IN THE SUPREME COURT OF FLORIDA

CASE NO. SC19-195

WILLIAM EARL SWEET,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT OF THE FOURTH JUDICIAL CIRCUIT FOR DUVAL COUNTY, STATE OF FLORIDA
Lower Tribunal No. 1991-CF-2899

INITIAL BRIEF OF APPELLANT

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REQUEST FOR ORAL ARGUMENT

This is an appeal of the circuit court's denial of William Earl Sweet's Eighth Successive Motion to Vacate Judgments of Conviction and Sentence brought pursuant to Florida Rule of Criminal Procedure 3.851. Given that this case involves an innocent man on death row for more than a quarter century and serious flaws in the machinery of the justice system, Mr. Sweet requests this Court grant oral argument.

STATEMENT OF THE CASE AND OF THE FACTS

William Sweet has lived in solitary confinement on Florida's death row since 1991 – nearly thirty years. He is innocent of capital murder. Mr. Sweet's trial lawyers were a notorious alcoholic teamed with a civil rights lawyer who was later disbarred. Neither had any capital trial experience. During trial, there was no physical evidence, weapons, bullets, DNA, blood, or hair introduced to tie Mr. Sweet to the crime scene. Since 1991, every witness against him has recanted except a twelve year old girl. Solomon Hansbury, who fabricated the jailhouse confession used to convict Mr. Sweet, explained that prosecutors showed him articles in the Florida Times Union to create his false testimony. There have been twenty different lawyers representing Mr. Sweet over the past twenty-nine years. Some were post-conviction lawyers so ineffective that they failed to timely file Mr. Sweet's federal habeas claims. Others were so self-enriching that they repeatedly moved for and received fees to investigate, research, and file a *Giglio*[1] claim based on prosecutorial misconduct that was never actually filed. As a poor, urban alumnus of the infamous Dozier School for Boys who barely survived childhood meningitis, Sweet was condemned because he was represented by incompetent lawyers and repeated systemic failures in the justice system.

a. Statement of Facts - Trial Proceedings

On June 28, 1990, merely one day after the fatal shooting in the urban morass

[1] *Giglio v. United States*, 405 U.S. 150 (1972).

of Jacksonville's Springfield neighborhood, William Earl Sweet was arrested for one count of first degree murder, three counts of attempted murder, and one count of burglary with an assault or battery.[2] A jury trial began on May 20, 1991. There was no physical evidence tying Mr. Sweet to the crime scene. The State's case was based solely on circumstantial evidence and dubious eyewitness testimony. Even the trial judge remarked that, "obviously credibility of the witnesses is going to play a very big part in this trial." R2/478. [3] *See Sweet v. State*, 624 So. 2d 1138, 1139 (Fla. 1993) (this Court affirmed Sweet's conviction without reference to any physical evidence or facts other than eyewitness accounts). The murder weapon was never recovered. There were no fingerprints, no hair, no blood, no DNA, nor any specific ballistics evidence that tied Sweet to the crime scene in the early morning hours of June 27, 1990. Although witnesses testified that the shooter wore a ski mask or that his face

[2] The facts of Mr. Sweet's convictions and sentences are discussed in this Court's opinion on direct appeal at *Sweet v. State*, 624 So. 2d 1138 (Fla. 1993).

[3] The transcript of the guilt phase trial consists of six volumes, consecutively numbered 1 through 1177. Page references to the record on direct appeal are designated with R[volume number]/[page no]. The record on appeal pertaining to Mr. Sweet's First Motion to Vacate Judgments of Conviction and Sentence, filed on August 1, 1995, and subsequent evidentiary hearing on January 25-28, 1999, comprises eleven volumes. Citations to the first post-conviction record on appeal will be cited as PC[volume number]/[page number]. The record of appeal for Mr. Sweet's Sixth Motion is one volume. Citations to this record on appeal will be cited as TM6/[page number]. Finally, the record of appeal for the Eighth Motion is also in three consecutively paginated volumes and will be cited as TM8/[page number].

was obscured by dark clothing, none of these items were ever found in Sweet's possession or recovered during the investigation.

The jury found Mr. Sweet, who was represented by lawyers without any capital trial experience, guilty on all charges. R6/1170; R10/1780. There were three witnesses whose testimony sealed Mr. Sweet's guilty verdict: 1) Marcene Cofer, the only adult eyewitness and a victim of the shooting; 2) Sharon Bryant,[4] the twelve-year old eyewitness and victim; and, 3) Solomon Hansbury, who falsely testified to Mr. Sweet's "jailhouse confession" and later recanted his testimony during the first post-conviction hearing. *See Sweet v. State*, 810 So. 2d 854, 867 (Fla. 2002). After a penalty phase presentation including a sole, unprepared witness, the jury recommended death by a vote of ten to two on June 4, 1991. R/1278. The court imposed Mr. Sweet's death sentence on August 30, 1991. Mr. Sweet's judgment and sentence were affirmed on appeal.[5] *Sweet v. State*, 624 So. 2d 1138 (Fla. 1993), *cert.*

[4] Miss Bryant was twelve years old at the time of the shooting and thirteen years old when she testified at trial. R3/609.

[5] Mr. Sweet raised the following issues on direct appeal: 1) the court erred when it failed to grant Sweet's personal request to go to trial and when it failed to adequately inquire whether he wanted to represent himself; 2) the court erred in admitting evidence Cofer had been robbed three weeks before the murder and that Sweet may have participated in that crime; 3) the court erred in finding the murder was committed in a cold, calculated and premediated manner; 4) the court erred in finding the murder was committed for the purpose of avoiding or preventing a lawful arrest; 5) the court erred in finding the prior violent felony aggravator; and 6) the court erred imposing four fifteen year minimum mandatory sentences.

denied, 510 U.S. 1170 (1994).

Constitutional protections afforded to Mr. Sweet in 1991 would be significantly expanded today. The ABA did not publish the landmark *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* until more than a decade after Mr. Sweet was convicted. 31 Hofstra L. Rev. 913, 914 (2003). The *Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases* were not published until five years later. 36 Hofstra L. Rev. 763 (2008). The ABA had not even published the precursor policy paper to these standards until 1996. ABA, *Report Regarding Implementation of the American Bar Association's Recommendations and Resolutions Concerning the Death Penalty and Calling for a Moratorium on Executions*, 4 Geo. J. on Fighting Poverty 3 (1996).

In 1991 when Mr. Sweet was sentenced to death, Florida executed people with intellectual disabilities and juveniles. *See Atkins v. Virginia*, 536 U.S. 304 (2002) (barring execution of the mentally retarded); *Roper v. Simons*, 543 U.S. 551 (2005) (outlawing execution of juveniles). A failure to obtain funds for investigators and experts was not considered ineffective assistance of counsel. *Hinton v. Alabama,* 571 U.S. 263, 274 (2014) (trial attorney's failure to request additional funding in order to replace an inadequate investigator constituted deficient performance). None of the modern Sixth Amendment jury guarantees for capital defendants were in place.

Hurst v. Florida, 136 S. Ct. 616 (2016) (advisory jury barred by Sixth Amendment); *Ring v. Arizona*, 536 U.S. 584 (2002) (Sixth Amendment right to jury in capital sentencing); *Hurst v. State*, 202 So. 3d 40 (2016) (unanimous jury required for capital sentencing under Florida law). *See* John D. Bessler, *Tinkering Around the Edges: The Supreme Court's Death Penalty Jurisprudence*, 49 Am. Crim. L. Rev. 1913, 1941-42 (2013) ("For the time being, the gears of America's badly broken machinery of death grind on. The facts, though, unmistakably show that the death penalty is 'cruel and unusual' in both a legal and factual sense. Not only is the system riddled with error and discrimination, but executions fly in the face of what the Supreme Court itself says the Eighth Amendment is designed to do").

b. Statement of Facts - Previous Post-Conviction Proceedings

On August 1, 1995, Mr. Sweet timely filed his first post-conviction motion. An Amended Motion to Vacate Judgments of Convictions and Sentences was later filed on June 30, 1997 (the "First Motion"). He raised twenty-eight claims for relief.[6]

[6] Mr. Sweet's First Motion argued: 1) Access to the file and records pertaining to Sweet's case in the possession of certain State agencies were withheld in violation of constitutional rights; 2) Requiring Sweet to file a motion under Rule 3.850 one year after his final conviction violated his rights of due process and equal protection; 3) Sweet's sentences rest upon an unconstitutionally automatic aggravating circumstance; 4) The avoiding arrest aggravating factor was improperly applied and the jury received inadequate instructions; 5) The CCP aggravating instruction failed to limit the jury's consideration and was not supported by the evidence; 6) Sweet's right to due process, equal protection, and

an adversarial testing were violated by the Duval County Sheriff's Department's illegal destruction of evidence; 7) Sweet was denied the effective assistance of counsel at the guilt phase as counsel failed to adequately investigate and prepare a defense or challenge the State's case; 8) Sweet's trial counsel was ineffective in the penalty phase by failing to investigate and present available mitigating evidence and this failure rendered Sweet's waiver of mitigating evidence involuntary; 9) Sweet was denied his right to a fair trial before an impartial jury because of improper influences on the jurors during trial; 10) The jury's death recommendations were tainted by consideration of invalid aggravating circumstances; 11) The rules prohibiting Sweet's lawyers from interviewing jurors to determine if constitutional error was present violated his constitutional rights and denied Sweet adequate assistance of counsel; 12) Sweet is innocent of first degree murder and innocent of the death sentence; 13) Sweet's absence from critical stages of the proceedings prejudiced his guilt and penalty phases; 14) Prosecutorial argument and inadequate jury instructions misled the jury regarding its ability to exercise mercy and sympathy and deprived Sweet of a reliable and individualized capital sentencing determination and Sweet's counsel was ineffective for not proposing that the jury be instructed on mercy and for not objecting to the improper prosecutorial argument; 15) Sweet cannot meaningfully petition for review under Rule 3.850 and is denied effective assistance of counsel since the record on appeal is incomplete; 16) Sweet was denied a proper direct appeal due to the omissions in the record; 17) Sweet's trial court proceedings were fraught with procedural and substantive errors which cannot be harmless when viewed as a whole since the combination of errors deprived him of the fundamentally fair trial; 18) Sweet's penalty phase jury instructions improperly shifted the burden to Sweet to prove that death was inappropriate and the judge employed this improper standard in sentencing; 19) The State's use of misleading testimony and improper argument violated Sweet's constitutional rights and his counsel was ineffective for not objecting; 20) The use of contemporaneous acts to support the finding of the prior violent felony violated Sweet's constitutional rights; 21) The State failed to prove that Sweet knowingly created a great risk of death to many persons; 22) Sweet's sentence of death was based upon an unconstitutionally obtained prior conviction; 23) Florida's capital sentencing statute is unconstitutional on its face and as applied for failing to prevent the arbitrary and capricious imposition of the death penalty and for violating the constitutional guarantee prohibiting cruel and unusual punishment; 24) Sweet was denied a reliable sentencing because the judge refused to find the existence of

The trial court granted an evidentiary hearing on four of the twenty-eight claims, including Claim 7(b) that trial counsel failed to investigate and present evidence to the jury of other suspects. PC4/605-06. The evidentiary hearing on the First Motion was held on January 25-28, 1999. The trial court denied all claims in a written order dated March 30, 2000 and it was affirmed on January 31, 2002. *Sweet v. State*, 810 So. 2d 854 (Fla. 2002). The claims in the First Motion never enjoyed federal habeas corpus review as Mr. Sweet's post-conviction attorney miscalculated the filing deadline. *See* Order of Dismissal with Prejudice, *Sweet v. Crosby*, Case No. 3:03-cv-844 (M.D. Fla. August 8, 2005).

During the evidentiary hearing on the First Motion, it came to light that Mr. Sweet's capital trial counsel, Charlie Adams, had never represented a client facing the death penalty. PC9/1765. Mr. Adams suffered "health problems" throughout his representation, which were later revealed to be a debilitating alcohol addiction.

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mitigation established by the evidence in the record; 25) The introduction of non-statutory aggravating factors and the State's argument upon these factors rendered Sweet's death sentence fundamentally unfair and unreliable; 26) Sweet's sentencing jury was misled by comments and instructions which unconstitutionally diluted its sense of responsibility; 27) Sweet was denied the effective assistance of counsel in that counsel failed to provide mental health experts with available information which the experts needed to make an accurate competency determination, counsel failed to request the appointment of a confidential defense expert, and the State withheld exculpatory information needed to reach such a determination; and 28) The mental health experts who evaluated Sweet for competency did not render adequate assistance as required by *Ake v. Oklahoma*.

PC10/1777. Adams repeatedly filed pretrial motions in Sweet's case in the name of an unrelated man named Walter Martin. TM8/333-337.

Lindsey Moore, second chair counsel who joined Mr. Sweet's case fifty days before jury selection, worked primarily in federal civil litigation and had no capital experience. PC8/1454. Moore believes that Adams was "burdened by the work that he had" and asked him to cross examine two to three witnesses. PC8/1455. "Beyond cross examining the witnesses," Moore did not feel he was competent and qualified to do what Adams asked him to do. PC8/1468-69. Yet Moore was given the important responsibility of preparing the mitigation phase and questioned the only mitigation witness without even meeting her.[7] R8/1463-64.

Adams' theory of defense was that "[Sweet] didn't do it," specifically noting that the case was one of misidentification. PC10/1783. He agreed that any evidence of other potential suspects would have been helpful to the defense. PC10/1785. Charles Abner, a private investigator hired by Adams for $300-$500, worked on Mr.

[7] Moore testified that he did not obtain school, mental health, medical, foster care, or juvenile justice records to prepare for the mitigation phase. R8/1462. Even more shocking, Moore testified he was completely unprepared to present mitigation testimony on Mr. Sweet's behalf. R8/1463-64. Moore met the sole mitigation witness, Deonne Sweet, the day of the penalty phase trial, never speaking with her prior nor preparing any testimony. *Id.* Rather, Moore "played it by ear" in determining what questions to ask. *Id.* Moore was subsequently disbarred. R8/1469.

Sweet's capital case "[p]robably off and on about a week-and-a-half" to find additional witnesses. PC8/1438-41. This was the first time Adams ever utilized an investigator in any of his cases. PC9/1768. Mr. Abner "didn't accomplish a whole lot at the time" because investigating a capital case like this one would, at a minimum, cost $5000 to $6000 in fees. PC8/1439, 1441. *See generally Hinton v. Alabama,* 571 U.S. 263, 274 (2014) (trial attorney's failure to request additional funding in order to replace an inadequate investigator constituted deficient performance under *Strickland v. Washington*, 466 U.S. 668 (1984)).

Despite a lack of investigative resources, Adams proffered one exculpatory witness, Marcene Cofer's cousin, Anthony McNish. PC10/1788. Mr. McNish was listed as a defense witness and deposed by the State but he did not appear at trial. R5/997-1002. Mr. McNish eventually testified at the post-conviction hearing that he saw three people by Ms. Cofer's apartment in the early morning hours of June 27, 1990 and none of the three men were built or walked like Sweet. R5/997-98.

Mr. Sweet filed seven additional post-conviction motions over nearly three decades, with more than twenty different lawyers representing him, including: 1) Defendant's Second Successive Motion to Vacate Judgments of Convictions and Sentences (raising claims related to *Ring v. Arizona*, 536 U.S. 584 (2002)); 2) Defendant's Third Successive Motion to Vacate Judgments of Convictions and

Sentences (raising claims pertaining to *Crawford v. Washington*, 451 U.S. 36 (2004)); 3) Defendant's Fourth Successive Motion for Post-Conviction Relief (arguing that his death sentence was obtained in violation of Florida Rule of Criminal Procedure 3.190(a) and *Furman v. Georgia*, 404 U.S. 238 (1972)); 4) Defendant's Fifth Successive Motion to Vacate Judgments of Convictions and Sentence (relying on *Martinez v. Ryan*, 566 U.S. 1 (2012)); 5) Pro Se Motion to Vacate Conviction and Sentence of Death Based Upon Newly Discovered Evidence, (based on recanting State's witness Marcene Cofer); 6) Defendant's Sixth Successive Motion to Vacate Judgments of Conviction and Sentence (based on the newly discovered exculpatory evidence by eyewitnesses Marcene Cofer and Eric Wilridge); and 7) Defendant's Seventh Successive Motion to Vacate Judgments of Conviction and Sentence (based on *Hurst*). All of these motions were denied.

During discovery conducted for the Sixth Motion, Marcene Cofer, the only adult eyewitness to the crime for which Sweet has served close to three decades on death row as an innocent man, unambiguously stated under oath that Tommy Williams, the father of one of her sister's children, shot her in 1990. T6/263-64, 290-91. At the hearing on the motion, Ms. Cofer, the State's star witness at trial, explained she does not, "want Earl Sweet to die on death row and he wasn't the one that pulled that trigger." T6/562. After post-conviction proceedings, the only

remaining testimony or evidence against Sweet, an innocent man, is the testimony of a girl who was twelve years old at the time of the shooting.

c. Statement of the Facts - Eighth Successive Motion to Vacate Judgments of Conviction and Sentence

By 2009, post-conviction counsel learned that the State provided newspaper accounts of the crime to shore up the testimony of Solomon Hansbury, the jailhouse informant who sealed Mr. Sweet's death verdict. Post-conviction counsel Frank Tassone was provided funds for further investigation of a *Giglio* claim - but he never filed it. TM8/481-561. Mr. Sweet is constitutionally entitled to a fair hearing on his claims.

Mr. Sweet has had more than twenty lawyers from four different state agencies assigned to his case in three decades on death row. *See* TM8/339 (Attorney Roulette Wheel for William Sweet). The phenomenon of inconsistent and underfunded counsel was discussed by the Florida Supreme Court, which called Florida's past approach to provision of post-conviction counsel a "hodge-podge" because lawyers have, "come and gone in a haphazard fashion." *Arbelaz v. Butterworth*, 738 So. 2d 326, 329 (Fla. 1999) (Anstead, J. & Kogan, S.J. concurring). Justice Anstead tied the "uncertainty and unevenness of representation" to "consequent doubt and lack of confidence in the outcome" of death penalty cases. *Id*. at 329-30.

Throughout the 1990s, Florida's post-conviction representation was hampered by lack of funding. *See, e.g.*, *Hoffman v. Haddock*, 695 So. 2d 682, 684 (Fla. 1997) (by Spring 1997, CCR's ten year history of underfunding culminated in no remaining funds for witnesses, costs, transportation or lodging). Lack of funding and incompetent representation have publicly dogged Florida's capital sentencing scheme for decades. *Hill v. Butterworth*, 941 F. Supp. 1129 (N.D. Fla. 1996, *rev'd on other grounds*, *Hill v. Butterworth*, 147 F.3d 1333, 1142 (11th Cir. 1998) (finding Florida lacked competency standards for post-conviction counsel); Report of the Supreme Court Committee on Post-Conviction Relief in Capital Cases (May 31, 1991); Robert L. Shevin, Study of the Capital Collateral Representative (February 26, 1996) (detailing funding and staffing shortages at the CCR). These deficits of funding and competent representation continued through the first decade of the new millennium. *Lugo v. Secretary*, 750 F. 3d 1198, 1212-13 (11th Cir. 2014) (finding "cause for concern" that counsel in eight percent of Florida death-row cases failed to meet federal filing deadlines). The extreme inadequacy of post-conviction counsel denied Mr. Sweet the right to federal habeas corpus review and its attendant protections against the malfunctions of Florida's criminal justice system. *Id*. at 1217-1218 (Martin, J. concurring) ("it is simply arbitrary . . . to allow some capital defendants to get federal habeas review (because their court-appointed attorneys

appreciate the significance of AEDPA's statute of limitations) while others do not.") Post-conviction counsel's errors and omissions have left an innocent man on death row for close to three decades. Mr. Sweet earned his death sentence in a time-honored fashion: ineffective assistance of his trial and post-conviction lawyers. Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 Y. L. J. 1835 (1994).

Mr. Sweet repeatedly requested, chided, and prodded his post-conviction lawyers to investigate and present his claims. TM8/341-480. His registry post-conviction counsel, Frank Tassone, filed more than twenty motions for attorney fees and investigative expenses, but never filed motions regarding newly discovered evidence, Marcene Cofer's recantation, or Solomon Hansbury's fabrications, despite stating he intended to file a claim on Hansbury as early as 2009. TM8/479-480. The only method available to Mr. Sweet to challenge his unjust confinement and ineffective post-conviction representation was a series of letters and *pro se* motions. TM8/481-561. Ironically, Mr. Sweet's motions were routinely denied on the basis that he was provided competent counsel under Florida's scheme.[8]

On April 24, 2018, Mr. Sweet filed his Eighth Successive Motion to Vacate

[8] *See Sweet v. Crosby*, No. 3:03-cv-00844 (M.D. Fla. filed October 1. 2003); *State v. Sweet*, No. 91-2899-CF (Duval County 1990).

Judgments of Conviction and Sentence, including claims of ineffective assistance of trial and post-conviction counsel, spoliation of evidence, and actual innocence. TM8/291. While the 3.851 motion was pending, the circuit court abused discretion by denying Mr. Sweet's request for the production of secret, illegal, garage files held by State Attorney Bernie de la Rionda pursuant to Rule 3.852(i). TM8/192. The circuit court denied all of Mr. Sweet's claims without a hearing on January 7, 2019. *Id*.

This appeal invokes the examination of the adequacy of Florida procedures to address death row exonerations. Duval County has never had a death row exoneration despite being the originating county in twenty-five percent of Florida's death sentences. TM8/106. In the absence of any physical evidence, blood, bullets, guns, or DNA and the recantation of every adult witness, how can Mr. Sweet establish his innocence of capital murder? It is procedural bars, rather than those made of tempered steel, that unfairly confine Mr. Sweet due to the poor performance of his counsel at every stage of the legal process.

JURISDICTION

This is a timely appeal from the trial court's final order denying a successive motion for post-conviction relief from a judgment and sentence of death. Fla. R. Crim. P. 3.851(k). This Court has plenary jurisdiction over death penalty cases. Fla. Const. Art. V, § 3(b)(1); *Orange County v. Williams*, 702 So. 2d 1245 (Fla. 1997).

STANDARD OF REVIEW

This Court employs a mixed standard of review in post-conviction matters, deferring to the circuit court's factual findings that are supported by competent, substantial evidence, but reviewing legal conclusions de novo. *King v. State*, 211 So. 3d 866, 880 (Fla. 2017); *Rodgers v. State*, 113 So. 3d 761, 767 (Fla. 2013); *Sochor v. State*, 883 So. 2d 766, 772 (Fla. 2004). "**Despite this deference to a trial court's findings of fact, the appellate court's obligation to independently review mixed questions of fact and law of constitutional magnitude is also an extremely important appellate principle**." *Stephens v. State*, 748 So. 2d 1028, 1034 (Fla. 1999).

SUMMARY OF THE ARGUMENTS

Mr. Sweet is an innocent man who has languished on death row for close to thirty years. It is a violation of due process, proportionality, and every protection provided to the innocent in the state and federal constitutions to impose a death sentence based solely on the testimony of a twelve year old child. *See House v. Bell*, 547 U.S. 518, 536-37 (2006) (comity and finality must yield to the imperative of correcting a fundamentally unjust incarceration on *habeas corpus* review); *Souter v. Jones*, 395 F.3d 577, 592 (6th Cir. 2005) (considering changed testimony as "new evidence" which "chips away" at slim circumstantial evidence supporting conviction). *See also Schlup v. Delo*, 513 U.S. 298 (1995). Added to all of the new evidence, recanting witnesses, incompetent lawyers, and unfair hearings, is a discovery that Mr. Sweet's primary trial counsel kept a bottle of rum in his bottom drawer and was drunk throughout the investigation and trial of Mr. Sweet's capital case. Next, by 2009, post-conviction counsel learned that the State provided newspaper accounts of the crime to shore up the testimony of Solomon Hansbury, the jailhouse informant who sealed Mr. Sweet's death verdict. Post-conviction counsel Frank Tassone was provided funds for further investigation of a *Giglio* claim—but he never filed it. Then, in a 2017 hearing when the only adult witness against Mr. Sweet recanted, the State may have produced altered records to discredit

exculpatory witness Eric Wilridge. Mr. Sweet is constitutionally entitled to a fair hearing on his claims and the circuit court gravely erred in failing to grant an evidentiary hearing.

ARGUMENT I

EGREGIOUS ERRORS AND OMMISIONS BY PAST POST-CONVICTION COUNSEL SHOULD ALLOW AN EXCEPTION TO THE TIME LIMITS IN FLORIDA RULE OF CRIMINAL PROCEEDURE 3.851(d)(2)(C)

Mr. Sweet brought two claims of ineffective assistance of trial and post-conviction counsel in his 3.851 motion. Claim 1 involves trial counsel's severe drinking problem, which was discovered, but never disclosed, by post-conviction counsel. Claim 2 is a claim regarding post-conviction counsel's failure to file a *Giglio* claim regarding the perjured testimony of Solomon Hansbury. Mr. Sweet's counsel's grave errors beyond all expectation are responsible for this wrongful death conviction. Post-conviction counsel failed to use an affidavit that proved Sweet's trial counsel was drunk, missed federal habeas deadlines, and filed more than twenty motions for fees to investigate and prepare a *Giglio* claim on Hansbury's perjured testimony that was never actually ever filed. The facts of these claims far exceed the type of error that might exist in a standard death penalty case and show the cumulative effect of a denial of due process and constitutional guarantees. The circuit court should have granted an evidentiary hearing to allow further

development of these claims.

A. Mr. Sweet was a Victim of Prejudicial Ineffective Assistance of Trial and Post-Conviction Counsel

Post-conviction counsel discovered that Mr. Sweet's trial counsel had a disabling drinking problem but this evidence was never introduced during the post-conviction hearing. On July 19, 1995, Mary Mills, Sweet's appointed attorney from Florida's Capital Collateral Representative ("CCR"), met with Linsey Moore. Moore shared office space with Sweet's trial attorney, Charlie Adams. Adams had no death penalty experience prior to Mr. Sweet's trial and Adams asked Moore, a civil rights lawyer, to help with Sweet's defense a few weeks before the June, 1991 trial. TM8/ 563-571. Ms. Mills took extensive notes of Moore's shocking revelations about the inadequacy of Mr. Sweet's trial counsel. "Charlie Adams is a drunk. He is drunk seven days out of the week . . . he's either drinking at the office, out of a bottle of rum he keeps in his desk, or he's fishing on the St. John's River and drinking there." TM8/566-7. Mills' notes reflect that Adams was "never in the office" and "always sleeping it off somewhere." *Id*. "The unspoken word around Jacksonville is that if you want a case lost, give it to Charlie Adams . . . Adams has not won a single criminal case." *Id*. Moore also explained that Sweet called Adams a hundred times before trial but Adams would never speak to him and Adams never visited Sweet in jail. *Id*. Ms. Mills incorporated the findings of her investigation into a notarized

affidavit signed by Moore. *See* TM8/568-9. Mills resigned from the CCR in 1997 and she has no idea why Moore's affidavit or the subject of Adams' grave substance abuse problem was never raised during the first post-conviction hearing in 1999.

Sweet's lead post-conviction lawyer, Andrew Thomas, is now the elected Public Defender for the Second Judicial Circuit in Tallahassee, Florida. In his affidavit, Thomas explained that Sweet's hearing was his first capital evidentiary hearing as a lead lawyer. TM8/573-4. When the CCR was dismantled, a huge volume of papers existed and it was "nearly impossible" to be assured that any client's file was complete. *Id*. The CCR had no digital files or document management system. *Id*. Thomas does not recall seeing Moore's affidavit. *Id*. "If I had seen the affidavit or the notes prior to the evidentiary hearing, I would have utilized them in asserting that Mr. Adams was legally ineffective during the trial." *Id*.

When counsel's intoxication prevents effective assistance of counsel, the *Strickland* test applies. *Berry v. King*, 765 F. 2d 451, 454 (5th Cir. 1985), *cert. denied*, 476 U.S. 1164 (1986). There are two prongs to an ineffective assistance of counsel claim: 1) deficient performance of counsel; and 2) prejudice to the defense. *Strickland v. Washington*, 466 U.S. 668, 688 (1984). This requires showing that counsel's errors deprived the defendant of a fair trial and a reliable result. *Id*. at 687. To establish deficient performance, a petitioner must demonstrate that counsel's

representation "fell below an objective standard of reasonableness." *Id.* at 688. In order to show prejudice, it is not necessary to establish that counsel's deficient conduct more likely than not altered the outcome in the case. *Id.* at 693. Instead, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694. The Court evaluates the totality of the evidence "both that adduced at trial, and the evidence adduced in the habeas proceeding[s]" to make this determination. *Williams v. Taylor*, 529 U.S. 362, 397-398 (2000).

Evidence that Mr. Sweet's lead trial counsel was drunk and never returned one hundred phone calls from Sweet's holding cell is the death knell to a claim that he received constitutionally sound assistance of counsel under the totality of the circumstances of his case. During hearings on the First Motion, it came to light that Mr. Sweet's capital trial counsel, Charlie Adams, had never represented a client facing the death penalty. PC9/1765. Moore worked primarily in federal civil litigation and had no capital experience. PC8/1454. At the time Adams and Moore experimented with their capital trial skills, there were no guidelines or requirements for capital defense. The ABA didn't publish the landmark Guidelines for the

Appointment and Performance of Defense Counsel in Death Penalty Cases until more than a decade after Mr. Sweet was convicted. 31 Hofstra L. Rev. 913, 914 (2003).[9]

While post-conviction counsel disclosed that Adams suffered "health problems" throughout his representation at the 1999 hearing, it was never disclosed that Adams was consistently drinking heavily, "sleeping it off," or absent due to his substance abuse problem. PC10/1777; TM8/ 563-571. Adams was only in his office 8-12 times in the two full months before the trial. PC10/1777. He either failed to take notes or disposed of them prior to producing his files in post-conviction and billed ten hours for preparing a trial notebook that was never found in his files. PC10/1775-76; 1801-02.

Adams' theory of defense was that, "[Sweet] didn't do it," specifically noting that the case was one of misidentification. PC10/1783. Although Adams agreed that any evidence of other potential suspects would have been helpful to the defense, he never investigated alternative suspects like Dale George. PC10/1785; 1793-1800.

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[9] The *Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty* Cases were not published until five years later. 36 Hofstra L. Rev. 763 (2008). The ABA had not yet even published the precursor policy paper to these published standards until 1996. ABA, *Report Regarding Implementation of the American Bar Association's Recommendations and Resolutions Concerning the Death Penalty and Calling for a Moratorium on Executions*, 4 Geo. J. on Fighting Poverty 3 (1996).

Charles Abner, a private investigator hired by Adams for $300-$500, worked on Mr. Sweet's capital case "[p]robably off and on about a week-and-a-half" to find additional witnesses. PC8/1438-41. This was the first time Adams ever utilized an investigator in any of his cases. PC9/1768. Mr. Abner "didn't accomplish a whole lot at the time" because investigating a capital case like this one would, at a minimum, cost $5000 to $6000 in fees. PC8/1439, 1441. *See generally Hinton v. Alabama*, 571 U.S. 263, 274 (2014) (trial attorney's failure to request additional funding in order to replace an inadequate investigator constituted deficient performance under *Strickland v. Washington*).

Despite a lack of investigative resources, Adams proffered one exculpatory witness, Marcene Cofer's cousin, Anthony McNish. PC10/1788. Mr. McNish was listed as a defense witness and deposed by the State but he did not appear at trial. R5/997-1002. Mr. McNish eventually testified at the post-conviction hearing that he told Adams he needed help with transportation and childcare if he were to testify, but Adams made "no arrangements" to secure his presence. PC10/1871-74. Adams made errors in the last-minute subpoena served on McNish and when he didn't appear, Adams never asked the trial judge to issue a capias. PC10/ 1790-93. At the post-conviction hearing, McNish provided credible exculpatory testimony that he saw the three people outside by Ms. Cofer's apartment in the early morning hours of

June 27, 1990 and none of the three men were built like Sweet, walked like Sweet, or had Sweet's dark complexion. PC10/1867-69.

Perhaps the greatest prejudice resulting from Adams' ineffective assistance was the failure to investigate or produce mitigation evidence. Adams must have been too intoxicated to investigate, plan, and present anything substantive during the sentencing phase of trial. His billing records reflect he did nothing to investigate mitigation except interviewing Sweet's sister, Deonne. PC11/1806-07. Adams never found mental health records, foster care records, or school records showing Sweet survived a serious case of childhood spinal meningitis, grew up with an alcoholic mother, had attention deficit disorders, was confined at the notorious Dozier School for Boys, and suffered severe poverty, neglect, homelessness and abuse throughout his youth. PC11/1808-1824; TM8/340-352. Adams assigned Moore, a civil rights lawyer with no capital sentencing experience, the important responsibility of preparing the mitigation phase of Sweet's capital sentencing. Moore questioned the only mitigation witness without even meeting her.[10] R8/1463-64. He was

[10] Moore testified that he did not obtain school records, mental health records, medical records, foster care records, or juvenile justice records to prepare for Mr. Sweet's mitigation phase. R8/1462. Moore testified he was completely unprepared:

> Q: All right. You did present the testimony of Deonne Sweet during the penalty phase of Mr. Sweet's trial, is that correct, his sister?
> A: I started to present it, yes.

subsequently disbarred. R8/1469.

An innocent man has been confined to death row for close to three decades as a result the unreasonably poor representation of inexperienced, inebriated, and unprofessional counsel. This altered the outcome of Sweet's conviction and sentence and gravely prejudiced him in the failure to present mitigation, investigate alternative suspects, and vigorously defend his constitutional rights. These claims might have been brought to light if it hadn't been for the chronic lack of consistency, funding, and supervision of Florida's capital post-conviction representation in the

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> Q: Okay. Tell me about the circumstances of you putting on the direct examination of Deonne Sweet.
> A: Well, to the best of my recollection the Court – either it was lunch time or a recess. I am not sure which…when 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.
> Q: And Deonne Sweet was the only witness presented during the penalty phase of Mr. Sweet's trial?
> A: To my knowledge, yes.

R8/1463-64.

three decades after Mr. Sweet's conviction. TM8/339.

B. Post-Conviction Counsel Rendered Prejudicial Ineffective Assistance of Counsel by Failing to File Mr. Sweet's False Testimony Claim in Violation of his Rights under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Corresponding Provisions of the Florida Constitution

Another ineffective post-conviction lawyer, Frank Tassone, knew Mr. Sweet had a *Giglio* claim regarding the false and misleading testimony of Solomon Hansbury. Tassone repeatedly requested funds to investigate, but never filed the claim, and never appealed the denial of funds. Post-conviction counsel's incompetent performance compromised a full and fair hearing of Mr. Sweet's *Giglio* claim.

1. The State Had to Know That Hansbury's Perjured Testimony Was False

On August 1, 1990, Hansbury gave a sworn statement to police. He said, "On June 28th I was in the booking cell downstairs, Duval County Jail, when Earl Sweet walked in and we started a conversation. I asked him what he was in for. He told me, three attempted murders and a murder." TM8/588. Hansbury repeated this testimony before the jury when he was the last witness at trial:

> Q: All right. Did you ask the Defendant why he was arrested?
> A: I asked him what he was in there for
> Q: And what did he say?
> A: Three attempted – three attempts and a murder.

R5/942. The State had to know that Hansbury's testimony was false because the June 28 arrest and booking report included ***only one charge of attempted murder***. Sweet's charges for three attempts and a murder weren't filed until July 11, 1990, almost two weeks after Hansbury claimed Sweet confessed to them. ***The charging documents in Mr. Sweet's hands on June 28***, at the time Hansbury claimed he spoke to Sweet, charged Sweet with ***one attempt at murder*** only. *Cf.* TM8/ 575-583.

2. The State Manipulated Hansbury's Testimony to Provide Evidence of Motive

Mr. Sweet was convicted without any physical evidence tying him to the crime scene. The case against Mr. Sweet was a weak and circumstantial one. There was no physical evidence to prove Mr. Sweet's involvement in the shooting. *See Sweet*, 624 So. 2d at 1139. The murder weapon was neither found in a search of Sweet's apartment nor recovered elsewhere. There were no fingerprints, no hair, no blood, no DNA, nor any specific ballistics evidence that tied Mr. Sweet to Ms. Cofer's apartment in the early morning hours of June 27, 1990.

The State had to present compelling evidence of motive to convince the jury that Mr. Sweet was guilty of murder beyond a reasonable doubt. The State's theory was that Mr. Sweet attempted to murder Ms. Cofer because Mr. Sweet thought she identified him as a suspect in an earlier robbery, on June 6, 1990. Yet, Mr. Sweet was never charged with or convicted of a robbery on June 6, 1990. The State mutated

Hansbury's statement that Sweet said he "tried to rob Marcene," which would have been an admission of the indicted crime on June 27, 1990, into testimony that Sweet "robbed" Marcene on June 6, 1990. In this way, the State manipulated Hansbury's testimony to establish motive for the June 27, 1990 murder.

During Hansbury's August 1990 statement, he said:

> A: I asked him what happened. He said, did I remember Marceen that stayed out in the project, Blodgett Homes, around that area? I told him, no. He said, well they was selling dope out of the house on Third Street and **he had tried to rob them**. He said then, if I knew that –
>
> Q: let me stop you there. **He had tried to rob Marcene**?
>
> A: Marceen
>
> Q: Okay. Go ahead.
>
> A: He said, if I knew this was going to happen like this, I would have killed them all, I guess. . . meaning, you know –
>
> Q: Okay. Did he make any other statements?
>
> A: Not concerning that.

TM8/588-9 (emphasis added).

Defense counsel objected to the State's inference that Sweet had robbed Ms. Cofer on June 6 and returned on June 27 to eliminate her as a witness. At trial, the State presented similar testimony:

> Prosecutor Phillips: Well, we're talking about two things; one

> is the circumstances of his [Sweet's] arrest, and two would be the circumstances of the conversation relating to Marcine Cofer.
>
> Defense Counsel: Okay. There is nothing about an incident concerning June 6, 1990, when you talk about the robbery?
>
> Prosecutor Phillips: Well, I don't think this witness knows what he was talking about. The statement is that he had tried – he had robbed Marcine. Now, to my knowledge, there was no date given and I don't know which time he's talking about, honestly. I don't think the witness knows that. That's for the jury to determine . . . .
>
> Defense Counsel: We're talking about – is he talking about June 6, 1990 or is he talking about a robbery at the time of the shooting?
>
> Prosecutor Phillips: All I can say is it's got to be one or the other. I don't know, you know, I don't know what the – I'm not responsible for how the Defendant put it.

R5/937-38. The State hammered this fabrication in closing argument, sarcastically calling Sweet's presence on June 27 quite a "coincidence" and using it to bolster Ms. Cofer's trustworthiness. R5/1051, 1055, 1058. The State destroyed the fundamental fairness of Sweet's trial by presenting false and misleading testimony to create a motive to convict.

3. Hansbury Later Recanted, But His False Testimony Eviscerated Fundamental Fairness

Hansbury recanted this testimony during the 1999 hearing on the First Motion. PC10/1908-14. He said:

Counsel: Can you explain what lead up to your testimony in Mr. Sweet's trial?

A: What lead up to it?

Q: How it was arranged that you were to testify against Mr. Sweet?

A: I talked to the State Attorney and agreed to testify against Earl.

Q: Okay. And you got some benefit for doing that?

A: Yeah. You could say that . . . .

Q: Do you recall what you said at Mr. Sweet's trial?

A: Yeah

Q: Was it the truth?

A: No

Q: You want to explain what the truth is?

A: There is no truth, you know. What I said in the trial was something that it was like stuff that I 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.

Id. at 1909-10.

4. Post-Conviction Counsel Investigated but Inexcusably Failed to File Sweet's Claim

After languishing in prison for close to twenty years, Mr. Sweet began to formulate a *Giglio* claim based on Hansbury's false testimony. Mr. Sweet wrote to his counsel, Frank Tassone, who had represented him since 2003. TM8/358-478. Tassone responded by telling Sweet his claim had no merit. Tassone continued, "[i]f Mr. Hansbury has recanted in the intervening years . . . you could attack the validity of this evidence." TM8/593-4. Apparently, while representing Mr. Sweet for more than five years, Tassone had never read the post-conviction transcript or realized that Hansbury recanted years earlier in 1999.

Once Mr. Sweet notified Tassone of the factual and legal errors in his analysis, Tassone moved for funds to investigate and was denied. TM8/596. A second motion to obtain funds to investigate was granted. Tassone's investigator, Tom W. Wildes, met with Hansbury in March 2009, found Hansbury to be cogent and reliable, and discovered that the State gave Hansbury a newspaper article to read to prepare his statement falsely inculpating Mr. Sweet. TM8/598-9. Tassone finally withdrew from Mr. Sweet's case in 2014. He never filed a *Giglio* claim based on the State's witness tampering, procurement of false testimony, and failure to correct Hansbury's false testimony.

5. Hansbury's Testimony was a Violation of *Giglio* and Due

Process

The presentation of Hansbury's testimony violated standards of due process and the United States and Florida Constitutions and made Sweet's trial fundamentally unfair. *Giglio v. United States*, 405 U.S. 150 (1972). To establish a *Giglio* violation, it must be shown that: (1) the testimony given was false; (2) the prosecutor knew the testimony was false; and (3) the statement was material. *Ventura v. State,* 794 So. 2d 553, 562 (Fla. 2001); *see also Rose v. State,* 774 So. 2d 629, 635 (Fla. 2000). The same violation occurs when the State, although not soliciting false evidence, allows it to go uncorrected when it appears. *Napue v. Illinois*, 360 U.S. 264 (1959). The *Giglio* standard for materiality is "more defense friendly" than the *Brady* standard of materiality because it reflects a heightened concern and heightened judicial scrutiny where perjured testimony is used to convict a defendant. *Guzman v. State*, 868 So. 2d 498, 507 (Fla. 2003). Perjured testimony is considered material unless failure to disclose it would be harmless beyond a reasonable doubt. *United States v. Bagley*, 473 U.S. 667 (1985); *Guzman*, 868 So. 2d at 506. The State bears the burden of proving harmless error. *Id.*

In this case, Hansbury's perjured testimony meets the *Giglio* standard and denied Mr. Sweet the fundamental right to a fair trial. Hansbury's testimony was undeniably false as he recanted in 1999. PC10/1908-14. The State was aware that

Mr. Sweet was not charged with "three attempts and a murder" until July 11, 1990, almost ***two weeks after*** Hansbury claimed Mr. Sweet allegedly confessed to these crimes, but ***three weeks before*** Hansbury gave his statement to law enforcement. If the State enhanced Hansbury's testimony by showing him a newspaper account of the crime there can be no doubt of a knowing *Giglio* violation. Hansbury's perjured testimony provided the only evidence tying Sweet to the crime, the only motive for the crime, and a full, but completely false, confession. These false statements were material to Mr. Sweet's wrongful conviction. Mr. Sweet was denied due process, a fundamentally fair trial, and a reliable, constitutionally permissible conviction.

C. Procedural Default of Ineffective Assistance of Post-Conviction Counsel should Trigger an Exception to the Time Limitations in 3.851(d)(2)(C)

This Court has consistently recognized a statutory right to effective post-conviction counsel. *Spaulding v. Dugger,* 526 So. 2d 71, 72 (1988) ("we recognize that under Fla Stat. 27.702, defendants under sentence of death are entitled as a statutory right, to effective legal representation . . . in all collateral relief proceedings"). Any other finding would be incongruous, given that Florida both regulates and funds the extensive machinery of post-conviction death litigation to the tune of tens of millions of dollars per year. Fla. R. Crim. P. 3.112(k) & 3.851(b).

A death penalty case requires due process at every stage in proceedings. *Beck v. Alabama*, 447 U.S. 625, 637 (1980) ("death is a different kind of punishment from

any other which may be imposed in this country . . . different in its severity and its finality, and the action of the sovereign in taking the life of one of its citizens also differs dramatically from any other legitimate state action"). Summary denials are disfavored in death cases. *See Maharaj v. State,* 684 So. 2d 726 (Fla. 1996); *Hoffman v. State*, 571 So. 2d 449 (Fla. 1990). It is unfair to hold Mr. Sweet on death row without a due process hearing his trial and post-conviction lawyer's unconscionable oversights and in violation of his statutory right to effective post-conviction counsel.

Rule 3.851(d)(2)(C) permits an exclusion to the applicable time limits for filing a post-conviction claim for neglect of counsel. Fla. R. Crim. P. 3.852(d)(2)(C) ("No motion shall be filed or considered . . . if filed beyond the time limitation . . . unless it alleges . . . post-conviction counsel, through neglect, failed to file the motion"). In this case, post-conviction counsel Frank Tassone knew Sweet had a *Giglio* claim regarding the false and misleading testimony of Solomon Hansbury. Tassone filed more than twenty motions for attorney fees and investigative expenses, but he never filed a single motion regarding newly discovered evidence or Solomon Hansbury's fabrications. TM8/479-480. Tassone also never appealed the unconstitutional denial of funds. Post-conviction counsel's incompetent performance compromised a full and fair hearing of Mr. Sweet's *Giglio* claim in violation of due process. Neglect of post-conviction counsel, coupled with

uncontroverted evidence of a colorable *Giglio* claim, should be sufficient to meet the standards of 3.851(d)(2)(C).

Both the circuit court and the State cite *Howell v. State*, 145 So. 3d 774 (Fla. 2013), in support of the proposition that that the neglect exception in 3.851(d)(2)(C) should only apply in the context of an initial motion, rather than a successive motion. However, the facts of *Howell* are distinguished from Sweet's case. *Howell* was the second successive motion filed under 3.851 in a warrant posture and it contained no bare claim of ineffective assistance of post-conviction counsel. In Mr. Sweet's case, post-conviction counsel requested and was paid fees to investigate and prepare a motion on the Hansbury claim. Post-conviction counsel never filed the Hansbury claim. Thus, Mr. Sweet's situation is much more analogous to the type of neglect encountered in an initial post-conviction motion than in *Howell*. The circuit court should have exercised its inherent discretion to permit an evidentiary hearing in Mr. Sweet's case.

ARGUMENT II

THE CIRCUIT COURT ERRED IN DENYING DISCOVERY FROM THE JACKSONVILLE SHERIFF'S OFFICE AND DISMISSING THE SPOLIATION CLAIM REGARDING THE WILRIDGE ARREST RECORDS

On July 21, 2017, in conjunction with Mr. Sweet's Sixth Motion for post-conviction relief, the State filed an arrest and booking report for Eric Wilridge dated

June 22, 1990 with a Business Records Certification signed by Silvia Hutchinson of the Jacksonville Sherriff's Office ("JSO"). TM8/602-611. On August 2, 2017, the State filed an "Amended Certification of Business Record" stating that the same arrest and booking report submitted on July 21, 2017 was, "a true and accurate copy . . . made and maintained by the Jacksonville Sherriff's Office in the normal course of business" not properly executed by an authorized custodian of records. TM8/613-4. The State filed this amendment "to ensure the record is completely accurate and in accord with the internal policies established by the Jacksonville Sheriff's Office." *Id*.

Collateral counsel obtained copies of Wilridge's arrest and booking report from both the Duval County Public records database ("CORE") and the JSO in the fall of 2017, and it is different from the arrest and booking report produced by the State Attorney in State's Exhibit 1. *C.f.* TM8/621-5. The arrest and booking report obtained by post-conviction counsel, which was, in turn, obtained from the Jacksonville Sheriff's office and CORE, contains an additional JSO ID number, stamps that say "original" "THIS INSTRUMENT IN COMPUTER" and "CLERK COPY." Likewise, the space under "verified by" is blank. Most importantly, there is a stamp under the disposition column that states "June 22, 1990." By contrast, the arrest and booking reports produced by the State Attorney have a signature under the "verified" space and a stamp that says "RECORD." TM8/618-9. The disposition date stamp is omitted from the copy of the

arrest record provided by the State.

This spoliation of these jail records was the subject of Claim 3 of Sweet's Eighth Motion and Mr. Sweet requested discovery form the Jacksonville Sheriff's Office to establish Claim 3. TM8/48. Without discovery, post-conviction counsel could never know the meaning of the disposition stamp or why it was excluded from the "true and correct" business records that the State produced during the hearing. The more troubling question is: if not from CORE or the Jacksonville Sherriff's Office, where exactly did the State obtain this record that has been sworn to be a true and correct copy of a court record kept in the ordinary course of business? If the ordinary business records produced to post-conviction counsel is actually the true and correct copy, why did the State enter a different record into evidence? Since the documents produced by the State, which were admitted into evidence based on the business records exception to the hearsay rule, markedly differ from what is available in CORE and what was produced by the Jacksonville Sherriff's Office, there was a grave possibility of a *Brady* violation, spoliation of evidence, and withholding evidence favorable to Mr. Sweet. *Brady v. Maryland,* 373 U.S. 83 (1963). After discovery, documents produced by the State may have shown that Wilridge's case was disposed on the same day he was charged, as he testified at the hearing on the Sixth Motion. Mr. Sweet should have been entitled to discovery and a hearing on this claim.

ARGUMENT III

THE CIRCUIT COURT ABUSED DISCRETION IN ITS DENIAL OF DISCOVERY FROM SECRET GARAGE FILES THAT MAY HAVE CONTAINED NEWLY DISCOVERED EVIDENCE RELATING TO THE *GIGLIO* CLAIM ON FALSE TRIAL TESTIMONY OF SOLOMON HANSBURY

The circuit court abused its discretion in denying discovery of potentially relevant secret and illegally maintained garage files by State Attorney Bernie de la Rionda. De la Rionda was photographed with thirty boxes of secret garage files in the Florida-Times Union. TM8/16. The State never represented that de la Rionda's secret garage files were either irrelevant or produced to the State Public Records Repository as required by law. The circuit court improperly shifted an unreasonable burden of proof to Mr. Sweet in withholding discovery under Rule 3.852(i) and also prevented Mr. Sweet from finding newly discovered evidence that could have exempted his existing claims from the time limits in Rule 3.851(d)(2)(A). *See Swafford v. State*, 125 So. 3d 760, 776 (Fla. 2013) (requiring a cumulative analysis of all evidence, including evidence which is procedurally barred or presented in another post-conviction proceeding); *Marek v. State*, 14 So. 3d 985, 990 (Fla. 2009); *Jones v. State*, 709 So. 2d 512, 521 (Fla. 1998). This decision should be reversed.

De la Rionda kept thirty boxes of secret state attorney files in his garage. TM8/16. An article published on May 1, 2018, disclosed "some 30 boxes of personal

notes from the 300-plus felony cases he prosecuted" with a picture. TM8/16, 19. The article refers to "boxes of case files" that de la Rionda brought to his home at the end of his 35 year career of "put[ting] killer after killer after killer on Florida's death row." TM8/18.

Rule 3.852(i) is a broad discovery rule that compels production of records when public records that are not in the State Public Records Repository ("SPRR") are either relevant to the subject matter of a proceeding or appear reasonably calculated to lead to the discovery of admissible evidence. Fla. R. Crim. P. 3.852(i)(2). A defendant bears the burden of demonstrating that the records sought relate to a colorable claim for post-conviction relief. *Mann v. State,* 112 So. 3d 1158, 1163 (Fla. 2013). This Court reviews denials of public records requests under the abuse of discretion standard. *Pardo v. State,* 108 So. 3d 558, 565 (Fla. 2012), *cert. denied,* 568 U.S. 1078 (2012).

It is undisputed that de la Rionda made an appearance in Sweet's case on at least two occasions relating to motions for fees for the investigation of the *Giglio* claim on Solomon Hansbury in 2013. TM8/183-191. ***This is exactly the same matter at issue in Argument I.*** It was Hansbury who falsely testified at trial that Mr. Sweet confessed to the crime. TM8/3-4. In return, prosecutors commuted Hansbury's second degree felony escape charge from a potential 15 years in a Florida State

Prison to a mere 32 days in jail and one year probation. *See* Fla. Stat. § 944.40 (1999); R5/932-33. In addition to appearing in Sweet's case, de la Rionda prosecuted Hansbury in 1993 when he was charged with several counts of murder, robbery, and aggravated assault with a deadly weapon.[11]

De la Rionda is not an ordinary prosecutor. He has a history of legal impropriety and has drawn harsh criticism for allegations of overzealousness and prosecutorial misconduct. A 2015 Harvard Law School study analyzed death row statistics across the United States and identified sixteen outlier counties that routinely sentenced defendants to death despite a nationwide recession. Fair Punishment Project, *Too Broken to Fix: Part I: An In-Depth Look at America's Outlier Death Penalty Counties*, August 2016; TM8/90-147. Duval County was one of the sixteen counties where, "what remains is the culmination of one systemic deficiency layered atop another. Those who receive death sentences do not represent the so-called 'worst of the worst.' Rather, they live in counties with overzealous and often reckless prosecutors, are frequently deprived access to competent and effective representation, and are affected by systemic racial bias." TM8/99. According to the Harvard study, almost one quarter of the death sentences for the entire state of Florida came from Duval County between 2010 and 2015. TM8/106. The Harvard

[11] *Hansbury v. State*, 1993-CF-004386 (Fla. Duval Cir. Ct. Feb. 12, 1996).

study specifically cited unethical prosecutors Bernie de la Rionda and his boss Angela Corey as key reasons for the unfair application of the death penalty in Duval County. TM8/107. From 2006 to 2015, one in every six cases from Duval County that was reviewed by the Florida Supreme Court had a finding of "inappropriate behavior, misuse of discretion, or prosecutorial misconduct." TM8/108. De la Rionda has been accused of concealing and slowing the delivery of evidence in the prosecution of George Zimmerman and called "disgraceful" when he fought for missing images from the alleged victim's phone. Tom Watkins & Nancy Leung, *IT Director Who Raised Questions About Zimmerman Case Is Fired*, CNN (July 15, 2013), https://www.cnn.com/2013/07/13/justice/zimmerman-it-firing/index.html. Chris Francescani, *Zimmerman's Lawyer Calls Prosecutors 'Disgrace' to Profession*, Reuters (July 15, 2013), https://www.reuters.com/article/us-usa-florida-shooting-omara/zimmermans-lawyer-calls-prosecutors-disgrace-to-profession-idUSBRE96F04R20130716.

Secret garage files with information relevant to Sweet's case and Hansbury's prosecution could be relevant and probative of Mr. Sweet's claims in the Eighth Motion. *Brady v. Maryland,* 373 U.S. 83 (1963); *Giglio v. United States*, 405 U.S. 150 (1972). De la Rionda's garage files were illegally maintained. *See* Fla. R. Crim. P. 3.852(h)(1) & (2). The State never represented that de la Rionda's garage files

were duplicates. The State never produced any evidence that de la Rionda's files were produced to the SPRR as required by law. *See* Fla. R. Crim. P. 3.852(d); *Sims v. State*, 753 So. 2d 66, 70-71 (Fla. 2000).[12] De la Rionda's secret files could be relevant to Mr. Sweet's claim and they belong in the light of the SPRR rather than the garage.

In *Maharaj v. State*, 684 So. 2d 726 (Fla. 1996), this Court considered a case analogous to Mr. Sweet's case. The post-conviction court denied a public records request and an evidentiary hearing in a case involving allegations of prosecutorial misconduct and discovery violations. The case was reversed and remanded for failure to allow public records request discovery and failure to hold a hearing.

As in *Maharaj*, the circuit court abused its discretion when it denied Sweet's request for updated production of records from the State Attorney, including the case files stored at the home of former Assistant State Attorney Bernie de la Rionda. Without holding any hearing to weigh credibility, the circuit court relied on an

[12] This case concerned public records requests under section (h)(3) when a death warrant is signed and expressly stated that "[a]ny concerns that this construction of rule 3.852(h)(3) may lead to harsh results in the non-warrant situation should be ameliorated by rule 3.852(i), . . . [t]his provision allows collateral counsel to obtain records at any time if collateral counsel can establish that a diligent search of the records repository has been made and 'the additional public records are either relevant to the subject matter of the postconviction proceedings or are reasonably calculated to lead to the discovery of admissible evidence.' Fla. R. Crim. P. 3.852(i)(1)." *Sims*, 753 So. 2d at 70-71.

affidavit of Tom Wildes, who reported that Hansbury stated that the man who walked him from the Duval County Jail was not de la Rionda. TM8/193. However, there is no dispute that de la Rionda was involved in prosecuting Hansbury and appeared in Sweet's case on at least two occasions. TM8/183-191.

Hansbury admitted he lied to convict Mr. Sweet. In the affidavit filed in August 22, 2018, Hansbury stated he clearly understood the process of making up testimony to avoid lengthy sentences. TM8/1-3. Uncontroverted evidence in the record establishes that in 1991, Hansbury was looking for relief from his sentence and was willing to lie. TM8/3-4. He spoke to unidentified prosecutors without his counsel present numerous times. *Id*. Similar to *Maharaj,* the undisputed prosecutorial misconduct that occurred in Sweet's case – prosecutors showed the Florida Times Union to Hansbury and "spoon fed" him information about Sweet's crime to encourage inculpatory perjury – should have been a sufficient showing of relevance to warrant production of de la Rionda's garage files, even for an *in camera* inspection.

The circuit court should have ordered the production of de la Rionda's files because they are relevant and probative of Mr. Sweet's *Giglio* claim. Mr. Sweet's Eighth Successive Motion to Vacate was based partly on the ineffective assistance of trial and post-conviction counsel who failed to properly file a *Giglio* claim relating

to Hansbury, the jailhouse informant who has admitted the State presented his perjured testimony in exchange for a greatly reduced sentence. *Brady v. Maryland,* 373 U.S. 83 (1963); *Giglio v. United States*, 405 U.S. 150 (1972).

The duty typically falls to the State to set the record straight when prosecutors or police conceal exculpatory evidence. *Banks v. Dretke*, 540 U.S. 668, 676-677 (2004). Therefore, a rule "declaring 'prosecutor may hide, defendant must seek,' is not tenable in a system constitutionally bound to accord defendants due process." *Id*. at 696. However, that is exactly what happened in *State v. Zimmerman* when de la Rionda was accused by a colleague of purposefully concealing evidence.[13] The prosecuting attorney has a duty not only in candor to the court and fairness with the defense, but a higher duty to seek justice. *Berger v. United States*, 295 U.S. 78, 88 (1935).

When the State plays hide and seek with evidence, the Defense is entitled to "get the facts." *See Smith v. State*, 708 So. 2d 253 (Fla. 1998). *See also Roberts v. State*, 840 So. 2d 962 (Fla. 2002). In *Smith*, as in *Roberts*, the Florida Supreme Court relinquished jurisdiction to the trial court for development of the facts pertaining to a claims of *ex parte* communications between the trial court and the prosecution. *Id*. These cases illustrate the critical importance of developing a full factual record in

[13] Watkins & Leung, *supra*.

capital post-conviction proceedings -- especially when claims of prosecutorial misconduct are at issue. As in *Smith*, the Court should remand this case to the circuit court for further factual development.

The circuit court also mistakenly relied on the affidavit of Tom Wildes to deny production of de la Rionda's garage files. TM8/192-198. Wildes stated that Hansbury merely stated that de la Rionda was not the man who walked with him from the Duval County jail to the prosecutor's office. Hansbury himself was clear that prosecutors "spoon fed" him information on Sweet's case and that he "lied to get his charges dropped." These may have been the very charges that de la Rionda prosecuted Hansbury for in 1993.

Mr. Sweet had a pending *Giglio* claim relating to Hansbury's testimony before the circuit court. Bernie de la Rionda took his state case files home and kept them in his garage, instead of providing them in response to repeated discovery requests and all of his legal and ethical obligations as a state actor. Mr. Sweet's request under Rule 3.852(i) was "reasonably calculated to lead to the discovery of admissible evidence" because de la Rionda worked with the dishonest man at the center of Mr. Sweet's *Giglio* claim. De la Rionda prosecuted Hansbury for murder, robbery and a slew of other charges and entered an appearance in Mr. Sweet's case. Production is authorized under Rule 3.852(i)(2)(C). *See* Fla. R. Crim. P. 3.852(i)(2)(C) (the trial

court ***shall*** order production of additional public records where records reasonably calculated to lead to admissible evidence have been diligently sought at the SPRR and are identified with specificity).

Whether de la Rionda or other State Attorneys knew of Mr. Hansbury's fabrication, or assisted in his fabrication, is critical to Mr. Sweet's claims, including his claims of actual innocence. All of the prerequisites of Fla. R. Crim. P. 3.852(i) were satisfied and the circuit court abused discretion in denying Mr. Sweet's motion.

ARGUMENT IV

THE CIRCUIT COURT ERRED IN FAILING TO GRANT AN EVIDENTIARY HEARING ON MR. SWEET'S SUBSTANTIVE CLAIMS

The circuit court erred in failing to hold an evidentiary hearing on Mr. Sweet's claims. An ineffective assistance of counsel claim is a mixed question of law and fact subject to plenary review under the test set forth in *Strickland v. Washington,* 466 U.S. 668 (1984). *See also Sochor v. State*: 883 So. 2d 766 (Fla 2004). The legal standard for an evidentiary hearing is a liberal one: a hearing is mandated unless there is a conclusive showing of no possible relief. Fla. R. Crim. P. 3.851(f)(5)(B) (2019). The circuit court should have permitted the additional discovery and the opportunity for Mr. Sweet to amend his pleading if newly discovered evidence was discovered in de la Rionda's secret garage files. *See supra*, Argument III; *Bryant v. State*, 901 So. 2d 810 (Fla. 2005).

Mr. Sweet is entitled to an evidentiary hearing unless records conclusively show he is not entitled to relief or a particular claim is legally insufficient. *Freeman v. State*, 761 So. 2d 1055, 1061 (Fla. 2000). *See* Fla. R. Crim. P 3.851(f)(5)(B) & (D) (2); *Lemon v. State*, 498 So. 2d 923 (Fla. 1986) (quoting Fla. R. Crim. P. 3.850); *Gaskin v. State*, 737 So. 2d 509, 516 (Fla. 1999) (same). Factual allegations as to the merits of a constitutional claim as well as to issues of diligence must be accepted as true, and an evidentiary hearing is warranted if the claims involve "disputed issues of fact." *Maharaj v. State*, 684 So. 2d 726, 728 (Fla. 1996). *See also Lightbourne v. State*, 742 So. 2d 238, 249 (Fla. 1999) (remanding for an evidentiary hearing to evaluate the reliability of factual allegations); *Swafford v. State*, 679 So. 2d 736, 739 (Fla. 1996) (remanding for an evidentiary hearing); *Roberts v. State*, 678 So. 2d 1232, 1235 (Fla. 1996) (same); *Scott v. State*, 657 So. 2d 1129, 1132 (Fla. 1995) (same); *Johnson v. Singletary*, 647 So. 2d 106, 111 (Fla. 1994). The circuit court failed to accept that Mr. Sweet's allegations were true in the initial stage of 3.851 proceedings. *See Lightbourne v. Dugger*, 549 So. 2d 1364, 1365 (Fla. 1989). Because Mr. Sweet had claims with disputed issues of fact, Mr. Sweet should have been granted an evidentiary hearing under 3.851(f).

ARGUMENT V

STANDARDS OF DECENCY ARE EVOLVING AND FLORIDA SHOULD RECOGNIZE A CLAIM OF ACTUAL INNOCENCE TO PROTECT THE

FUNDAMENTAL RIGHTS OF PRISONERS CONDEMNED TO DEATH

Mr. Sweet has languished as an innocent man on death row for close to thirty years. This Court never explicitly conducted a thorough proportionality review following the direct appeal of Sweet's case. At a minimum, this Court should weigh the paucity of evidence that might still exist to convict Sweet in a hypothetical new trial and determine if his death sentence complies with state and federal constitutional protections. *See* Editorial Board, *Capital Punishment Deserves a Quick Death*, N.Y. Times, December 31, 2017 ("In many . . . exonerations, prosecutors won convictions and sentences despite questionable or nonexistent evidence, pervasive misconduct or a pattern of racial bias . . . at least 4 percent of all death-row inmates are wrongfully convicted."). The excruciatingly high standard of reasonable doubt reflects a "fundamental value determination of our society is that it is far worse to convict an innocent man than to let a guilty man go free." *In re: Winship*, 397 U.S. 358, 371 (1970) (Harlan, J., concurring). Such protections for due process and against cruel and unusual punishment of the innocent apply with equal force in this case. *House v. Bell*, 547 U.S. at 536-38; *Schlup v. Delo*, 513 U.S. 298. *See* Jan Pudlow, *Panel: Death Penalty Needs Fixing – You Can Never Release an Innocent Person from the Grave*, 36 Fla. B. News 1 (October 1, 2009) (emphasizing that more than twenty innocent people have been executed in Florida since the death penalty was reinstated); Bruce P.

Smith, *The History of Wrongful Execution*, 56 Hastings L.J. 1185, 1186 (2005) (the prospect that persons can be executed for crimes they did not commit provides the most compelling argument for abolishing the death penalty). If Florida chooses to continue to execute its citizens, it must take unique precautions to avoid executing the innocent ones. This Court should reverse Mr. Sweet's unjust conviction and provide relief from the three decades of wrongful incarceration on death row.

It is a violation of due process, proportionality, and every protection provided to the innocent in the state and federal constitutions to impose a death sentence based solely on the testimony of a twelve year old child. *See House v. Bell*, 547 U.S. 518, 536-37 (2006) (comity and finality must yield to the imperative of correcting a fundamentally unjust incarceration on *habeas corpus* review); *Souter v. Jones*, 395 F.3d 577, 592 (6th Cir. 2005) (considering changed testimony as "new evidence" which "chips away" at slim circumstantial evidence supporting conviction). *See also Schlup v. Delo*, 513 U.S. 298 (1995). Added to all of the new evidence, recanting witnesses, incompetent lawyers, and unfair hearings, is a discovery that Mr. Sweet's primary trial counsel kept a bottle of rum in his bottom drawer and was drunk throughout the investigation and trial of Mr. Sweet's capital case.

The Eighth Amendment prohibits cruel and unusual punishment. The United States Supreme Court has recognized that "in a capital case a truly persuasive

demonstration of 'actual innocence' made after trial would render the execution of a defendant unconstitutional." *Herrera v. Collins*, 506 U.S. 390, 417 (1993). In a concurring opinion, Justice O'Connor agreed that "executing the innocent is inconsistent with the Constitution," "contrary to the contemporary standards of decency," "shocking to the conscience," and "offensive to a principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Id*. at 419 (O'Connor, and Kennedy, J.J., concurring) (internal quotations and citations omitted). Justice O'Connor concluded that "the execution of a legally and factually innocent person would be a constitutionally intolerable event." *Id*. In light of the compelling evidence of Mr. Sweet's innocence, allowing him to be executed violates his rights under the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution.

Florida should protect Mr. Sweet from cruel and unusual punishment. The Florida Constitution specifically provides that, "[t]he prohibition against cruel or unusual punishment, and the prohibition against cruel and unusual punishment, shall be construed in conformity with decisions of the United States Supreme Court which interpret the prohibition against cruel and unusual punishment provided in the Eighth Amendment to the United States Constitution." Art. I, §17, Fla. Const. The Florida Supreme Court has rejected the claim that Florida's failure to recognize a

freestanding actual innocence claim violates the Eighth Amendment. *Tompkins v. State*, 994 So. 2d. 1072, 1089 (Fla. 2008) (citing *Rutherford v. State*, 940 So. 2d 1112, 1117 (Fla. 2006)). Nonetheless our standards of decency have evolved since 2006. *Roper v. Simons*, 543 U.S. 551, 561 (2005) (evolving standards of decency that mark the progress of a maturing society) (quoting *Trop v. Dulles*, 356 U.S. 86, 100-01 (1958) (plurality opinion)); *Graham v. Florida*, 560 U.S. 48, 85 (2010) (Stevens, J., concurring) ("Society changes. Knowledge accumulates. We learn, sometimes, from our mistakes. Punishments that did not seem cruel and unusual at one time may, in the light of reason and experience, be found cruel and unusual at a later time."); Dan King, *It's Time to End the Death Penalty Nationwide*, The American Conservative, May 2, 2019 ("Even one wrongful death at the hands of the government is a clear moral failure. It's long past time that the United States catch up with the rest of the world and end the barbaric, inhumane practice that is the death penalty"). *See Baze v. Rees*, 553 U.S. 35 (2008); Brandon L. Garrett, *Judging Innocence*, 108 Colum. L. Rev. 55 (2008); D. Michael Risinger, *Innocents Convicted: An Empirically Justified Factual Wrongful Conviction Rate*, 97 J. Crim. L. & C. 761 (2007). Four decades after *Furman*, "the poor, the sick, the ignorant, the powerless and the hated" are still executed, perpetuating a barbaric practice that

devalues our constitutional protections and all human life. *Furman v. Georgia*, 408 U.S. 238, 251 (1972).

CONCLUSION

The circuit court improperly denied Mr. Sweet's Eighth Successive Motion to Vacate Judgments of Conviction and Sentence. The only adult eyewitness and the victim of the crime have both recanted. The State's jailhouse informant admitted he lied. Throughout post-conviction proceedings, further exculpatory evidence has been produced. There is no remaining evidence to convict Mr. Sweet with a unanimous jury verdict beyond a reasonable doubt. Serious flaws in the justice system put an innocent man on death row for more than a quarter century. A correction is long overdue. Mr. Sweet requests this Court reverse the circuit court's order, vacate his conviction and sentence of death, grant him a new trial, or at a minimum, remand this case for further discovery under Rule 3.852(i) and a full evidentiary hearing.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing INITIAL BRIEF OF APPELLANT has been transmitted to this Court through the Florida Courts E-Filing Portal, which will send a notice of electronic filing to Lisa A. Hopkins, Assistant Attorney General, at capapp@myfloridalegal.com and Lisa.Hopkins@myfloridalegal.com, and mailed via United States Postal Service to William Earl Sweet, DOC #100063, Florida State Prison, P.O. Box 800, Raiford, Florida 32083 on this 13th day of May, 2019.

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I hereby certify that a true copy of the foregoing Initial Brief of Appellant was generated in Times New Roman, 14 point font, pursuant to Fla. R. App. 9.210 (a) (2).

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