweet from the neighborhood and would have recognized him. In fact, he was able to provide exact details describing how Mr. Sweet's appearance differs from that of the men he saw. However, Mr. McNish is not friends with Mr. Sweet and is actually related to one of the victims in this case, Marcene Cofer, thereby adding even more credibility to

his testimony.

The jury did not hear this testimony because his subpoena from Mr. Adams was defective, because Mr. Adams did not make arrangements to get Mr. McNish to court despite the warnings that he had no transportation, and because Mr. Adams failed to request the appropriate remedy from the trial court when Mr. McNish did not show up to testify. Regarding the failure to present Mr. McNish's testimony, Mr. Salmon testified that Mr. Adams was ineffective. He explained that defense lawyers are responsible for establishing a relationship with "street witnesses," which involves knowing where they can be found and personally ensuring their appearance. Mr. McNish was not motivated to help Mr. Sweet and had no interest in the outcome of this case; it was Mr. Adams who was responsible for defending his client and protecting his right to a fair trial and one of his duties was to ensure the appearance of crucial witnesses who could exonerate Mr. Sweet. Mr. Salmon expressed his expert opinion that had Mr. McNish testified, there is a reasonable probability that the outcome of the case would have been different, either because the jury would have acquitted or returned a lesser verdict, or because the lingering doubt raised by his testimony would have resulted in a life recommendation.

C. THE CIRCUIT COURT ORDER.

The circuit court found that Mr. Sweet failed to prove that Mr.

Adams's guilt phase representation was ineffective. The court's order is deficient in several respects. In regard to the failure to investigate and prepare the case, the court shifted the blame and misconstrued the evidence. The court stated: "The defendant makes the conclusory allegations that his attorney's preparation was inadequate due to counsel's health problems, and due to a break down in communications between he and his attorney." (PCR. 1081). Mr. Adams' health problems were cited as only one excuse for his lack of preparation; the court ignored that Mr. Adams also repeatedly referred to his inexperience in using an investigator and his admitted lack of judgment when evaluating the available evidence. In addition, the "break down in communication" between Mr. Sweet and Mr. Adams to which the circuit court refers involved their disagreement about seeking an additional continuance (Mr. Sweet wanted to proceed to trial while Mr. Adams protested that he was still not ready) -- due to this court's decision to grant a continuance, that disagreement is irrelevant and has no impact on Mr. Adams' representation of Mr. Sweet. The court then concluded that Mr. Adams was not to blame because "this Court denied counsel's additional requests for more continuances." (PCR. 1081). Mr. Sweet has never alleged that the failure to get more time was the sole or even primary cause of Mr. Adams' deficient performance at the guilt phase. Rather, it was the failure to use that time to investigate and

prepare. Mr. Adams sought and received continuances; yet, when the trial began he had nothing to show for it because he had not used that time as an effective advocate on behalf of Mr. Sweet.

The court also found that Mr. Sweet had failed to prove Mr. Adams was ineffective for failing to present evidence of other suspects. In regard to Jessie Gaskins, the court stated that "[c]ounsel's hearing testimony establishes his strategic decision not to establish a third identification of the defendant as the murder[er] (especially by a witness that the State had not even called)." (PCR. 1082). The circuit court ignored Mr. Salmon's testimony that Mr. Gaskins' statement would have been inadmissible and instead distorts his hearing testimony: "Even the defendant's capital trial expert, William Salmon, . . . admitted that he would not put a witness on the stand who would bolster the State's case." (PCR. 1082). In fact, Mr. Salmon testified that Mr. Gaskins' out of court statement "wouldn't have troubled me a bit. I don't think it would have hindered the effect it would have had to the benefit of Mr. Sweet." (PCR. 1942). He also testified that there was no strategic reason to justify not presenting Mr. Gaskins' testimony (PCR. 1972) and that "Mr. Gaskins would have . . . presented to the jury certainly at least reasonable argument, food for thought, something to give those 12 people something to seriously think about with regard to in the first instance the identification of Mr. Sweet

as the perpetrator of this crime." (PCR. 1941). After accepting Mr. Salmon as an expert in capital defense, the circuit court ignored those parts of his testimony that support Mr. Sweet's claim and then distorted the testimony to support its denial of relief.

In regard to Mr. McNish, the court again ignored Mr. Salmon's testimony in order to deny Mr. Sweet the relief to which he is entitled. The court found that Mr. Adams was not ineffective for failing to secure Mr. McNish's presence at trial because he subpoenaed the witness and tried to find him during a recess. First, the court seemed to forget that Mr. McNish was not properly subpoenaed and that the subpoena did not even tell him the date and time that he was expected to testify. The court also ignored Mr. McNish's testimony regarding his location on the day of trial and the fact that no one ever contacted his grandmother on that day to determine where he could be found. All of this evidence contradicts Mr. Adams' testimony regarding his efforts to find Mr. McNish.¹⁸ And again Mr. Salmon's expert testimony requires an outcome different from that reached by the circuit court: he testified that Mr. Adams was ineffective in his failure to get Mr. McNish to court. As a

¹⁸Mr. Adams' testimony regarding his preparations for trial were also contradicted by Mr. Sweet's sister, mother and foster mother, Dr. Miller, and his own lack of any notes or billing records documenting the efforts he later claimed to have made, thus calling into question his testimony regarding his efforts to find Mr. McNish as well.

trial attorney, he explained that defense lawyers are responsible for ensuring the presence of witnesses at court and that this sometimes includes actually transporting them to the courthouse. Issuing a defective subpoena is not competent trial practice and failing to request any of the available remedies when McNish did not appear only compounded Mr. Adams' mistakes. Mr. Adams knew that this witness could have made a difference in the outcome of Mr. Sweet's trial. His failure to get Mr. McNish to court was ineffective and it prejudiced Mr. Sweet. The circuit court erred in denying relief on this claim.

D. CONCLUSION.

In Strickland v. Washington, the Supreme Court explained the importance of the right to competent counsel: "The right to counsel plays a crucial role in the adversarial system embodied in the Sixth Amendment, since access to counsel's skills and knowledge is necessary to accord defendants the 'ample opportunity to meet the case of the prosecution' to which they are entitled." 466 U.S. 668, 685 (1984). The Court also cautioned that the mere presence "of a person who happened to be a lawyer ... is not enough to satisfy the constitutional command" and that the right to counsel "envisions counsel's playing a role that is critical to the ability of the adversarial system to produce just results. An accused is entitled to be assisted by an attorney ... who plays the role necessary to

ensure the trial is fair." Id. At Mr. Sweet's trial, Mr. Adams was merely a person who happened to be a lawyer. He did not fulfill his duty to Mr. Sweet to advocate on his behalf, and, as a result of his failures, Mr. Sweet was deprived of his right to a fair trial. This Court must perform an independent de novo review of the mixed questions of law and fact presented in Mr. Sweet's ineffective assistance of counsel claims giving deference only to factual findings supported by competent substantial evidence. Stephens v. State, 748 So. 2d 1028 (Fla. 1999). As discussed above, the findings of the lower court do not provide a basis for denying relief or are not supported by competent substantial evidence.

The primary responsibility of a defense attorney is to independently investigate and prepare for trial. Gaines v. Hopper, 575 F.2d 1147, 1148-50 (5th Cir. 1982). See also Davis v. Alabama, 596 F.2d 1214, 1217 (5th Cir. 1979) ("An attorney does not provide effective assistance if he fails to investigate sources of evidence which may be helpful to the defense."). Once an independent investigation has been conducted, the defense attorney must present "an intelligent and knowledgeable defense" in order to ensure that his client receives a reliable adversarial testing. Caraway v. Beto, 421 F.2d 636, 637 (5th Cir. 1970). Mr. Sweet has proved that Mr. Adams did not investigate sources of evidence that would have enabled him to prove his theory that Mr. Sweet was innocent; Mr. Adams'

failure to investigate this case precluded him from presenting a knowledgeable and intelligent defense to the jury. Despite the availability of evidence that could have exonerated his client, Mr. Adams presented only one guilt phase witness -- a doctor who testified that Marcene Cofer had drugs in her system, a fact that had already been admitted by the State. Essentially, despite his belief in his client's innocence, Mr. Adams presented no defense at all. Confidence in the outcome of Mr. Sweet's trial is undermined and he must be granted a new trial.

ARGUMENT II

THE CIRCUIT COURT ERRED IN DENYING MR. SWEET'S CLAIM THAT HE WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AT THE PENALTY PHASE.

A. COUNSEL'S DEFICIENT PERFORMANCE.

Mr. Sweet's trial counsel had no capital experience. His co-counsel also had no capital experience. The investigator who worked on his case, on-and-off for about a week, did not even know that Mr. Sweet was facing the death penalty. Charles Adams was the lead attorney with the responsibility of saving Mr. Sweet's life. He assumed the entire burden of preparing for the penalty phase and did not ask his investigator or co-counsel to do anything to help him. Mr. Adams claims that he spoke with Mr. Sweet's mother and foster mother, but there is nothing in his trial notebook or billing records documenting these conversations. He also claimed that he spoke with

Dr. Ernest Miller, who evaluated Mr. Sweet for competency, but there are no records reflecting this conversation and Dr. Miller does not remember ever talking to Mr. Adams. Whether Mr. Adams spoke to these other potential witnesses or not, he did not present their testimony.

There was only one defense witness at the penalty phase -- Deone Sweet, Mr. Sweet's sister -- whose testimony was presented by co-counsel who had never met her before. Mr. Moore's lack of preparation to present this witness was revealed in both the quality and quantity of her testimony. He knew nothing about her and did not know what potential mitigating evidence she could offer. As a result, her testimony is five transcript pages long and contains none of the compelling detail about Mr. Sweet's childhood that was presented at the evidentiary hearing. Ms. Sweet testified that Mr. Sweet did not know his father, that their mother was an alcoholic "on and off," (although she did not know whether this affected her brother), and that they were placed in foster care due to their mother's neglect. (R. 1245-47). In addition to presenting only the tip of the iceberg in regard to mitigating evidence from this witness, Mr. Moore's unfamiliarity with her caused him to ask questions that elicited negative responses. For example, Ms. Sweet characterized her childhood as "normal," while her testimony at the evidentiary hearing proves that it was far from what most jurors

would consider normal.¹⁹ He also asked whether Mr. Sweet helped her financially when he was living with her and her child, presumably because he was trying to make the jury see Mr. Sweet as a responsible family member, but Ms. Sweet told the jury that her brother did not help to support her and her young child. (R. 1246). Substantial mitigating evidence could have been presented through Ms. Sweet if only Mr. Adams had taken the time to elicit it from Ms. Sweet rather than wasting time talking about his client's girlfriends and other irrelevant matters.²⁰

Mr. Adams was also deficient for failing to request the appointment of a mental health expert to evaluate Mr. Sweet. Dr. Ernest Miller, the court-appointed competency expert at trial, believes that a "team" of mental health experts should be appointed in every capital case to evaluate the defendant for mitigation. In this case, there was not even one mitigation expert because Mr. Adams, due to his lack of capital experience, did not think of it. Mr. Adams also failed to use mental health evidence that was readily

¹⁹The evidentiary hearing testimony from Ms. Sweet, Bertha Mae Sweet, and Emily Shealey was so compelling that even the State Attorney referred to Mr. Sweet's childhood as "very deprived." (PCR. 1983).

²⁰ Ms. Sweet testified at the evidentiary hearing that her brother's case never really seemed like a case and that her meetings with Mr. Adams did not focus on what could be done to save her brother. She remembers that Mr. Adams was acting like he was Mr. Sweet's friend, discussing his girlfriends and other irrelevant matters. (PCR. 1720).

available to him despite his own lack of effort on this matter. Dr. Miller's competency report contains evidence that would have supported statutory mitigating factors but was not presented to the jury.

Because he presented only one witness who was not properly prepared to testify and because he did not consult a mental health expert, Mr. Adams had nothing to say in his closing argument. He did not refer to any statutory mitigating circumstance. During the final moments when he should have provided the jury with a compelling argument to spare his client's life, Mr. Adams came up empty-handed. He began by trying to cast doubt on the evidence of Mr. Sweet's guilt, despite the fact he was speaking to the same jury that had just accepted that evidence and convicted Mr. Sweet of first-degree murder. (R. 1265-66). Next, Mr. Adams tried to dispute the evidence supporting the prior violent felony aggravating factor by casting doubt on the witnesses' identification of Mr. Sweet and arguing that the prior crimes were not really violent. (R. 1266-67). He was interrupted at this point by the State Attorney's objection reminding the jury that Mr. Sweet had pled guilty to one of those priors and that Mr. Adams was misstating the evidence. (R. 1266).

Finally, he discussed mitigation. He reminded the jury that Mr. Sweet had never known his father and characterized the effect of this on his childhood in the following way:

What you've got is a kid that the father's never taken -- never had a parent to take him to a baseball game or a football game, you've got a kid that's never had a father to take him or participate in little league, teach him how to swim, teach him how to throw a baseball, teach him how to throw a football.

. . .

But he's never had the opportunity where a father can come in and bring him a Christmas present or put the lights up on a Christmas tree or even bring in a Christmas tree. He's never had that.

. . .

[H]e never got the advice of a father, sit down and say son, you shouldn't do this, you shouldn't do that. Never had the experience, never had the spiritual upbringing of a father and mother, when you do wrong, boy, I'm going to whip your butt. He's never heard that, not from his father.

(R. 1268-69).

He reminded the jury that Mr. Sweet's sister tried to raise him because of his mother's alcoholism. (R. 1268). He told the jury that Deone Sweet "had no problems with [her brother] walking in the park with Mr. Sweet holding his hand and going to the stores, talking to the kid, advising the child. She had no problems with that because he was trustworthy. He's not an animal like they perpetuate." (R. 1286). Mr. Adams concluded by expressing his opinion that the evidence does not support the cold, calculated, and premeditated or avoid arrest aggravating factors. (R. 1269-70). He concluded with the following argument for a life recommendation:

What we're asking for is not to convict this man for over what the testimony that was given in that trial, think about this situation wherein which he grew up, the evidence that was

brought out at trial, the people who testified and what those people were about and the background of those people and their credibility of those people. And if you look at that and you see that that testimony that was elicited should not kill a man.

(R. 1270). The jury recommended death by a vote of ten to two.

Mr. Adams' testimony at the evidentiary hearing confirms that his inexperience is the primary reason that Mr. Sweet is on death row. He admitted that despite his inexperience he did not seek help from his investigator or co-counsel in preparing for the penalty phase. (PCR. 1807). He explained that he had no experience using an investigator and was not even sure how much money was necessary to adequately investigate a capital case. (PCR. 1768).²¹ Mr. Adams had some records from Mr. Sweet's childhood and adolescence that had been obtained by the Public Defender's Office before he took over the case. (PCR. 1808). Although these records would have raised several red flags to a competent attorney to further investigate his client's background and seek more documentation, Mr. Adams did not follow up and try to obtain more records. (PCR. 1808-10). In fact, Mr. Adams did not even use the records he had, explaining that due to his inexperience, he did not know that they could have helped his client.

²¹As a result of Mr. Adams' inexperience in this area, he sought only \$500 to fund the investigation for both phases of Mr. Sweet's trial. As the investigator, Mr. Abner, explained, he ran out of money after less than two weeks and had barely begun to uncover guilt phase witnesses. Of course he did no investigation for the penalty phase because Mr. Adams never even told him that Mr. Sweet was facing the death penalty.

(PCR. 1811).

Mr. Adams admitted that the trial court did not try to restrict the presentation of mitigation and that it was only his own inexperience that resulted in a ten-page penalty phase. (PCR. 1814-15). Aside from what Deone Sweet told him, he knew nothing about Bertha Sweet's alcoholism, which resulted in the limited presentation at trial that she was an alcoholic "on and off." (PCR. 1813). Although Mr. Sweet's siblings' names were available from the jail visiting records, Mr. Adams did not interview them to determine whether they could help at the penalty phase. (PCR. 1842). That the failure to present mitigation was due to Mr. Adams' inexperience is revealed in the fact that there was readily available mitigation in Dr. Miller's report that was not presented for no apparent reason. (PCR. 1816). This evidence was available despite the lack of funds, the failure to investigate, and counsel's inexperience. Mr. Adams admitted that this evidence could have made a difference at Mr. Sweet's penalty phase, in particular by rebutting the cold, calculated and premeditated and avoid arrest aggravating factors. (PCR. 1818). He also admitted that having a mental health expert evaluate Mr. Sweet for mitigation could have made a difference to the outcome of the penalty phase. (PCR. 1819).²²

²²Mr. Adams did three capital trials in his career and never presented a mental health expert. (PCR. 1951).

B. THE PREJUDICE TO MR. SWEET.

The evidence presented at the evidentiary hearing demonstrates that with a competent investigation, Mr. Sweet's trial attorney could have presented substantial evidence that has been accepted by this Court as mitigation. Most significantly, Mr. Sweet's childhood which was characterized by instability, poverty, abandonment by his mother, an environment of violence, and complete lack of nurturance and guidance by a parent due to his mother's alcoholism. These are all factors recognized by this Court as mitigation. See Pomeranz v. State, 703 So. 2d 465, 472 (Fla. 1997); Hunter v. State, 660 So. 2d 244, 254 (Fla. 1995); Foster v. State, 614 So. 2d 455, 461 (Fla. 1993); Hall v. State, 614 So. 2d 473, 478 (Fla. 1993); Maxwell v. State, 603 So. 2d 490, 492 (Fla. 1992); Meeks v. Dugger, 576 So. 2d 713, 716 (Fla. 1991); Stevens v. State, 552 So. 2d 1082, 1085 (Fla. 1989); Brown v. State, 526 So. 2d 903, 907-08 (Fla. 1988). The Eleventh Circuit Court of Appeals has also addressed this kind of evidence and has recognized its importance as mitigation: "Although there is no per se rule that evidence of a criminal defendant's troubled childhood must always be presented as mitigating evidence in the penalty phase of a capital case, it is undoubtedly true that such evidence will usually present a defendant in a more sympathetic light to the jury." Devier v. Zant, 3 F.3d 1445 (11th Cir. 1993).

Dr. Toomer testified about Mr. Sweet's low intelligence and the

possibility of organic damage. This Court has consistently recognized low intelligence as a mitigating factor. In Thompson v. State, 648 So. 2d 692, 697 (Fla. 19**), this Court explained its approach to the Supreme Court's opinion in Penry v. Lynaugh, 492 U.S. 302 (1989), which requires that a capital sentencing jury be permitted to consider low intelligence as mitigation; this Court "elected to follow the approach of the United States Supreme Court and treat low intelligence as a significant mitigating factor with the lower scores indicating the greater mitigating influence." See also Henyard v. State, 689 So. 2d 239, 244 (Fla. 1997); Sinclair v. State, 657 So. 2d 1138, 1142 (Fla. 1995); Larkins v. State, 655 So. 2d 95, 100-101 (Fla. 1995); Brown v. State, 526 So. 2d 903, 907-08 (Fla. 1988).

This Court has also established that when trial counsel is on notice that his client suffers from some mental deficiency, reasonably effective representation requires counsel to investigate and present independent mental health testimony during the penalty phase. See Rose v. State, 675 So. 2d 567, 572-73 (Fla. 1996); State v. Lara, 581 So. 2d 1288, 1290 (Fla. 1991); State v. Michael, 530 So. 2d 929, 930 (Fla. 1988); O'Callaghan v. State, 461 So. 2d 1254, 1355-56 (Fla. 1984); Perri v. State, 441 So. 2d 606, 609 (Fla. 1983). Mr. Sweet was entitled to the assistance of a competent mental health expert throughout his capital trial. Ake v. Oklahoma, 470 U.S. 68

(1985). Mr. Adams' failure to secure a defense expert to assist in the preparation and to testify at Mr. Sweet's trial constitutes deficient performance under Strickland v. Washington. In Hildwin v. Dugger, 654 So. 2d 107, 110 (Fla. 1995), this Court held that a trial attorney's failure to present mitigating mental health evidence constitutes ineffective assistance of counsel because it deprived the defendant of a reliable penalty phase.

C. THE CIRCUIT COURT'S ORDER.

The Circuit Court denied relief based on the following conclusions, all of which are contrary to the law or firmly contradicted by the evidence presented in this case: an attorney cannot be ineffective for following his client's instructions; Mr. Adams made the correct decision to not present Mr. Sweet's foster mother because her testimony would have been more damaging than helpful; and the jury was thoroughly informed of Mr. Sweet's disadvantaged background through Deone Sweet's penalty phase testimony. (PCR. 1084-85). After concluding that the penalty phase evidence presented by Mr. Adams was sufficient and that the evidentiary hearing testimony would not have made a difference, the court concluded: "Any attempts to increase the amount of information in support of [his disadvantaged childhood] would have backfired, in that it would have resulted in a wealth of information that the defendant was, in fact, a really bad individual, despite the efforts

of his older sister and foster families to make up for the lack of his mother's care." (PCR. 1085). The Circuit Court's order improperly minimizes the potential impact of the mitigation evidence that was presented at the evidentiary hearing and incorrectly characterizes testimony as "damaging" that a competent lawyer would have presented as mitigation. In addition, the court's conclusion that Deone Sweet's trial testimony would not have been enhanced by the testimony presented at the hearing is simply contradicted by the evidence. Finally, the court completely failed to consider the testimony of Dr. Toomer and Dr. Miller and trial counsel's failure to consult and present a mental health expert.

At no time during his direct or cross examination did Mr. Adams offer a strategic reason for his failure to present mitigation evidence. Instead, he attempted to blame Mr. Sweet for the lack of mitigation evidence presented, and the circuit court erred in accepting this explanation in its order denying relief. A defendant's desire not to present mitigation evidence does not terminate his lawyer's constitutional duties during the penalty phase. See Blanco v. Wainwright, 943 F.2d 1477, 1502 (11th Cir. 1991); Deaton v. Dugger, 635 So. 2d 4, 7-9 (Fla. 1994). Lawyers have a duty to investigate and present to their client the results of investigation and their view of the merits of alternative courses of action. Tafero v. Wainwright, 796 F.2d 1134, 1320 (11th Cir. 1986);

Eutzy v. Dugger, 746 F. Supp. 1492, 1499 (N.D. Fla. 1989); Koon v. Dugger, 619 So. 2d 246 (Fla. 1993). Although a client's directions may limit the scope of an investigation, they do not excuse the failure to conduct any investigation of his background for potential mitigating evidence. See Thompson v. Wainwright, 787 F.2d 1447, 1451 (11th Cir. 1986); Thomas v. Kemp, 796 F.2d 1332 (11th Cir. 1986). Competent, effective lawyers do not blindly follow where their clients may lead them, and the circuit court erred when it relied on this explanation to excuse Mr. Adams' deficient performance.

The circuit court also erred when it concluded that Mr. Adams made the appropriate decision to not present Mr. Sweet's foster mother as a penalty phase witness because she would have told the jury that Mr. Sweet "was a pretty bad individual." (PCR. 1084).²³ This conclusion is based solely on Mr. Adams' testimony that he did not present Mrs. Shealey because she would have told the jury that Mr. Sweet was a "bad boy" (PCR. 1811) and is contradicted by Ms. Shealey's testimony. The circuit court ignores the obviously mitigating aspects of Ms. Shealey's testimony: that Mr. Sweet arrived at her house with a small bundle of ragged clothes and no other belongings; that he had essentially been evicted by a previous foster mother who did not want to take care of him; that he bonded

²³It is apparent from the hearing testimony that Mr. Adams did not even speak to Ms. Shealey and that if he contacted any foster parent it was the woman who preceded Ms. Shealey in Mr. Sweet's life.

with her family and did not want to return to his biological mother; and that his mother drank and did not take care of her children. (PCR. 1686-90).

Contrary to the circuit court's conclusion, Ms. Shealey did not testify that Mr. Sweet was "a pretty bad individual." Ms. Shealey testified that Mr. Sweet did not do well in school because he was hyper and "had a couple bouts;" however, she explained that after he was prescribed Ritalin, he "calmed down" and did better in school and that he always behaved well at her home. (PCR. 1688). She also testified that he stole candy two or three times. (PCR. 1691). A competent attorney could present all of this information as mitigation: the fact that he needed Ritalin to control his behavior is particularly mitigating in light of the fact that his mother took him off the drug because she did not like the effect it had on his energy level and that Dr. Toomer testified that requiring Ritalin may be a sign of organic damage. Finally, the fact that as an eight-year-old boy, a disadvantaged and deprived child who had lived without food or electricity, stole candy two or three times does not rise to the level of being "a pretty bad individual" and could be seen as yet another sign of his deprived background.

This is also an insufficient reason to not present Ms. Shealey's testimony to the jury that had already convicted Mr. Sweet of one count of first-degree murder and three counts of attempted

murder and had heard testimony about Mr. Sweet's role in a prior assault and a jail riot. The Eleventh Circuit rejected a similar argument in Chandler v. United States, where the lower court found that the trial attorney made a calculated decision not to present a more substantial mitigation case in order to avoid "opening the door" to detrimental evidence. The court rejected this explanation because there was no new damaging information that would have been elicited from the mitigation witnesses and because the State had already managed to present the same kind of evidence through other witnesses. 193 F.3d 1297, 1305 (11th Cir. 1999).

The circuit court also erred when it minimized the impact that the hearing testimony could have had on the jury that sentenced Mr. Sweet. The court's conclusion that Deone Sweet's testimony alone sufficiently informed the jury about Mr. Sweet's background is simply not supported by the evidence. The evidence presented at the hearing was not merely cumulative to that presented at trial, it was of a totally different nature. Mr. Adams' closing statement attempted to elicit sympathy for Mr. Sweet because he did not have a father to teach him sports or to give him Christmas presents. This does not even begin to capture what Mr. Sweet's childhood was really like.

Mr. Sweet's mother's priority was alcohol and she frequently abandoned her children to go out partying; she took William along with her sometimes and gave him beer when he was only two or three

and even took him to pornographic movies; William witnessed his mother's boyfriends abuse her; his childhood was completely unstable as his mother moved to escape abusive relationships; his mother left the children alone without food or electricity for days at a time; William's mother left him alone in Texas with one of her boyfriends after she decided to return to Florida; his mother did not give him the medication that was prescribed to control his behavior and without which he could not succeed in school. Other mitigation includes the head injury William suffered as a child; his untreated spinal meningitis; the fact that his mother drank a lot when she was pregnant with him; early substance abuse.

Mr. Sweet's case is like that in Ragsdale v. State, 720 So. 2d 203 (Fla. 1998), in which the trial attorney presented only one penalty phase witness, the defendant's brother, who presented only "minimal evidence in mitigation." In ordering a hearing on the defendant's ineffective assistance of counsel claim in that case, this Court recognized that there was mitigation evidence available to the trial attorney, including a childhood of poverty and deprivation, that was not presented to the jury. The fact that the defendant's attorney presented one penalty phase witness did not cause this Court to conclude that he had competently represented his client. See also Collier v. Turpin, 177 F.3d 1184, 1201-02 (11th Cir. 1999) ("Counsel presented no more than a hollow shell of the testimony necessary for

a `particularized consideration of relevant aspects of the character and record of [a] convicted defendant' before the imposition upon him of a sentence of death.").

Finally, the circuit court erred in denying this claim because it did not even mention the testimony of Dr. Toomer and Dr. Miller and Mr. Adams' failure to present a mental health expert at trial.²⁴ In Ragsdale v. State, this Court explained that this type of claim "necessarily overlaps" with an ineffective assistance of penalty phase counsel claim because both claims impact the presentation of mitigating evidence and the reliability of the outcome of the penalty phase. 720 So. 2d 203, 208-09 (Fla. 1998). The circuit court erred in failing to consider Mr. Adams' failure to get a mental health expert in conjunction with his other failures to present mitigation evidence. Dr. Toomer, or a similar expert, would have been able to explain to the jury the significance of Mr. Sweet's childhood and how the instability and poverty he experienced undermined his ability to function as an adult. Dr. Toomer was also able to explain the mitigating effect of Mr. Sweet's childhood illness (untreated spinal meningitis), his diagnosis of attention deficit disorder and the

²⁴When post-conviction counsel attempted to demonstrate Mr. Adams' ineffectiveness through reference to his performance on two other capital cases on which he also neglected to use a mental health expert, the State conceded that "it's clear that [Mr. Adams] didn't present [a] mental health expert in this case. And he said it wasn't because of a tactical reason so what else is there to know?" (PCR. 1822).

effect of his mother's decision to withhold his medication. The circuit court also failed to consider Dr. Miller's testimony that two statutory mitigating circumstances apply to this case: extreme emotional disturbance and inability to conform his conduct to the requirements of law. The circuit court also failed to consider Dr. Toomer's testimony that these two mitigating factors apply to Mr. Sweet.

This expert mental health testimony is crucial for an additional reason that was ignored by the circuit court: it rebuts the State's argument in support of two aggravating factors. Mr. Adams suggested in his closing statement that the cold, calculated and premeditated and the avoid arrest aggravating factors do not apply to this case. Both experts testified that Mr. Sweet acted impulsively, especially when under stress or an emotional overload, and that the cold, calculated, and premeditated aggravator would not apply. His argument was unsupported by any evidence because only a mental health expert could provide the evidence necessary to explain Mr. Sweet's mental functioning to the jury. Mr. Salmon explained that this type of evidence is highly persuasive to a jury and is "the kind of evidence . . . that a jury is desperately seeking and want to have before they make their recommendation." (PCR. 1946). If the evidentiary hearing testimony of Dr. Toomer and Dr. Miller that these aggravators do not apply had been presented to the jury, in addition

to the mitigating evidence regarding Mr. Sweet's childhood and the expert testimony regarding the applicability of statutory mitigating circumstances, the balance of aggravating and mitigating factors would have resulted in a life recommendation. The circuit court erroneously denied relief on this claim without considering the mental health expert testimony which undeniably would have influenced the outcome of Mr. Sweet's penalty phase. All of this evidence that was presented at the evidentiary hearing proves Mr. Sweet's claim that his trial counsel rendered ineffective assistance and that he was denied his right to a fair adversarial testing at the penalty phase.

D. CONCLUSION.

An attorney "has a duty to conduct a reasonable investigation, including an investigation of the defendant's background, for possible mitigating evidence." Porter v. Singletary, 14 F.3d 554, 557 (11th Cir. 1994). "The failure to do so may render counsel's assistance ineffective." Baxter v. Thomas, 45 F.3d 1501, 1513 (11th Cir. 1995). The courts have recognized that an attorney may make a strategic decision to not present mitigation evidence; however, such decisions must be based on the results of a competent investigation. In Dobbs v. Turpin, 142 F.3d 1383, 1388 (11th Cir. 1998), the court rejected the notion that "a strategic decision can be reasonable when the attorney has failed to investigate his options and make a

reasonable choice between them." See also Jackson v. Herring, 42 F.3d 1350, 1367 (11th Cir. 1995)(trial counsel, who had a "small amount of information regarding possible mitigating circumstances regarding [his client's] history, but . . . inexplicably failed to follow up with further interviews and investigation" rendered constitutionally deficient performance.").

Mr. Sweet has proved that his attorney's failure to investigate and present available mitigation evidence denied him the right to the effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 686-87 (1984). This failure fell outside the range of professionally competent performance. The evidentiary hearing testimony demonstrates that Mr. Sweet has also satisfied the second prong of Strickland. Substantial mitigation evidence was available that would have resulted in a life recommendation. There was no strategic decision to not present mitigation in this case. There was, instead, a complete dereliction of duty by an inexperienced and overwhelmed attorney who utterly failed to conduct any investigation and did not even know to consult a mental health expert for assistance. As the Eleventh Circuit recognized in Blake v. Kemp, "It should be beyond cavil that an attorney who fails altogether to make any preparations for the penalty phase of a capital murder trial deprives his client of reasonably effective assistance of counsel by any objective standard of reasonableness." 758 F.2d 523, 533 (11th

Cir. 1985).

In this case, Mr. Adams admitted at the evidentiary hearing that due to his inexperience he did not recognize the mitigating evidence that was available to him and he did not investigate Mr. Sweet's background to discover what other evidence could be presented. His hearing testimony is consistent with his performance at trial: at the conclusion of the State's penalty phase evidence, Mr. Adams requested a recess so that he could check the hallway to discover what witnesses were available to testify on behalf of Mr. Sweet. Apparently, the hallway was empty and he found only Deone Sweet, who had not been prepared to testify, and, as a result, provided only a meager sample of the mitigation that the jury should have heard before deciding whether Mr. Sweet would live or die. Mr. Adams rendered ineffective assistance of counsel. Blanco v. Singletary, 943 F.2d 1477, 1501-02 (11th Cir. 1991) ("To save the difficult and time-consuming task of assembling mitigation witnesses until after the jury's verdict in the guilt phase almost insures that witnesses will not be available."). Mr. Sweet is entitled to a new penalty phase.

ARGUMENT III

THE CIRCUIT COURT ERRED IN FAILING TO CONSIDER THE CUMULATIVE EFFECT OF THE NEWLY DISCOVERED EVIDENCE OF MR. SWEET'S INNOCENCE WITH THE EVIDENCE THAT WAS NOT PRESENTED DUE TO TRIAL COUNSEL'S INEFFECTIVENESS.

The circuit court erred in failing to consider the cumulative

effect of all the evidence not presented at Mr. Sweet's trial as required by Kyles v. Whitley and this Court's precedent. Swafford v. State, 679 So. 2d 736 (Fla. 1996)(directing the circuit court to considered newly discovered evidence in conjunction with evidence introduced in the defendant's first 3.850 motion and the evidence presented at trial). In State v. Gunsby, this Court ordered a new trial in Rule 3.850 proceedings because of the cumulative effect of Brady violations, ineffective assistance of counsel and/or newly discovered evidence.

Gunsby is exactly on point here and should have been followed by the circuit court. The jury in Mr. Sweet's case was persuaded by the State's theory that Mr. Sweet intended to kill Marcene Cofer to eliminate the possibility that she would identify him as the perpetrator of a robbery and assault against her. There was no evidence implicating Mr. Sweet in that robbery and no evidence that Ms. Cofer would identify him as a suspect. In fact, on the day of the shooting in this case, Ms. Cofer was talking with a detective about the unidentified suspect in the robbery when she saw Mr. Sweet on the street outside her apartment. At that time, she did not tell the detective that he was the third man she had been previously unable to identify, indicating that Ms. Cofer did not and would not identify Mr. Sweet as the perpetrator of the robbery. This theory implicating Mr. Sweet in the murder was supplied to the police by

Dale George, thereby diverting suspicion away from himself. The only evidence supporting the State's theory was Solomon Hansbury's false testimony that Mr. Sweet made an inculpatory statement that he would have "killed them all" if he had known that he would be arrested.

As in Gunsby, where the jury was led to believe that the crime was race motivated when it later appeared to be drug related, Mr. Adams' failures and Hansbury's lies misled the jury in this case into believing this was a simple case of witness elimination that went awry. The evidence not presented at Mr. Sweet's trial presents a different picture: that this crime was either drug related or an act of domestic violence that was committed by someone other than Mr. Sweet. Just as the eyewitnesses in Gunsby appeared solid and irrefutable at trial but were later discovered to be highly impeachable, the identifying witnesses in Mr. Sweet's case could also have been impeached through the testimony of Jessie Gaskins and Anthony McNish. In addition, an alternative suspect could have been presented if Mr. Adams had pursued the information he had about Dale George. Had the circuit court examined all the evidence that was not presented at Mr. Sweet's trial, whether due to trial counsel's ineffectiveness or because it is newly discovered, it would have found that confidence in the outcome of Mr. Sweet's trial is undermined and that Mr. Sweet had proved his claim that he is innocent of first-degree murder.

ARGUMENT IV

THE CIRCUIT COURT ERRED IN DENYING MR. SWEET'S CLAIM THAT HE WAS DENIED A COMPETENT MENTAL HEALTH EVALUATION AND THAT COUNSEL WAS INEFFECTIVE FOR FAILING TO INVESTIGATE AND PROVIDE THE MENTAL HEALTH EXPERTS WITH BACKGROUND INFORMATION AND FOR FAILING TO ENSURE THAT MR. SWEET RECEIVED AN ADEQUATE COMPETENCY EVALUATION.

At counsel's request, Mr. Sweet was evaluated for competency to be tried. Dr. Ernest Miller, a psychiatrist, and Maritza Cabrera, a psychologist with a Masters Degree, examined Mr. Sweet. Dr. Miller spent one hour with Mr. Sweet and relied only on Mr. Sweet's self-report regarding his background. Because Mr. Adams did not investigate his client's background, he had no information to provide to the mental health expert to ensure that the competency report was reliable. Despite his request for a competency evaluation, Mr. Adams did not request a penalty phase expert and did not speak to Dr. Miller about the mitigating evidence contained in the competency report. Dr. Miller testified at the evidentiary hearing that a "team" of mental health experts should have been involved in this case to help prepare for and present the mitigation evidence at the penalty phase.

Because his attorney failed him, virtually none of the evidence that was presented at the postconviction hearing through the testimony of expert witnesses was revealed during Mr. Sweet's penalty phase. The evaluation that was conducted was grossly inadequate, due to trial counsel's ineffectiveness and his failure to investigate

mitigation and provide relevant information about Mr. Sweet to the court-appointed experts. Crucial statutory mitigating circumstances were not addressed. No adequate testing was performed. A cursory one-hour interview and pro forma presentation of opinion based solely on what Mr. Sweet was able to provide during this interview is all the mental health assistance Mr. Sweet received. This is inadequate and resulted in a denial of Mr. Sweet's constitutional rights. Mason v. State, 489 So. 2d 734 (Fla. 1986). See also State v. Sireci, 536 So. 2d 231 (Fla. 1988).

Dr. Miller testified that he examined Mr. Sweet for one issue only -- competency. (PCR. 2049). He explained that his examination had a limited focus and was not the same as what is required of an adequate mental health evaluation for mitigation. (PCR. 2049). Dr. Miller also testified that a mental health expert should have evaluated Mr. Sweet specifically for mitigation and that there was considerable mitigation in his background, including abandonment by his parents, neglect, alcoholism of his mother, and early drug abuse. (PCR. 2050, 2053). This information should have been presented to the jury. Dr. Toomer testified that based on Dr. Miller's competency report, the evaluation was inadequate because there is no data in the report to support the competency finding. (PCR. 1578). Dr. Toomer also testified that the report contained "red flags" that should have alerted Dr. Miller to the need for further evaluation before an

accurate diagnosis could be made. (PCR. 1579-80).

Mr. Adams admitted that he did not talk to Dr. Miller before his evaluation of Mr. Sweet. (PCR. 1804). He also did not request that a mental health expert be appointed to examine Mr. Sweet for mitigation. (PCR. 1805). Although he had school and HRS records documenting Mr. Sweet's deprived childhood, he did not provide them to Dr. Miller in order to ensure that the evaluation was based on accurate information. Although Dr. Miller's report contained information that could have been used at the penalty phase, Mr. Adams did not speak to Dr. Miller about mitigation. (PCR. 1816). He did not recognize how the available information could have been used in Mr. Sweet's defense. (PCR. 1811). He admitted that this evidence could have made a difference at Mr. Sweet's penalty phase, particularly by negating the State's evidence in support of the aggravating factors. (PCR. 1818). Mr. Adams blamed his inexperience for his many failures that deprived Mr. Sweet of a penalty phase proceeding. (PCR. 1811).

A criminal defendant is entitled to expert psychiatric assistance when the State makes his mental state relevant to guilt/innocence or sentencing. Ake v. Oklahoma, 470 U.S. 68 (1985). A defendant must have an "adequate psychiatric evaluation of [his] state of mind." Blake v. Kemp, 758 F.2d 523, 529 (11th Cir. 1985). When a defendant's mental health is at issue, counsel has a duty to

conduct proper investigation into his client's mental health background, O'Callaghan v. State, 461 So. 2d 1354 (Fla. 1984), and to assure that his client is provided a professional and professionally conducted mental health evaluation. Mason v. State, 489 So. 2d 734 (Fla. 1986); Mauldin v. Wainwright, 723 F.2d 799 (11th Cir. 1984). If there is a reasonable probability that an expert would aid in the defense and that denial of an expert's assistance would result in an unfair trial, due process is violated if the defendant is denied that assistance. The assistance of a competent mental health expert assures the defendant "a fair opportunity to present his defense" and also "enables the jury to make its most accurate determination of the truth on the issues before them." Ake, 470 U.S. at 77. See also Cowley v. Strickland, 929 F.2d 640 (11th Cir. 1991).

Mr. Adams failed to protect Mr. Sweet's due process rights. His failures under the circumstances were unreasonable and Mr. Sweet was prejudiced. The mental health professional also has a duty to protect the defendant's rights and the expert violates those rights when he fails to provide professionally adequate assistance. Mason v. State, 489 So. 2d at 736-37. Had counsel protected Mr. Sweet's right to an appropriate penalty phase mental health evaluation and made reasonable decisions about the presentation of mitigation evidence, there is a reasonable probability that the outcome of the proceedings would have been different. See Baxter v. Thomas, 45 F.3d

1501 (11th Cir. 1995); Lloyd v. Whitley, 977 F.2d 149 (5th Cir. 1992); Cunningham v. Zant, 928 F.2d 1006 (11th Cir. 1991); Middleton v. Dugger, 849 F.2d 491 (11th Cir. 1988); Magill v. Dugger, 824 F.2d 879 (11th Cir. 1988); Stephens v. Kemp, 846 F.2d 642 (11th Cir. 1988); Elledge v. Dugger, 823 F.2d 1439 (11th Cir. 1987); Blake v. Kemp, 758 F.2d 523 (11th Cir. 1985). An adequate investigation and appropriate mental health evaluation would have resulted in expert testimony supporting at least two mitigating factors and rebutting the State's evidence in support of two aggravating factors.

ARGUMENT V

THE CIRCUIT COURT ERRED IN DENYING A HEARING ON CLAIMS RELATED TO TRIAL COUNSEL'S INEFFECTIVENESS AND THE STATE'S MISCONDUCT THAT MUST BE CONSIDERED UNDER STATE V. GUNSBY FOR THEIR CUMULATIVE EFFECT ON THE OUTCOME OF MR. SWEET'S TRIAL AND PENALTY PHASE.

Mr. Sweet's Motion to Vacate raised several different claims supporting his argument that his trial counsel was ineffective, but he was granted a hearing only on the issue of counsel's failure to investigate other suspects. The circuit court erred in attempting to compartmentalize Mr. Sweet's ineffective assistance of counsel claim by granting a hearing only on a limited aspect of the claim. The circuit court also denied any hearing Mr. Sweet's claims regarding the State's misconduct. Mr. Sweet also raised several claims challenging the fairness of his penalty phase that should have been considered with the claim that his attorney was ineffective for

failing to present mitigation evidence. The denial of a hearing on these claims, which are related to the limited claims that were the subject of the hearing, was error because State v. Gunsby and this Court's precedent requires that the circuit court consider the cumulative effect of trial counsel's errors and the State's misconduct in order to determine whether confidence in the outcome of the trial and penalty phase are undermined.

Mr. Sweet's claim that Mr. Adams was ineffective was presented in three broad categories: failure to conduct an adequate pre-trial investigation and preparation of the case; failure to investigate and present evidence of other suspects; and failure to properly impeach the State's witnesses Marcine Cofer and Solomon Hansbury. The circuit court granted a hearing only on the claim regarding the investigation of other suspects. Mr. Sweet demonstrated that two months after being appointed, Mr. Adams told the court that he was not prepared for trial and had not had time to talk to any witnesses. (R. 60-61). Two months later, Mr. Adams still did not have any witnesses and told the court he did not yet have a theory of the case: "I can't tell you what I'm going to argue in this case either if you ask me today nor can I tell you how I am going to address my opening statement or my closing statement." (R. 136). He admitted that serious health problems interfered with his ability to prepare for trial. (R. 145-46).

As a result of Mr. Adams' failure to prepare for trial, he failed to conduct an adequate voir dire, presented a weak closing argument that was repeatedly interrupted by objections that were sustained; failed to object to improper comment and inflammatory evidence. In regard to his failure to properly impeach the State's witnesses, Mr. Sweet has demonstrated that Mr. Adams had valuable information that he simply failed to use to Mr. Sweet's benefit. He failed to cross-examine Marcene Cofer regarding her drug use to cast doubt on her ability to accurately recall what she observed on the night of the shooting. Mr. Adams was also ineffective for failing to investigate the possibility that Ms. Cofer received a deal from the State in exchange for her testimony. In regard to Solomon Hansbury, the State prevented Mr. Adams from questioning him about a pending burglary charge as a result of his failure to effectively argue against the motion. This is valuable impeachment evidence that the jury was entitled to know.

Mr. Sweet's motion to vacate presented additional examples of Mr. Adams' ineffectiveness that should have been considered in conjunction with his failure to investigate other suspects. Mr. Adams failed to adequately object when it was discovered that jurors were subject to outside influences that encouraged them to conclude that Mr. Sweet was guilty. Mr. Sweet was denied his right to trial by a fair and impartial jury, and Mr. Adams was ineffective for

failing to protect this right. Mr. Adams was also ineffective for failing to object to improperly vague aggravating factors that violated Mr. Sweet's eighth amendment rights, including the avoid arrest, felony murder, and cold, calculated and premeditated aggravators. Mr. Adams was also ineffective for failing to ensure that Mr. Sweet was present for all critical stages of his trial and penalty phase. (R. 145, 152, 309, 367, 607). He was also ineffective for not objecting to inaccurate jury instructions regarding the role of mercy in the jury's deliberations and for not requesting a special jury instruction that could have properly informed the jury. Mr. Adams was ineffective for failing to effectively argue against jury instructions that shifted the burden of proving that life was an appropriate sentence to the defense and instructions that unconstitutionally diluted the jury's understanding of its role in sentencing.

These claims regarding trial counsel's ineffectiveness should also have been considered in conjunction with Mr. Sweet's claim regarding the State's misconduct. The Jacksonville Sheriff's Office destroyed the evidence in this case, thereby denying Mr. Sweet the opportunity to confront the evidence against him. Mr. Sweet has been denied his right to have this evidence independently tested to develop evidence that may further support his claim that he is innocent of this crime. The State has offered no explanation for why

this evidence was destroyed before Mr. Sweet's case was closed.

The State also denied Mr. Sweet his right to a fair adversarial testing when the State Attorney exceeding the bounds of proper argument throughout Mr. Sweet's trial and penalty phase. Mr. Adams was also ineffective for failing to object to inflammatory and misleading argument, thereby failing to protect Mr. Sweet's right to a fair trial. During a pretrial hearing on the State's motion to exclude evidence of Marcene Cofer's drug usage, the State misled the court when asked directly whether there was any evidence that Ms. Cofer was a drug user or was selling drugs. The State responded that the only evidence was "street word." The State was aware of Ms. Cofer's drug activity, based on more reliable sources than "street word," and intentionally misled the court and Mr. Adams about this information. Whether due to the State's misconduct or trial counsel's ineffectiveness, this information was not properly investigated or presented to the jury; as a result, no adversarial testing of the State's evidence occurred.

The State also presented improper argument during the penalty phase when it told the jury that it could not consider mercy or sympathy when making its sentencing recommendation. Mr. Adams was ineffective for failing to object. Apparently, due to his inexperience and failure to educate himself on death penalty law, he did not know that sympathy or mercy based on mitigating circumstances

is permissible. Wilson v. Kemp, 777 F.2d 621, 624 (11th Cir. 1985). As a result, Mr. Sweet's death sentence violates the eighth and fourteenth amendments.

The State improperly relied on nonstatutory aggravating circumstances when arguing for a death sentence in violation of Mr. Sweet's eighth amendment rights. The focus of the State's argument was that Mr. Sweet should be sentenced to death because he shot the other people in the apartment (other than Ms. Cofer) for "the pure meanness of it," because he was rude to Ms. Cofer on an earlier date, because he may have known that there were children in the apartment, because he was "street tough and street smart," because "assaults in the home are easier to conceal and more difficult to detect," because Ms. Cofer had done "nothing to deserve this attempted murder," and because as a juvenile Mr. Sweet had the benefit of some HRS programs. (R. 400-08, 1256-64). All of these arguments constitute nonstatutory aggravating circumstances that improperly persuaded the jury to recommend a death sentence. Mr. Sweet's eighth amendment rights were violated because the jury's sentencing discretion was not narrowly guided. Stringer v. Black, 503 U.S. 222 (1992); Maynard v. Cartwright, 486 U.S. 356 (1988). As a result, Mr. Sweet's death sentence was based on an "unguided emotional response" rather than a rational consideration of the evidence. Penry v. Lynaugh, 488 U.S. 74 (1989). Mr. Adams was ineffective for failing to object to

improper evidence and argument. As a result of the combined effect of the State's misconduct and counsel's ineffectiveness, confidence in the outcome of Mr. Sweet's penalty phase is undermined.

Mr. Sweet was also denied a fair sentencing proceeding by actions of the trial judge. Despite the presentation of evidence supporting several mitigating circumstances, the trial judge found no statutory and only one nonstatutory mitigating factor (that Mr. Sweet lacked parental guidance). It is a fundamental principle of death penalty jurisprudence that a defendant's character and background must be considered in determining the appropriateness of a death sentence. Lockett v. Ohio, 438 U.S. 586 (1978); Eddings v. Oklahoma, 455 U.S. 104 (1982); Hitchcock v. Dugger, 481 U.S. 383 (1987); Woodson v. North Carolina, 428 U.S. 280 (1976).

The nonstatutory mitigation that was presented in this case has been recognized by this Court and has been relied upon to reduce sentences to life imprisonment. These factors include the following: (1) organic brain damage, Carter v. State, 560 So. 2d 1166 (Fla. 1990); Sireci v. State, 587 So. 2d 450 (Fla. 1991); (2) broken home, Brown v. State, 526 So. 2d 903 (Fla. 1988); (3) difficult and impoverished background, Robinson v. State, 520 So. 2d 1 (Fla. 1988); Savage v. State, 588 So. 2d 975 (Fla. 1991); Thomas v. State, 618 So. 2d 155 (Fla. 1993); (4) potential for rehabilitation, McCray v. State, 582 So. 2d 613 (Fla. 1991); Carter; Nibert v. State, 547 So.

2d 1059 (Fla. 1990); Harris v. State, 532 So. 2d 1051 (Fla. 1988); Brown; (5) positive traits, McC Campbell v. State, 421 So. 2d 1072 (Fla. 1982); (6) drug abuse problems, Kramer v. State, 619 So. 2d 274 (Fla. 1993); Foster v. State, 614 So. 2d 455 (Fla. 1993); McKinney v. State, 579 So. 2d 1993 (Fla. 1991); Downs v. State, 574 So. 2d 1095 (Fla. 1991); Carter v. State; Buford v. State, 570 So. 2d 923 (Fla. 1990); (7) alcohol abuse, Kramer; Foster; McKinney; Downs; Buford; (8) potential to contribute to society, Harmon v. State, 527 So. 2d 182 (Fla. 1988); (9) acceptable behavior at trial, Parker v. State, 476 So. 2d 134 (Fla. 1985); (10) emotional disturbance or instability, Street v. State, 636 So. 2d 1297 (Fla. 1994); Gorby v. State, 630 So. 2d 544 (Fla. 1993); Foster; Cheshire v. State, 568 So. 2d 908 (Fla. 1990); Koenig v. State, 597 So. 2d 256 (Fla. 1992); (11) personality change from drugs, White v. State, 616 So. 2d 21 (Fla. 1993); (12) mother was an alcoholic, Klokoc v. State, 589 So. 2d 219 (Fla. 1991); Morgan v. State, 537 So. 2d 973 (Fla. 1989). The trial judge erred when he ignored evidence which has been recognized by this Court as sufficient to support a life sentence, and trial counsel failed to effectively use this evidence to argue in favor of a life sentence. The circuit court erred in denying a hearing on this claim which should have been considered in conjunction with the claim regarding the ineffective assistance of penalty phase counsel.

Mr. Sweet was also denied his right to a fair sentencing

hearing because the jury was instructed on unconstitutionally vague aggravating factors. The circuit court erred in denying a hearing on these claims so that they could be considered in conjunction with Mr. Sweet's other penalty phase claims to determine the cumulative effect of these errors on the outcome of his trial.

The circuit court also denied a hearing of Mr. Sweet's claims regarding the State's misconduct. These claims should have been considered in conjunction with the claims regarding trial counsel's ineffectiveness. The circuit court's failure to consider the cumulative effect of counsel's errors and the State's misconduct renders the court's analysis of Mr. Sweet's claims unreliable and unworthy of deference by this Court.

The circuit court erred because a consideration of only one aspect of an ineffectiveness claim without giving Mr. Sweet the opportunity to present evidence on all aspects of his trial counsel's ineffectiveness and the State's misconduct denied him the opportunity to fully prove that confidence in the outcome of his trial is undermined. Consideration of only one aspect of counsel's ineffectiveness is insufficient and resulted in an unreliable conclusion by the circuit court that Mr. Adams was not ineffective.

ARGUMENT VI

MR. SWEET CANNOT MEANINGFULLY RAISE HIS CLAIMS IN THIS APPEAL BECAUSE THE RECORD ON APPEAL IS INCOMPLETE DUE TO ERRORS IN THE TRANSCRIPT OF THE EVIDENTIARY HEARING DURING CRUCIAL TESTIMONY BY MR. SWEET'S MENTAL HEALTH EXPERT.

Meaningful appellate review requires absolute confidence in the completeness and accuracy of the record on appeal. The appeal of any criminal case requires that an accurate transcript and record will be provided counsel, appellant, and the appellate court. Mayer v. Chicago, 404 U.S. 189, 195 (1971)("State must provide a full verbatim record where that is necessary to assure the indigent as effective an appeal as would be available to the defendant with the resources to pay his own way."); Entsminger v. Iowa, 386 U.S. 748, 752 (1967)("Here there is no question but that petitioner was precluded from obtaining a complete and effective appellate review of his conviction by the operation of the clerk's transcript procedure."). Eighth Amendment considerations require even greater precautions in a capital case. See Penry v. Lynaugh, 488 U.S. 74 (1989); Eddings v. Oklahoma, 455 U.S. 104 (1982); Lockett v. Ohio, 438 U.S. 586 (1978); Woodson v. North Carolina, 428 U.S. 280 (1976); Proffitt v. Florida, 428 U.S. 242 (1976); Gregg v. Georgia, 428 U.S. 153 (1976); Furman v. Georgia, 408 U.S. 238 (1972).

The transcript of the evidentiary hearing is incomplete. Dr. Toomer was being questioned by postconviction counsel about the aggravating and mitigating circumstances. There is an entire page of

testimony that was not transcribed. (PCR. 1594-95). This testimony is necessary to Mr. Sweet's appeal because it concerns the crucial issue of which mitigating and aggravating circumstances apply to Mr. Sweet's case. At another point, Dr. Toomer was testifying on cross-examination. The State was attempting to impeach him by demonstrating his bias against capital punishment. Dr. Toomer had just testified that he had never testified on behalf of the State in a capital proceeding. He then sought to explain his testimony. Again, there is an error in the transcript and the testimony is missing. (PCR. 1601). The next line of transcript is the end of a question, "defendant's No. 2 in evidence --." (PCR. 1602). There is no way for counsel or this Court to determine how much testimony is missing.

Florida law requires that in capital cases this Court review "the entire record." Fla. Stat. 921.141(4). In capital cases, the chief circuit judge is required to "monitor the preparation of the complete record for timely filing in the Supreme Court." Fla.R.App.P. 9.140(b)(4). Critical portions of the proceedings are currently unavailable to this Court. Mr. Sweet is being denied his right to appeal because this Court's review cannot be constitutionally complete. Parker v. Dugger, 498 U.S. 308 (1991). This is not the first time that Mr. Sweet's counsel has encountered problems with the record on appeal to this Court. He was denied a proper direct appeal

before this Court because the record on direct appeal was incomplete. Mr. Sweet raised this claim in his motion to vacate, and the circuit court erred in denying a hearing or relief on this claim.

CONCLUSION

Based on the foregoing argument and authority, this Court must conclude that Mr. Sweet is entitled to relief or at a minimum a remand for further evidentiary development.

I HEREBY CERTIFY that a true copy of the foregoing Initial Brief has been furnished by United States Mail, first class postage prepaid, to all counsel of record on this 5th day of February, 2001.

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