IN THE SUPREME COURT OF FLORIDA

WILLIAM EARL SWEET,

Appellant,

v. CASE NO. SC00-1509

STATE OF FLORIDA,

Appellee.
_____/

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

ANSWER BRIEF OF APPELLEE

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TABLE OF CONTENTS

TABLE OF CITATIONS

CASES PAGE(S)

FEDERAL CASES

STATE CASES

MISCELLANEOUS

STATEMENT OF THE CASE AND FACTS

A jury convicted Sweet of first-degree murder for killing thirteen-year-old Felicia Bryant during a residential burglary. The facts are set out more fully in this Court's opinion affirming his convictions and death sentence:

> On June 6, 1990, Marcine Cofer was attacked in her apartment and beaten and robbed by three men. She could identify two of the men by their street names. On June 26, 1990, she was taken by Detective Robinson to the police station to look at pictures to attempt to identify the third assailant. When Robinson dropped Cofer off at her apartment, William Sweet was standing nearby and saw her leave the detective. Unknown to Cofer, Sweet had previously implicated himself in the robbery by telling a friend that he had committed the robbery or that he had ordered it done. Cofer asked her next-door neighbor, Mattie Bryant, to allow the neighbor's daughters, Felicia, thirteen, and Sharon, twelve, to stay with Cofer in her apartment that night. Mattie agreed, and the children went over to Cofer's apartment around 8 p.m.
>
> At approximately 1 a.m. that evening, Sharon was watching televison in the living room of Cofer's apartment when she heard a loud kick on the apartment door. She reported this to Cofer, who was sleeping in the bedroom, but because the person had apparently left, Cofer told Sharon not to worry about it and went back to sleep. Shortly thereafter, Sharon saw someone pulling on the living room screen. She awakened Cofer. The two then went to the door of the apartment, looked out the peephole, and saw Sweet standing outside. Sweet called Cofer by name and ordered her to open the door.
>
> At Cofer's direction, Felicia pounded on the bathroom wall to get Mattie's attention in the apartment next door, and a few minutes

> later Mattie came over. The four then lined up at the door, with Cofer standing in the back of the group. When they opened the door to leave, Sweet got his foot in the door and forced his way into the apartment. Sweet's face was partially covered by a pair of pants. He first shot Cofer and then shot the other three people, killing Felicia. Six shots were fired. Cofer, Mattie, and Sharon were shot in the thigh, ankle and thigh, and buttock, respectively, and Felicia was shot in the hand and in the abdomen.
>
> Sweet was convicted of first-degree murder, three counts of attempted first-degree murder, and burglary. The jury recommended a sentence of death by a vote of ten to two, and the trial court followed this recommendation.

Sweet v. State, 624 So.2d 1138, 1139 (Fla. 1993), cert. denied, 510 U.S. 1170 (1994). On appeal this Court affirmed the trial court's finding that the four aggravators of prior violent felony convictions; committed to avoid arrest; committed during a burglary; and cold, calculated, and premeditated (CCP) had been established. Id. at 1142-43. This Court also recognized that the trial court found lack of parental guidance as a nonstatutory mitigator and affirmed Sweet's death sentence for the homicide. Id.

Sweet filed a motion for postconviction relief in the summer of 1995. (I 1 et seq.).[1] Following public records disclosure, Sweet filed an amended postconviction motion in September 1997 (II

[1] "I 1 et seq." refers to page 1 and following pages of volume I of the record on appeal in these postconviction proceedings.

210 et seq.), and the state filed a written response. (II 339 et seq.). The circuit court scheduled a hearing pursuant to Huff v. State, 622 So.2d 982 (Fla. 1993), for November 14, 1997. (II 387). Sweet's collateral counsel, however, moved to continue the Huff hearing several times (II 392; III 401, 407), and that hearing was eventually held on February 20, 1998. (III 422).

The amended motion raised twenty-eight issues, and on May 13, 1998 the circuit court set an evidentiary hearing for August 5-6, 1998 on the following claims: VII(B) trial counsel, Charlie Adams, failed to investigate and present evidence of other suspects; VIII Adams failed to present as potentially mitigating evidence Sweet's background history; XXVII Adams failed to present background information to the mental health experts; and XXVIII whether the mental health experts conducted an adequate evaluation. (IV 605-06). Sweet filed numerous public records requests after that order. (E.g., IV 608, 636, 640, 643, 647, 667, 681, 687, 694, 697, 701, 708, 729; V 846, 851, 854, 859). The circuit court disposed of those requests at a hearing on October 9, 1998 (VII 1308-70, VIII 1371-1422), and rescheduled the evidentiary hearing for the week of January 25, 1999. (V 915).

Sweet presented testimony from several witnesses at the evidentiary hearing. The state recalled one of Sweet's witnesses and then called Ernest Miller, the psychiatrist who examined Sweet prior to trial, as its witness.

Lindsey Moore testified that he and Adams shared office space (VIII 1454) and that he agreed to cross-examine several witnesses when Adams asked him to do so a few weeks before trial. (VIII 1455, 1469). Moore had no contact with Anthony McNish, Dale George, or Jessie Gaskins (VIII 1455) and admitted that he did not know what preparations Adams had made for trial. (VIII 1469). He did not remember much about what McNish would have testified to, but knew that McNish saw three people in the well-traveled alley behind Cofer's apartment before the shooting, that McNish's eyesight was poor, and that the people he saw did not appear to be armed. (VIII 1472-73). The only thing Moore remembered about Dale George was that there was no evidence that George was present during the shooting. (VIII 1473). Regarding Jesse Gaskins, Moore recalled that Gaskins indicated he had seen a masked man at Cofer's door, but did not know why Gaskins was not called as a witness. (VIII 1473-74). He agreed, however, that presenting a witness who would identify Sweet as that man would be a bad idea. (VIII 1474).

Jethro Toomer, a psychologist, was hired to examine Sweet by collateral counsel. After going through the tests he gave to Sweet, the people he talked with, and the materials he reviewed (VIII 1503-32), Toomer concluded that Sweet had an IQ of 84 (VIII 1555) and that Sweet had no organic impairment. (VIII 1561-62). Based on his mother's being an alcoholic and Sweet's stuttering, meningitis, head injury, and use of Ritalin, however, Toomer

suspected organic brain damage even though Sweet exhibited none and Toomer could find none. (VIII 1563-64).

He diagnosed Sweet as having a personality disorder rather than a major mental illness. (VIII 1568-69). Toomer discounted Dr. Miller's pretrial conclusion that Sweet was competent because he saw no data (presumably, from testing such as he had conducted) to support that conclusion. (IX 1578-79). He also disagreed with Miller's diagnosing Sweet as having antisocial personality disorder because Sweet had no formal diagnosis of a conduct disorder before he was eighteen years old. (IX 1580). Toomer has always used juvenile diagnosis of a conduct disorder as a prerequisite for diagnosing antisocial personality disorder. (IX 1584).

Based on Sweet's early development, Toomer opined that Sweet was too impulsive to premeditate the crime that occurred in this case for the cold, calculated, and premeditated (CCP) aggravator to be applicable. (IX 1591-94). He also thought that Sweet was incapable of long-range planning and that the avoid/prevent arrest aggravator, therefore, could not be found. (IX 1594-95). Toomer opined that, due to Sweet's history, he was unable to conform his conduct to the requirements of the law and that, due to what he diagnosed as a borderline personality disorder, Sweet was under the influence of an emotional disturbance at the time of the murder. (IX 1595-96).

On cross-examination Toomer admitted that he had testified for defendants in death penalty cases, but that he had never testified for the state in such a case. (IX 1600-01). Toomer could not say that Dr. Miller's competency evaluation was not conducted properly. (IX 1602). Toomer agreed that, at the penalty phase, Deone Sweet's testimony set out many of the deprivations that Sweet experienced. (IX 1604-05). He also agreed that the records showed that Sweet did not lose consciousness or bleed when he hit his head as a child and that Sweet never suffered a head trauma that caused a measurable amount of brain damage. (IX 1606-08). Toomer's tests showed no evidence of brain damage. (IX 1612). Toomer acknowledged that Sweet has an extensive juvenile record, including violent crimes (IX 1614-15) and stealing. (IX 1619-20). He admitted that Sweet had never been given psychiatric treatment, other than the use of Ritalin, and that Sweet was never suicidal.[2] (IX 1626). Toomer was of the opinion that Sweet knew the difference between right and wrong at the time of the murder. (IX 1628). After stating that his diagnosis of borderline rather than antisocial personality disorder was based on the lack of a juvenile diagnosis of conduct disorder (IX 1630-31), Toomer admitted that such a formal diagnosis is not required for an adult diagnosis of

[2] According to the Diagnostic and Statistical Manual of Mental Disorders (4th ed. 1994), the "DSM-IV" that Toomer relied on: "Individuals with Borderline Personality Disorder display recurrent suicidal behavior, gestures, or threats." Id. at 651.

antisocial personality disorder and that Sweet's behavior as a juvenile met the criteria for conduct disorder. (IX 1632-37). Toomer found no evidence that Sweet was under the influence of alcohol or drugs at the time of the crime. (IX 1651). On recross-examination Toomer agreed that an impulsive-act defense would be inconsistent with a defense of innocence. (IX 1674-75).

Emily Shealey was Sweet's foster mother for two years, starting when he was eight years old. (IX 1686-87, 1689). She testified that Sweet said his mother drank and could not keep her kids. (IX 1687). Shealey also stated that she got Sweet straightened out about his school work and that he calmed down and did better on Ritalin. (IX 1688). On cross-examination Shealey said that the things that had to be straightened out concerned Sweet's stealing. (IX 1690). She also stated that Sweet got in trouble for acting up at school. (IX 1692). Shealey was the person who caused Sweet to be put on Ritalin, which improved his behavior. (IX 1693).

Sweet's sister Deone was the only defense witness at the penalty phase of his trial. (DAR XXVIII 1242).[3] On direct examination at the evidentiary hearing she admitted that their mother was an alcoholic and that their father Powell was never around when they were growing up. (IX 1695-96). Deone also

[3] "DAR XXVIII 1242" refers to page 1242 of volume XXVIII of the record in Sweet's direct appeal to this Court of his convictions and sentence, case no. 78,629.

testified that Esau Brown, one of her mother's boyfriends, was the only father that she and her two younger brothers knew even though Esau and Bertha fought. (IX 1696-1700). Bertha moved to Jacksonville when Deone was eight to get away from Esau. (IX 1700-01). Because their mother drank, Deone became the mother for her two younger brothers. (IX 1702). When asked why, given all the problems with Bertha, she testified at Sweet's trial that she had a normal relationship with her mother, Deone responded "that was the life, the only life I knew so it was normal for me." (IX 1705). Deone testified that Sweet had behavior problems in school, that they were put into foster care and then sent back to their mother and that, when Sweet returned from the boy's school in Marianna, he moved in with her because Bertha had returned to Miami, at which point Deone became Sweet's legal guardian. (IX 1706-12). On cross-examination Deone admitted that she was more aware of the problems at home than Sweet because she was older and that Sweet was never physically abused. (IX 1716). On redirect Deone stated that she talked on the telephone with Adams several times and also saw him several times to talk about her brother and their lives. (IX 1720).

At the evidentiary hearing Bertha Mae Sweet, Sweet's mother, outlined her history with her ex-husband, Powell Sweet, and their six children (IX 1722-25) and admitted to drinking and living with violent boyfriends (IX 1727-32) and that the state removed Sweet

and a sister and brother from her custody although they were later returned. (IX 1734, 1736-38). She related Sweet's bout with meningitis while a toddler (IX 1732-33) and that he fell on his head when about three years old. (IX 1734). Bertha Mae stopped giving Sweet Ritalin when he was returned to her because it made him "drugged out or something." (IX 1739). She also admitted that Sweet had been in trouble with the law and was put into several juvenile programs and that she abandoned her children and returned to Miami while Sweet was in the Dozier School for Boys. (IX 1742-43). She denied being contacted by Sweet's trial counsel and averred that she would have testified for her son if contacted. (IX 1743-45).

On cross-examination Bertha Mae admitted that Sweet was an unruly child who fought and also ran away and that he was arrested for battery in 1981 (IX 1745-47). She acknowledged that Sweet began stealing money from her when he was around four years old and that he continued to steal things throughout his teens. (IX 1747-48). Additionally, she admitted that Sweet was arrested for stealing a bicycle in 1981, but did not remember the 1983 arrest for petit theft, the burglary arrest in 1983, or the trespass arrest in 1985. (IX 1749-50).

Charlie Adams, Sweet's trial counsel testified extensively at the evidentiary hearing. As to the current complaint about not calling witnesses, Adams testified on direct examination that the

theory of defense was that Sweet did not commit the murder, combined with lack of evidence and misidentification, and agreed that evidence of other potential suspects would have been helpful. (X 1783-85). Regarding Anthony McNish, Adams remembered that McNish knew Sweet and did not think Sweet was one of the people he saw in the alley. (X 1790). Adams subpoenaed McNish to testify and tried to find him when he did not appear. (X 1791). Adams recalled virtually nothing about Dale George. (X 1793-97). Adams remembered more about Jesse Gaskins and his account of being forced to knock on Cofer's door by a masked man. (X 1797-99). He rejected Gaskins as a witness, however, because, at one point, Gaskins said the man looked like Sweet. (X 1799-1800). Adams agreed with collateral counsel that Sweet's case would have been stronger without Solomon Hansbury's testimony that Sweet confessed to him while in jail. (X 1803).

On cross-examination Adams testified that Sweet did not have an alibi. (X 1832). McNish told him that he wanted to testify, and Adams had no reason to think that he would not appear at trial. (X 1833). McNish did not ask for transportation to court. (X 1833). As to Dale George, Adams agreed that he did not consider Dale George a suspect because there was no reason to believe that Cofer and Sharon Bryant, both of whom knew George, would have misidentified him if he had been the shooter. (X 1836). Regarding Gaskins, Adams agreed that it would have been damaging to have

Gaskins admit that he identified Sweet as the man who made him knock on Cofer's door. (X 1837). Adams did not call Gaskins because, unless he testified, the state could not introduce his identification of Sweet. (X 1838-39).

As to the penalty phase of Sweet's trial, Adams testified on direct examination that he prepared for the penalty phase by speaking with Sweet, his mother, sister, girlfriend, girlfriend's mother, and one set of foster parents. (X 1805). He thought he remembered having some school and jail records, but did not use them. (X 1808). Adams did not recall why he did not use those records, but thought it might have been because they contained harmful material, although now he would probably use such materials. (X 1809-10). He did not try to find mental health records on Sweet's relatives. (X 1810-12). The foster mother he spoke with was rejected as a witness because of what she told him. (X 1811). Adams could not recall if he knew that Sweet had taken Ritalin or that Sweet had spinal meningitis or a head injury while very young. (X 1812). He did not seek any evidence beyond Deone's testimony to document Bertha's alcoholism or her abandoning her children. (X 1813-14). When collateral counsel asked if Dr. Miller's competency report contained potential mitigating evidence, Adams did not know. (X 1815). After counsel took him through that report item by item, Adams stated that he did not use the report in the sentencing phase and did not remember if he argued its contents

as mitigation. (X 1816-17). Adams agreed that "all the stuff we just discussed" might have affected the aggravators. (X 1818). He also agreed that having testimony that the statutory mental mitigators applied to Sweet might have helped. (X 1819).

On cross-examination Adams confirmed that he had numerous discussions with Deone. (X 1825-26). He recalled asking her for the names of relatives that might be helpful, but she gave him no useful information. (X 1826). Adams spoke with Bertha Mae and told her she should attend the trial, but could not remember whether she said she would not attend the trial or would try to do so; she did not attend. (X 1826-27). He asked Sweet if he should call Bertha Mae as a penalty-phase witness, and Sweet told Adams that he did not want his mother to come to Jacksonville. (X 1827). At one time Sweet's girlfriend was willing to testify at the penalty phase, but changed her mind when she learned that Sweet was involved with another woman. (X 1828). The girlfriend's mother was not willing to testify because of what her daughter said. (X 1828). Adams rejected the foster mother as a witness because she said that Sweet "is a pretty bad individual." (X 1828-29). Besides containing possibly helpful material, Dr. Miller's report also contained his diagnosis of Sweet as being antisocial or a sociopath which would not have been helpful. (X 1839). Adams acknowledged that he had been able to keep details of Sweet's juvenile record out of evidence and that introducing more

information about Sweet's background could have opened the door for the admission of the juvenile criminal history. (X 1840). He also acknowledged that the state would be allowed to attempt to rebut any mental health mitigation. (X 1841).

Anthony McNish testified that he saw three men in the alley near Cofer's apartment and that none of them was Sweet. (X 1862-66). He also stated that: no arrangement was made for him to testify at trial; he never read the subpoena; he did not go to court because he had to babysit his daughter at her mother's house; Adams told him he would provide transportation, but no one came to pick him up; and Adams knew the location of the house where he was. (X 1871-75). On cross-examination McNish acknowledged that he knew he had been subpoenaed and that he was supposed to appear at trial, as well as that his current testimony was an attempt to help Sweet. (X 1880-81). McNish admitted that he is currently in prison and had been convicted of seven felonies. (X 1883). He agreed that, in his deposition, he said he left the alley because he saw a police officer and did not want to be stopped because he was carrying drugs. (X 1886). McNish also admitted that his eyesight was and is bad and that he did not get a good look at the three people he saw in the alley. (X 1892, 1893-94). McNish acknowledged that, in his deposition, he said he heard shots five minutes after leaving the alley (X 1898) and that he was "far away" from Cofer's when he heard the shots. (X 1906).

Solomon Hansbury testified that he lied at trial when he stated that Sweet confessed to him while they were inmates at the Duval County Jail. (X 1909-11). He also admitted that he has been convicted of more than ten felonies, that he is now serving a life sentence, and that snitches are not viewed favorably by other prisoners. (X 1916-19).

Sweet's last witness was attorney William Salmon. Salmon has been an attorney since the mid 1970s (X 1924) and was accepted by the circuit court "as a person qualified to render opinions in the area of capital murder cases." (X 1928). Salmon stated that Adams was ineffective for failing to call George, Gaskins, and McNish as defense witnesses. (X 1934). Although he found presenting George to be closer question, Salmon stated that Adams "[a]bsolutely" should have investigated George and considered him as a possible suspect. (X 1935). After opining that Adams was ineffective regarding McNish, whether or not he was properly subpoenaed (X 1938-39), Salmon stated that "there is a reasonable probability that had Mr. McNish testified the result of this case would have been different." (X 1939). Salmon based this bald statement on his opinion that McNish "would present the strongest evidence of other suspects raising reasonable doubt as to the identification or the jury accepting the testimony that" Sweet was the shooter. (X 1939). He stated that Gaskins' testimony would have given the

jurors "food for thought" (X 1941) and that Gaskins' identification of Sweet would not have "troubled [him] a bit." (X 1942).

On cross-examination Salmon agreed that, if a witness had not previously failed to appear and had assured an attorney that he would show up for trial, assuming that the witness would do so was not unreasonable. (X 1958). He also acknowledged that jurors can disregard testimony they do not believe. (X 1958-60). Salmon saw no problem with McNish's credibility with a jury even though McNish testified that he now recognizes one of the three people in the alley, but refused to identify that person. (X 1960-63). Salmon acknowledged that the state could have impeached Gaskins with his prior statement if he equivocated on identifying Sweet. (XI 1970-71). He finally admitted that if "it was going to be harmful to your client the strategic decision would be not to put him on, certainly." (XI 1972). Salmon reluctantly agreed that it would not have been unreasonable to conclude that Cofer and Sharon would have identified George if he had been the shooter. (XI 1974-76).

In Salmon's opinion, Adams' performance in the penalty phase was also ineffective. (X 1943-44). According to Salmon, juries "are in my estimation desperately seeking that information that will allow them to make sure that they are doing the right thing," i.e., recommend life imprisonment. (X 1944-45). He felt that the information from Toomer on statutory mental health mitigators and the nonstatutory material testified to by family members was

evidence that, again, the jury was "desperately seeking." (X 1944-46). In Salmon's view, Adams should have ignored Sweet's instructions and pursued all possible mitigating evidence because "the effective lawyer doesn't even listen to that. . . . He uses it if anything as a challenge to do a better job on presenting mitigating evidence." (X 1947). Salmon thought Adams' not using a mental health expert to rebut the aggravators was ineffective because he, personally, could see no strategic reason not to use information that might dilute the impact of the aggravators. (X 1948-49).

On cross-examination Salmon stated that Adams was ineffective for not keeping evidence of Sweet's prior robbery from the jury. (X 1966). When informed that the issue was raised on direct appeal and that the Florida Supreme Court found that prior robbery both admissible and relevant and affirmed the felony-murder aggravator, Salmon admitted that he had not read the Court's opinion. (X 1967). Salmon agreed that putting on extensive penalty-phase evidence opens the door to introducing damaging evidence and that telling the jury that the defendant was a sociopath who repeatedly committed crimes would not be helpful. (XI 1984-85). He also agreed that jurors could reject expert testimony that they found to be biased, unreasonable, or rebutted. (XI 1986). Salmon agreed that parts of Dr. Miller's report were damaging and that Adams successfully kept Sweet's juvenile record out of evidence. (XI

1987). Salmon stated that he has been a criminal defense lawyer for more than twenty years, that he has been affiliated with the Gainesville Citizens Against the Death Penalty, that he feels that the death penalty is immoral, and that he received $5,000 for his testimony in Sweet's case. (XI 1990-91).

On redirect Salmon agreed with collateral counsel that the more powerful the aggravation the more rebuttal information an attorney might want to present. (XI 1997-98). On recross he agreed that the more powerful the aggravation is the less likely a jury is to believe that it is outweighed by the mitigation. (XI 1998).

The state recalled Salmon as its first witness at the evidentiary hearing. He testified that snitches were not well regarded in prison and that testifying against the state for a fellow inmate would be seen by other inmates as a noble act. (XI 2003).

Dr. Ernest Miller, the psychiatrist who found Sweet competent to stand trial, then testified as a state witness. Miller estimated that he had seen around 40,000 cases where competency and sanity were at issue, most of which were criminal cases. (XI 2015). He has been qualified in court as an expert 2,000 times and has testified the majority of times as a court expert. (XI 2016). Miller stated that he had reviewed Toomer's deposition and other materials relevant to the proceedings. (XI 2019). He explained

his pretrial evaluation of Sweet and the conclusions he drew regarding Sweet. (XI 2019-26). Miller also stated that he diagnosed Sweet as an antisocial personality and explained that disorder. (XI 2026-30). Sweet's meningitis and fall on his head would not change his opinion (XI 2031), nor would Sweet's brothers' violent behavior and mental illness nor Sweet's experiences at the Dozier School. (XI 2032). Nothing in the materials he reviewed for the hearing altered his conclusion that Sweet has antisocial personality disorder. (XI 2032). Miller explained the basis for his opinion that Sweet has antisocial personality disorder and stated that a formal diagnosis of juvenile conduct disorder is not necessary. (XI 2032-36).

Miller has testified in the penalty phase of capital trials, primarily for the defense. (XI 2038-39). He does not think that borderline personality disorder is the proper diagnosis of Sweet.[4] (XI 2039-41). According to Miller, Sweet possesses the capability to form the intent necessary for the CCP aggravator to be

[4] The DSM-IV at 647 states that, while there are shared personality features among individuals with antisocial and borderline personality disorders, "[t]he likelihood of developing Antisocial Personality Disorder in adult life in increased if the individual experienced an early onset of Conduct Disorder (before age 10 years) and accompanying Attention-Deficit/Hyperactivity Disorder. Child abuse or neglect, unstable or erratic parenting, or inconsistent parental discipline may increase the likelihood that Conduct Disorder will evolve into Antisocial Personality Disorder." Furthermore, "[i]ndividuals with Antisocial Personality Disorder tend to be less emotionally unstable and more aggressive than those with Borderline Personality Disorder." Id. at 649.

applicable and the statutory mental mitigators do not apply to Sweet's commission of this murder. (XI 2042-45).

On cross-examination Miller agreed that information about Sweet's background should have been presented to the jury and stated that he would advocate using a mental health expert at the penalty phase of all capital cases. (XI 2050-52). He also agreed that Sweet's family history could be used as nonstatutory mitigation. (XI 2053). Miller agreed with collateral counsel that this incident could have been impulsive which could have been used to argue against CCP. (XI 2053-54).

Miller stated on redirect that the majority of the material he reviewed before the hearing confirmed his original conclusions. (XI 2056). He agreed that many people have backgrounds as bad as Sweet's but do not murder other people. (XI 2059). Miller acknowledged that introducing Sweet's background could lead to the introduction of evidence that otherwise might not have been admitted and would result in the jurors learning that Sweet consistently engaged in antisocial and criminal behavior since the age of four. (XI 2060-61).

After the evidentiary hearing, both sides filed written closing arguments. (VI 970-1022; VI 1023-60). The circuit court issued its order denying relief on March 30, 2000 (VI 1075-97), and this appeal followed.

SUMMARY OF ARGUMENT

ISSUE I

The circuit court did not err in holding that trial counsel did not render ineffective assistance by not having Anthony McNish, Jessie Gaskins, and Dale George testify at Sweet's trial. As the court found following the evidentiary hearing, Gaskins' testimony would have bolstered the state's case, McNish was not credible, and no evidence was presented to show that George was a viable suspect.

ISSUE II

The circuit court did not err in holding that trial counsel rendered effective assistance at the penalty phase. As the court found, the testimony about Sweet's background presented at the evidentiary hearing was cumulative to that introduced at trial and the evidence in the case contradicts the postconviction mental health expert's opinions.

ISSUE III

The circuit court properly denied the claim of innocence and committed no error in its consideration of that claim.

ISSUE IV

The circuit court did not err in finding that Sweet received an adequate competency evaluation prior to trial and that counsel was not ineffective regarding that evaluation.

ISSUE V

The circuit court did not err in denying various claims summarily.

ISSUE VI

Contrary to Sweet's claim, the record is not incomplete and did not contribute to his inability to meaningfully raise claims in this appeal.

ARGUMENT

ISSUE I

WHETHER THE CIRCUIT COURT CORRECTLY HELD THAT TRIAL COUNSEL WAS NOT INEFFECTIVE REGARDING INVESTIGATION OF THE CASE AND OTHER SUSPECTS.

Sweet argues that Adams was ineffective for not considering Dale George a suspect, for not presenting Jessie Gaskins' testimony, and for not ensuring that Anthony McNish appeared at trial. (Initial brief at 58). He contends that the circuit court erred in denying this claim. There is no merit to this issue, however.

The alleged failures regarding other suspects is claim VIIB of the amended motion (II 237-41) one of the claims included within the scope of the evidentiary hearing. After that hearing, the circuit court stated the following regarding claim VIIB in denying relief:

> In the defendant's second claim under this ground, he alleges that counsel failed to investigate other possible suspects *who would have had a motive to kill* Marcine Cofer. The first two such suspects were the two other perpetrators that Cofer had identified to the police as having been involved in the prior robbery of her. This Court finds that no evidence was presented at the hearing as to why Cofer (and Sharon Bryant) would not have identified either of these two individuals as the murderer, given Cofer's previous identification of them as two of the robbers. The only other person that the defendant suggests had a motive to kill Cofer was Dale George. Dale George was not only Cofer's boyfriend, he lived with Cofer, and he was known to Sharon Bryant. There was no evidence

presented as to why George would have had any problem getting into the home that he lived in, as did the murderer, nor why either Cofer or Bryant would not have identified George as the person they saw through the peep hole in the front door and who had shot them.

As part of this claim, the defendant goes on to expand his first claim under this ground - that counsel had failed to investigate and present the testimony of certain individuals. The first person the defendant alleges counsel should have investigated and called as a witness at trial was Jessie Gaskins. Gaskins had previously identified the defendant as the person who had allegedly forced him to knock on Cofer's door. Counsel'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). Even the defendant's capital trial expert, William Salmon, after acknowledging that identification and a lack of evidence were the proper theories of the defense in this case, admitted that he would not put a witness on the stand who would *bolster* the State's case. While Gaskins later indicated an inability to say for certain that the defendant was the man, he never said that the defendant was not the man. The second person was Anthony McNish. The evidence at the hearing established that counsel had listed and intended to use McNish as a witness, that McNish appeared at a deposition by the State pursuant to a subpoena, that McNish had assured counsel that he would appear at trial, that he had been subpoenaed by counsel to appear at trial (but had not read that subpoena), and that counsel secured a recess in the trial to go to McNish's house and to McNish's grandmother's house in order to locate McNish, but was unsuccessful[] in his efforts. This Court specifically finds that counsel was not ineffective in his efforts to secure McNish's appearance at trial. Moreover, given McNish's inconsistent testimony at the evidentiary hearing and

> complete evasiveness regarding a critical piece of newly divulged evidence - some *eight* years after the fact, the jury would find McNish's testimony to be as incredible as this Court found it to be, and therefore, the defendant has also failed to show any actual prejudice as well.

(VI 1082-83).

To prove that counsel rendered ineffective assistance, Sweet must demonstrate both that Adams' performance was deficient, i.e., that he made such serious errors that he did not function as the counsel guaranteed by the Sixth Amendment, and that the deficient performance prejudiced him, i.e., "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." Strickland v. Washington, 466 U.S. 668, 687 (1984). A postconviction movant must make both showings, i.e., both incompetence and prejudice. Id.; Kimmelman v. Morrison, 477 U.S. 365 (1986); Asay v. State, 769 So.2d 974 (Fla. 2000); Cherry v. State, 659 So.2d 1069, 1073 (Fla. 1995) ("The standard is not how present counsel would have proceeded, but rather whether there was both a deficient performance and a reasonable probability of a different result.") (emphasis in original). This standard "is highly demanding." Kimmelman, 477 U.S. at 382. Only those postconviction movants "who can prove under Strickland that they have been denied a fair trial by the gross incompetence of their attorneys will be granted" relief. Id.; Rogers v. Zant, 13 F.3d 384, 386 (11th Cir. 1994) (cases granting relief will be few and

far between because "[e]ven if many reasonable lawyers would not have done as defense counsel did at trial, no relief can be granted on ineffectiveness grounds unless it is shown that no reasonable lawyer, in the circumstances, would have done so. This burden, which is petitioner's to bear, is and is supposed to be a heavy one.") (emphasis supplied).

Moreover, "[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms." Strickland v. Washington, 466 U.S. at 688. Counsel should be presumed competent, and second-guessing counsel's performance through hindsight should be avoided. Id. at 689; Kimmelman; White v. Singletary, 972 F.2d 1218 (11th Cir. 1992); Atkins v. Singletary, 965 F.2d 952 (11th Cir. 1992); Shere v. State, 742 So.2d 205 (Fla. 1999); White v. State, 664 So.2d 242 (Fla. 1995).

While the standard for a postconviction movant claiming counsel was ineffective is a demanding one, competent trial counsel must perform at minimum level, not a maximum one. "The test has nothing to do with what the best lawyers would have done. Nor is the test even what most good lawyers would have done. We ask only whether some reasonable lawyer at the trial could have acted, in the circumstances, as defense counsel acted at the trial." White, 972 F.2d at 1220; see also Hendricks v. Calderon, 70 F.3d 1032, 1039 (9th Cir. 1995) (Strickland v. Washington requires only minimal competence); Teffeteller v. Dugger, 734 So.2d 1009, 1022

n.14 (Fla. 1999) ("the legal standard is reasonably effective counsel, not perfect or error-free counsel"). When considering ineffectiveness claims, a court "need not determine whether counsel's performance was deficient when it is clear that the alleged deficiency was not prejudicial." Williamson v. Dugger, 651 So.2d 84, 88 (Fla. 1994).

When considering ineffective assistance claims, this Court will defer to the circuit court's findings of fact and will review the conclusions regarding deficient performance and prejudice de novo. Cherry v. State, 25 Fla.L.Weekly S719, S721 (Fla. September 28, 2000); Stephens v. State, 748 So.2d 1028, 1033-34 (Fla. 1999) (same); Blanco v. State, 702 So.2d 1250, 1252 (Fla. 1997) (if the factual findings following an evidentiary hearing are supported by competent substantial evidence, an appellate court will not substitute its judgment for the circuit court's on questions of fact, credibility, or weight). The circuit court's findings are supported by the record evidence from both the evidentiary hearing at the trial, and its conclusion that Adams' assistance was not deficient and that Sweet suffered no prejudice is supported by both the evidence and the law. The denial of relief on this claim, therefore, should be affirmed.

As set out in the statement of the case and facts, Adams testified that he did not consider Dale George to be a suspect because none of the surviving victims, all of whom knew George,

identified him as the shooter. George lived with Cofer, and, as noted by the court, would have had no problem getting into the apartment. The court's finding that no evidence was presented as to why the eyewitnesses did not identify him is supported by the record and should be affirmed, as should the conclusion that Adams was not ineffective for not pursuing George as a suspect.

Adams also testified that he was concerned that Jessie Gaskins' identification of Sweet as the man who forced him to knock on Cofer's door would allow the state to impeach him if he testified that he could not identify Sweet. The circuit court noted that even Sweet's expert, William Salmon, admitted that he would not put a witness on the stand who would bolster the state's case by providing a third identification of the defendant. This finding of fact is also supported by the record and should be affirmed as well as the court's conclusion that Adams had good reason for not calling Gaskins and was, therefore, not ineffective.

Also as Adams testified, he was confident, after meeting with Anthony McNish at the beginning of trial, that McNish would answer the subpoena and appear to testify for Sweet. When that did not happen, Adams secured a continuance to look for McNish. (DAR XXVI 999-1000). When he returned to court, Adams reported that he had gone to the homes of both McNish and his grandmother, but could not find McNish. (DAR XXVI 1001-02). McNish's testimony at the evidentiary hearing was riddled with inconsistencies. Assuming

that his trial testimony would have been similar, these inconsistencies, coupled with his poor eyesight, criminal record, and deposition testimony that he was a considerable distance from the shootings in both space and time, would not have caused the jury to reject Manuela Roberts' testimony that Sweet told her he robbed Cofer or Cofer and Bryant's eyewitness identification of Sweet as the shooter. The record supports the circuit court's finding McNish not to be a credible witness, and that factual finding should be affirmed, as should the court's conclusion that Sweet demonstrated neither deficient performance nor prejudice regarding McNish's not testifying at trial. See Haliburton v. Singletary, 691 So.2d 466, 470-71 (Fla. 1997) (counsel's decision not to use a possible witness was not "so patently unreasonable that no competent attorney would have chosen" to forego presenting the witness' testimony), quoting Palmes v. Wainwright, 725 F.2d 1511, 1521 (11th Cir. 1984) (quoting Adams v. Wainwright, 709 F.2d 1443, 1445 (11th Cir. 1983)).

Sweet complains that the circuit court ignored Salmon's testimony that he considered Adams ineffective regarding George, Gaskins, and McNish. (E.g., initial brief at 62-64). A finder of fact, however, is not required to accept expert opinion testimony because such opinions "are not necessarily binding even if uncontroverted." Walls v. State, 641 So.2d 381, 390 (Fla. 1994); see also Walker v. State, 707 So.2d 300 (Fla. 1997); Wuornos v.

State, 676 So.2d 972 (Fla. 1995); Wuornos v. State, 644 So.2d 1000 (Fla. 1994). Moreover, this argument ignores the circuit court's assessment of Salmon's testimony:

> [T]he defendant also presented the opinion testimony of a defense expert in capital trials, Mr. William Salmon, Esquire. Mr. Salmon testified that the theories of the defense presented by defendant's trial counsel, identity and a lack of evidence, were the proper theories to be used under the facts of this case. However, Mr. Salmon also testified that counsel should have presented the testimony of witnesses during the guilt phase and potentially mitigating evidence during the penalty phase despite the fact that this evidence would lead to other evidence which would be, at a minimum, as detrimental to the defendant's case as it would be potentially favorable to his case. . . . This Court finds that reasonable attorneys would strongly disagree with these opinions, especially to the extent that they would be in violation of this State's code of professional conduct. Accordingly, this Court found Mr. Salmon's opinions to be of no assistance to this Court.

(VI 1095-96). These findings of fact and credibility determination are supported by the record, see X 1924-70, XI 1971-2001, and should not be disturbed.

Finally, Sweet complains about the circuit court's denial of claim VIIA, a subpart of his claim that Adams was ineffective at the guilt phase of his trial. (Initial brief at 61-62). In denying this claim the Court stated:

> The defendant's first claim under this ground is that counsel allegedly failed to conduct an adequate pre-trial investigation and preparation of the defendant's case. As

> the defendant acknowledges, the defendant was initially represented by the Public Defender's Office, and his trial counsel was not appointed until five months after the defendant's arrest, only one month prior to when the speedy trial period would have expired. Counsel sought and was granted two continuances of several months in duration for investigative purposes, and two continuances of a few weeks in duration for health reasons. When counsel attempted to obtain yet another continuance, this Court denied that request. The defendant makes the conclusory allegations that his attorneys' preparation was inadequate due to counsel's health problems, and due to a break down in communications between [him] and his attorney. The defendant cites to a statement he made in court as support for his allegation that there was a break down in communications. In point of fact, the defendant's statement clearly shows that the defendant was pushing counsel [to] bring the case to trial, and was unhappy that counsel was not doing so, which is diametrically opposed to counsel being able to take the time to adequately prepare for trial. Further, this Court denied counsel's additional requests for more continuances. This Court finds that this claim is, at best, facially insufficient. The defendant also makes the conclusory allegations that counsel "failed to conduct an adequate voir dire; to object to the introduction of inflammatory and improper evidence; and failed to present adequate argument to the jury." The defendant merely cites to the record on appeal in support of these allegations. This Court finds these allegations to be facially insufficient.

(VI 1081). Sweet disagrees with the court's assessment of what he raised in this subclaim, but the judge's findings accurately reflect the statement of the claim in the amended motion for postconviction relief. See II 234-37. No error has been demonstrated in the court's finding this subclaim to be conclusory,

ill-pled, and not supported by the record. See Sweet, 624 So.2d at 1139-42 (no error regarding the continuances); Ragsdale v. State, 720 So.2d 203, 207 (Fla. 1998) ("A summary or conclusory allegation is insufficient to allow the trial court to examine the specific allegations against the record"). The denial of this subclaim should be affirmed.

Sweet has failed to show that the circuit court erred in denying his claim that Adams failed to investigate and present his case properly. He presented nothing at the evidentiary hearing to refute the overwhelming evidence of his guilt. See Rutherford v. State, 727 So.2d 216, 220 (Fla. 1998). Therefore, this Court should affirm the denial of this claim.

ISSUE II

WHETHER THE CIRCUIT COURT CORRECTLY FOUND THAT TRIAL COUNSEL WAS NOT INEFFECTIVE REGARDING THE PENALTY PHASE.

In this issue Sweet argues that Adams was ineffective during the penalty phase for not introducing more testimony about his life and background and for not introducing any testimony by a mental health expert. The circuit court, however, fully considered the testimony at the evidentiary hearing and properly concluded that counsel was not ineffective. Thus, there is no merit to this claim.

In deciding this claim, the court stated:

GROUND EIGHT

The defendant claims that counsel rendered ineffective assistance of counsel by failing to investigate and prepare *available* mitigation evidence regarding the defendant's background. The evidence at the hearing failed to even show that counsel's performance was deficient. Counsel spoke to the defendant's mother (Bertha Mae Sweet), but the defendant instructed counsel that he did not want his mother to testify. An attorney cannot be ineffective for following his client's instructions. Rivera v. Florida, 717 So.2d 477 (Fla. 1998). Counsel spoke to the defendant's sister (Deone Sweet) and ultimately presented her testimony during the penalty phase of the trial. Counsel asked the defendant's sister if she knew of other relatives that could provide favorable testimony and the sister said that she did not. Counsel spoke to one of the defendant's foster mothers (Emily Shealey) and given her indication that the defendant was a pretty bad individual, chose not to call her as a witness. The princip[al] evidence the defendant presented at the hearing in support of this claim was the testimony of the defendant's mother (whom the defendant had excluded from his trial), his sister (who did testify at trial), and the foster mother (Emily Shealey), whose testimony demonstrated that counsel's assessment was accurate, i.e., that her testimony could have been far more damaging to the defendant than helpful.

While the *available* background evidence showed that the defendant had a disadvantaged childhood, that fact was brought to the jury's attention through the defendant's sister's trial testimony. Any attempts to increase the amount of information in support of that fact 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. Johnson v. State,

> 660 So.2d 637 (Fla. 1995). In sum, the evidence presented at the hearing failed to establish that counsel's performance was deficient under the instant circumstances, let alone that the defendant was prejudiced as a result of the allegedly deficient performance.

(VI 1084-85). Sweet complains that the circuit court misconstrued the evidence presented in this case (initial brief at 74-79) and chides the court for not mentioning the mental health experts' testimony. (Initial brief at 80-82). The circuit court, however, fully considered the possible mitigating effect of Miller and Toomer's testimony later in the order denying relief:

> The defendant claims that the mental health professionals who examined him failed to render adequate mental health assistance. Specifically, the defendant asserted that, "The experts relied almost exclusively on information they received from Mr. Sweet; no independent investigation into Mr. Sweet's family history was undertaken. Further, had this information been taken into account, the competency experts may have reached significantly different conclusions favorable to his defense in both phases of his trial." So as to ensure that the defendant was not prejudiced at trial, this Court granted the defendant a hearing on this claim, so as to allow him to establish whether the experts would have formed a different opinion in light of his proffered additional factual information. Instead of doing that, however, the defendant chose to call his own mental health expert, which he also asserts his trial counsel should have done at trial.
>
> The defendant presented the testimony of Dr. Jethro W. Toomer, Ph.D., who has a private practice in clinical and forensic psychology, and who is also a professor at Florida International University in Miami, Florida. This Court accepted Dr. Toomer as qualified to

render opinions in the area of forensic psychology. The defendant had provided Dr. Toomer with a copy of Dr. Miller's final report and asked him to conduct his own mental health evaluation, and then to provide the defendant with his impressions and evaluations regarding Dr. Miller's report. Dr. Toomer noted the various tests that he had administered to the defendant, and then noted that he had not administered the Minnesota Multiphasic Personality Inventory (commonly referred to as the MMPI) test, because that test was used for psychiatric patients who were hospitalized or suffering from severe forms of mental illness, and, "There is nothing suggesting the existence of any severe form of mental illness or major mental illness with respect to Mr. Sweet ...." Dr. Toomer also found no clinical evidence that the defendant suffered from an organic brain disorder (although he stated his opinion, not diagnosis, that there was a possibility of an organic brain disorder of a "sub-clinical level"). Dr. Toomer testified that the defendant's scores on the various intelligence tests placed him in the "low average range" (as opposed to the superior or deficit ranges) and that the defendant had obtained his GED while incarcerated at some point.

Dr. Toomer stated his opinion that the defendant has a "borderline personality disorder," that he was not able to conform his conduct to the requirements of the law at the time of his offense, due to the "impulsiv[i]ty" associated with his disorder, that the avoid arrest aggravator was inapplicable to the defendant due the impulsiv[i]ty associated with his disorder, and that the cold, calculated, and premeditated aggravator was also inapplicable due to the defendant's inability to engage in "higher order thinking," which was related to the impulsiv[i]ty associated with his disorder.

Even Dr. Toomer's opinions would not have establish[ed] a statutory mitigating factor.

Jones v. State, 612 So.2d 1370 (Fla. 1992). At best, his testimony would relate to non-statutory mitigation. However, this Court finds that the evidence in this case contradicts Dr. Toomer's opinions. The evidence at trial overwhelming showed the defendant's motive and intent to eliminate the victim/witness to his prior robbery of that victim, and the defendant's own inculpatory statements to Manuela Roberts and Solomon Hansbury provide the icing on the cake.

Dr. Toomer also disagreed with Dr. Miller's finding as to the defendant's competence to stand trial, and Dr. Miller's opinion that the defendant has an anti-social personality disorder. Dr. Toomer testified that he could not say that Dr. Miller's examination was not competently done, rather, he simply indicated his unwillingness to accept Dr. Miller's findings because he had not seen any data in the report in support of Dr. Miller's findings. This Court rejects Dr. Toomer's inconsistent opinion that the defendant was not competent to stand trial.

As to Dr. Miller's opinion that the defendant has an anti-social personality disorder, Dr. Toomer disagreed with this opinion on the ground that the defendant had never previously been diagnosed as having a "conduct disorder." Dr. Toomer testified that, "Vandalism, stealing, property destruction, truancy," are all characteristics of conduct disorder. As the State demonstrated on cross-examination of Dr. Toomer, there is a wealth of evidence of these factors throughout the defendant's life, and moreover, of the commission of violent offenses as well. Accordingly, this Court rejects Dr. Toomer's opinion in this regard, as it is inconsistent with Dr. Miller's opinion, it [is] inconsistent with his own criteria, and it is inconsistent with the evidence in this case. Rose v. State, 617 So.2d 291 (Fla. 1993). Moreover, Dr. Miller testified that the additional evidence, that the defendant contends that he did not

> consider, would not have changed his opinion that the defendant has an anti-social personality disorder. Breedlove v. State, 692 So.2d 874 (Fla. 1997). Had Dr. Toomer's testimony been presented at trial it would have [led] to contrary evidence by the State, which would have [led] the jury to the conclusion that the defendant has an anti-social personality disorder. Van Poyck v. State, 694 So.2d 686 (Fla. 1997).

(VI 1092-95).

This claim is governed by the same standards as set out in issue I, supra. First, Sweet must establish deficient performance by Adams that prejudiced him, i.e., he must show that, but for Adams failure to present the currently advanced testimony at the penalty phase, he would not have been sentenced to death. See Cherry, 25 Fla.L.Weekly at S721; Asay. Second, this Court will review the court's conclusions as to ineffectiveness de novo. Cherry; Stephens. Finally, the circuit court's findings of fact will not be disturbed if supported by competent substantial evidence. Cherry; Stephens. The record supports the circuit court's findings and conclusions.

Deone testified during the penalty phase that their mother drank and that they did not know their father; that she, being the oldest of the three youngest children, essentially raised Sweet; that Sweet was good with her young daughter; and that they were put into foster care because of their mother's alcoholism and neglect. (DAR XXVIII 1241-48). Adams successfully objected to the state's attempt to elicit testimony from Deone about Sweet's juvenile

criminal record and convictions. (DAR XXVIII 1251). In closing argument Adams argued that Sweet should not be sentenced to death because of his abysmal upbringing and lack of parental support and guidance and because the state had not established sufficient aggravators. (DAR XXVIII 1266-70).

Sweet argues that Adams should have presented more testimony about what miserable parents his were. More information, however, is not necessarily better. As set out above, the jury was informed of the problems with Sweet's upbringing. Moreover, Adams testified at the evidentiary hearing that he contacted Deone and Bertha Mae as well as Sweet's girlfriend and her mother and that Sweet directed him not to have his mother attend the trial. As the circuit court noted, a client's direct instructions must be taken into consideration. See Rutherford, 727 So.2d at 225; Rivera v. State, 717 So.2d 477 (Fla. 1998); Sims v. State, 602 So.2d 1253, 1258 (Fla. 1992) ("counsel cannot be deemed ineffective for honoring the client's wishes").

This is not a case such as those relied on by Sweet - Thompson v. Wainwright, 787 F.2d 1447 (11th Cir. 1986), and Thomas v. Kemp, 796 F.2d 1332 (11th Cir. 1986) - where counsel failed to prepare.[5]

[5] Sweet's reliance on Ragsdale v. State, 720 So.2d 203 (Fla. 1998), is also misplaced. In Ragsdale, this Court held that Ragsdale's allegations about counsel's ineffectiveness at the penalty phase were sufficient to warrant an evidentiary hearing and remanded for such a hearing. In this case, on the other hand, the circuit court granted Sweet an evidentiary hearing on a claim similar to Ragsdale's, but Sweet was unable to prove that his claim

Instead, the circuit court correctly found that the evidentiary hearing testimony from Sweet's mother, sister, and foster mother would have been cumulative to what was presented at the penalty phase. See Cherry, 25 Fla.L.Weekly at S721; Patton v. State, 25 Fla.L.Weekly S749, S752 (Fla. September 28, 2000); Downs v. State, 740 So.2d 506, 513-17 (Fla. 1999); Teffeteller, 734 So.2d at 1021.

Sweet's complaint about Adams' failure to present mental health testimony at the penalty phase is also meritless. As this Court stated in Walls, 641 So.2d at 390, expert opinion testimony can be rejected even if uncontroverted. Moreover, such "testimony gains its greatest force to the degree it is supported by the facts at hand, and its weight diminishes to the degree such support is lacking." Id. The circuit court was justified in rejecting Toomer's testimony and in finding that it was controverted by the facts.

As set out in the statement of the case and facts, for example, Toomer thought that Sweet had organic brain damage, but could find no evidence of such damage. Toomer disagreed with Miller's opinion that Sweet has an antisocial personality disorder, but admitted that Sweet's juvenile behavior supported Miller's opinion. The court's findings of fact regarding Toomer's testimony are supported by competent substantial evidence and should not be disturbed.

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had any merit.

Sweet's claim that Miller stated that the statutory mental mitigators applied (initial brief at 80-81) is incorrect as is his claim that Miller said the CCP aggravator did not apply to this homicide. (Initial brief at 81). Instead, the record of both the evidentiary hearing and the trial supports the circuit court's conclusions regarding the aggravators established in this case and the lack of statutory mitigators. See Sweet, 624 So.2d at 1142-43.

The record also supports the court's finding that, even with the additional evidence provided at the hearing, Miller's opinion that Sweet was competent and had antisocial personality disorder would not have changed. See Breedlove v. State, 692 So.2d 874, 877 (Fla.1998) (where additional information would not change original expert's opinion, there is no reasonable probability of a different penalty result). Moreover, antisocial personality disorder is not a mitigator. Gerlaugh v. Stewart, 129 F.3d 1027 (9th Cir. 1997); Schneider v. Delo, 85 F.3d 335 (8th Cir. 1996); Weeks v. Jones, 26 F.3d 1030 (11th Cir. 1994); Harris v. Pulley, 885 F.2d 1354 (9th Cir. 1988); Carter v. State, 576 So.2d 1291 (Fla. 1989); see also Van Poyck v. State, 694 So.2d 686 (Fla. 1997). As the court noted, testimony about Sweet's antisocial personality disorder would have opened the door for the state to explore Sweet's lifelong history of criminal behavior. See Asay, 769 So.2d at 988; Breedlove, 692 So.2d at 877; Rose, 617 So.2d at 294-95.

Additionally, Sweet again complains that the circuit court disregarded Salmon's testimony about mitigation. (Initial brief at 81). As stated in issue I, supra, however, the court's rejection of Salmon's testimony was justified. As to that opinion about the introduction of mitigation, the court also stated: "Indeed, it was clear that Mr. Salmon was of the opinion that any potentially mitigating evidence should be presented in any capital case, regardless of whether the evidence will also have a detrimental impact on his client's case, even in the face of his client's desire that the evidence not be presented." (VI 1095). The court's findings regarding Salmon are supported by the record and should not be disturbed.

This Court has stated that the purpose of its de novo review of ineffectiveness claims is "to ensure that the law is applied uniformly in decisions based on similar facts and that the defendant's representation is within constitutionally acceptable parameters." Stephens 748 So.2d at 1034. Instead of the cases cited by Sweet, this Court has found counsel to have acted reasonably and without prejudicing the defendant in numerous cases on very similar facts as to the investigation and presentation of penalty-phase evidence. E.g., Cherry, 25 Fla.L.Weekly at S720-23; Johnson v. State, 25 Fla.L.Weekly S578, S582-85 (Fla. July 13, 2000); Asay,769 So.2d at 985-88; Jones v. State, 732 So.2d 313, 319-20 (Fla. 1999); Rutherford, 727 So.2d at 220-26; Robinson v.

State, 707 So.2d 688, 695-96 (Fla. 1998); Breedlove, 692 So.2d at 877-78; Rose, 617 So.2d at 293-94. Given the facts of this case -- the indiscriminate shooting of four people while trying to kill a witness against him -- and the aggravators established by the state, there is no reasonable likelihood that the additional evidence presented at the hearing would have resulted in a life sentence for Sweet. E.g., Asay, 769 So.2d at 988; Jones, 732 So.2d at 320-21; Rutherford, 727 So.2d at 225-26; Haliburton, 691 So.2d at 471.

As with many other cases, counsel could have done more. That, however, is not the standard by which ineffectiveness claims are gauged. Instead, and especially when measured against truly comparable cases, it is obvious that the circuit court correctly found that Sweet failed to prove that Adams was ineffective regarding the penalty phase. Therefore, the denial of relief should be affirmed.

ISSUE III

WHETHER THE CIRCUIT COURT PROPERLY CONSIDERED SWEET'S CLAIM OF INNOCENCE.

Sweet raised a claim of actual innocence and innocence of the death penalty in his amended motion for postconviction relief. (II 282). The claim contains no allegation of ineffectiveness and consists of a single conclusory paragraph. The circuit court summarily denied the claim as follows:

GROUND TWELVE

> The defendant claims that he is innocent of first degree murder and that he is innocent of the death penalty. First, this Court finds this claim to be facially insufficient. Second, this Court finds that the evidence presented at the hearing (in regards to counsel's investigation of other witnesses, of the defendant's background history, and of the defendant's mental health evaluation and mitigation) not only failed to support this claim, but was, in fact, contrary to this claim. The evidence negated other possible suspects with a motive to kill Marcine Cofer, it established that the State could have provided the jury with a wealth of other bad character evidence about the defendant, and it established that the mental health evaluation of the defendant was not deficient, and that the mental health expert's opinion would not have been different if the additional evidence had been brought to his attention. Accordingly, this Court finds this claim to be meritless as well.

(VI 1086).

Now, Sweet claims that the court erred by not considering "the cumulative effect of all the evidence presented at" his trial (initial brief at 84) and "all the evidence not presented at" his trial. (Initial brief at 86). In making this claim Sweet cites Kyles v. Whitley, 514 U.S. 419 (1995), Swafford v. State, 679 So.2d 736 (Fla.1996), and State v. Gunsby, 670 So.2d 920 (Fla. 1996), cases dealing with the cumulative analysis to be employed in considering alleged violations of Brady v. Maryland, 373 U.S. 83 (1963), and newly discovered evidence. Sweet, however, made no

definite Brady claim in his amended motion and failed utterly to prove that any Brady violation occurred.

Moreover, contrary to his claim (initial brief at 84), Gunsby is not exactly on point. Instead, in that case, this Court reversed for a new trial because of Brady violations and counsel's ineffectiveness at the penalty phase. Here, however, Sweet established no Brady violation and, as explained in issue II, supra, the circuit court did not err in denying the penalty-phase ineffectiveness claim.

Sweet's contention that there was no evidence to connect him to the robbery of Cofer that precipitated this homicide ignores Manuela Roberts' testimony at trial.[6] (DAR XXV 911; see also Sweet, 624 So.2d at 1139). Contrary to his claim that only "Solomon Hansbury's false testimony" linked him to the murder (initial brief at 85), two eyewitnesses identified Sweet as the shooter. The circuit court, as was its prerogative as the finder of fact, found "Hansbury's current testimony that he lied at trial to be incredible." (VI 1084). See Armstrong v. State, 642 So.2d 730 (Fla. 1994) (recanted testimony is exceedingly unreliable);

[6] It also ignores the stipulation that: Cofer was robbed by three armed black men on April 6, 1990; Cofer went to the police department on April 26, 1990 and was driven home in a police vehicle; Sweet was near her residence when she returned; the homicide occurred that night; between April 6 and 26 Sweet told Roberts about the robbery; and Sweet told Hansbury that he had robbed Cofer. (DAR II 240).

Bell v. State, 90 So.2d 704 (Fla. 1956) (same); Henderson v. State, 135 Fla. 548, 185 So. 625 (1938) (same).

Conclusory allegations are insufficient to state a claim for relief. See Asay, 769 So.2d at 982; Ragsdale, 720 So.2d at 207. The circuit court, therefore, properly denied the innocence claim because it was insufficiently pled. The court also properly found the claim to be meritless because it was not supported by the evidence presented at trial or at the evidentiary hearing. Sweet demonstrated neither his innocence in fact nor of the death penalty and has failed to show that the circuit court erred in its consideration of his claim of innocence. The denial of that claim, therefore, should be affirmed.

ISSUE IV

WHETHER THE CIRCUIT COURT CORRECTLY FOUND THAT TRIAL COUNSEL WAS NOT INEFFECTIVE REGARDING SWEET'S ORIGINAL EVALUATION BY A MENTAL HEALTH EXPERT.

Sweet argues that Adams was ineffective because Miller examined him prior to trial only for competency, Adams did not provide Miller with background information that might have led to the introduction of mitigating evidence, and Adams did not ensure that Sweet had an adequate mental health examination. There is no merit to this claim.

This issue is a combination of claims VIII (penalty-phase ineffectiveness), XXVII (failure to provide Miller with background

information), and XXVIII (inadequate competency evaluation). (II 244-54, 319-35). The circuit court's findings regarding most of this argument are quoted in issue II, supra, and will not be repeated here. The court summarized the evidentiary hearing testimony and found that the evidence did not support the conclusions of Toomer and Salmon that mental health mitigation would have altered the outcome of the penalty phase and that Adams was ineffective for not discovering and introducing the testimony presented at the evidentiary hearing. (VI 1092-96). The court also stated the following in finding that claim XXVII had no merit:

> The defendant claims that his trial counsel failed to provided the two Court appointed mental health examiners with sufficient background information to allow them to adequately evaluate the defendant's competency to stand trial. Oddly enough, while taking the position in his instant motion, that he should basically have as long as he wants to file his postconviction motion, he also wishes to capitalize[] on the faded memory of his trial counsel, about matters that occurred some eight years ago, in support of this claim. This Court need not decide whether counsel's performance was deficient, as this Court finds that the evidence failed to establish actual prejudice. Williamson v. Dugger, 651 So.2d 84 (Fla. 1994); Kennedy v. State, 547 So.2d 912 (Fla. 1989).
>
> This Court appointed two independent mental health professionals to examine the defendant, Dr. Ernst C. Miller, M.D., and Maritza Cabrera, M.A., CRC. Their final report consists of pages 312-313 A, of the record on appeal(also received in evidence at the hearing as Defendant's Exhibit #2). The report shows that the examiners were, in fact, aware of much of the information that the

> defendant contends his counsel did not provide them with. The information in the report is stated in concise summarizations, as opposed to being recited in the detail that the defendant has stated it in his motion. The defendant did not call Dr. Miller as a witness at the hearing to establish his alleged lack of adequate information; rather, the State called Dr. Miller and established that his opinion would not have been different even when specifically considering the facts not specifically noted in his report. Therefore, this Court finds that the evidence failed to establish any prejudice to the defendant's mental health examination. Williamson, *supra*; Kennedy, *supra*.

(VI 1091-92). As set out in the statement of the case and facts and the circuit court's findings quoted in issue II, supra, the record supports the court's conclusions.

Sweet relies on numerous federal cases to support his argument, but all are factually distinguishable from this case. In Baxter v. Thomas, 45 F.3d 1501 (11th Cir. 1995); 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); and Stephens v. Kemp, 846 F.2d 682 (11th Cir. 1988), trial counsel were deemed ineffective for failing to find and/or use the defendants' psychiatric and medical records in mitigation. In Lloyd v. Whitley, 977 F.2d 149 (5th Cir. 1992); Elledge v. Dugger, 823 F.2d 1439 (11th Cir. 1987); and Blake v. Kemp, 758 F.2d 523 (11th Cir. 1985), counsel were ineffective, respectively, for failing to hire a mental health expert, failing to contact the

defendant's family, and for failing to prepare in any way whatsoever for the penalty phase.

Here, on the other hand, Sweet had no history of mental health problems. Instead, he had been diagnosed with antisocial personality disorder, which is not mitigating and which would not have convinced the jury to recommend less than a death sentence. Moreover, as explained in issue II, supra, Adams contacted Sweet's mother, sister, girlfriend and her mother, and one set of Sweet's foster parents, and the circuit court correctly found that he was not ineffective.

Again, this Court should compare cases with similar facts when considering ineffectiveness claims. Stephens, 748 So.2d at 1034. Instead of the cases cited by Sweet, his case is more similar to numerous cases where this Court has affirmed the circuit courts' finding that the defendants failed to prove the same claims that Sweet has made. E.g., Cherry, 25 Fla.L.Weekly at S721-22; Johnson, 25 Fla.L.Weekly at S583; Asay, 769 So.2d at 985-87; Jones, 732 So.2d at 320; Rutherford, 727 So.2d at 222-24; Breedlove, 692 So.2d at 877-78. Sweet has demonstrated no error in the circuit court's denial of claims VIII, XXVII, and XXVIII of his postconviction motion, and that denial of relief should be affirmed.

ISSUE V

WHETHER THE CIRCUIT COURT PROPERLY SUMMARILY DENIED SEVERAL OF SWEET'S POSTCONVICTION CLAIMS.

Sweet argues that the circuit court erred in summarily denying several claims raised in his postconviction motion. There is no merit to this claim.

In Duest v. Dugger, 555 So.2d 849, 852 (Fla. 1990), this Court stated: "The purpose of an appellate brief is to present arguments in support of the points on appeal. Merely making reference to arguments below without further elucidation does not suffice to preserve issues, and these claims are deemed to have been waived." See Teffeteller, 734 So.2d at 1020; Coolen v. State, 696 So.2d 738, 742 n.2 (Fla. 1997); Kight v. Dugger, 574 So.2d 1066, 1073 (Fla. 1990); Roberts v. State, 568 So.2d 1255, 1260 (Fla. 1990); see also Shere, 742 So.2d at 217 n.6 ("In a heading in his brief, Shere asserts that the trial court erred by summarily denying nineteen of the twenty-three claims raised in his 3.850 motion. However, for most of these claims, Shere did not present any argument or allege on what grounds the trial court erred in denying these claims. We find that these claims are insufficiently presented for review."). Most of the complaints raised in this issue are stated in a sentence or two. As such, they do not comply with Duest and should be summarily denied.

1. Failure to impeach the state's witnesses. This was claim VIIC in the amended motion. (II 241-43). The circuit court denied this subclaim as follows:

> The defendant's third claim under this ground is that counsel allegedly failed to properly cross-examine Marcine Cofer and Solomon Hansbury at trial (Hansbury testified at trial regarding the defendant's confession to him). The defendant contends that counsel should have attempted to impeach Cofer's identification of him through evidence of her drug usage. The defendant acknowledges that counsel was restrained in his efforts to do this through a pre-trial order of this Court. The trial transcripts rebut this claim, in that the jury did hear evidence that Cofer sold drugs, used drugs, and that she had drugs in her system on the night of the murder. Moreover, the defendant fails to allege why the jury would disbelieve Cofer's positive identification of the defendant in the face of such corroborating evidence as the positive identification of the defendant by Sharon Bryant, the defendant's possession of the jewelry he had stolen from Cofer during the prior robbery, and the testimony of the defendant's confession to both Solomon Hansbury and Manuela Roberts. As for Solomon Hansbury, the trial transcripts show that counsel did extensively cross-examine Hansbury and the defendant fails to allege what additional cross-examination counsel should have [performed]. As part of this claim, the defendant presented the recanted testimony of Hansbury at the evidentiary hearing. However, Hansbury admitted that he is now serving a life sentence without the possibility of parole, that snitches are not highly regarded in prison, and that the inmates consider it an admirable thing to testify on behalf of another inmate. Hansbury's trial testimony was consistent with the other evidence in this case. This Court finds Hansbury's current testimony that he lied at trial to be incredible. This Court finds that there is no

> reasonable probability that any of the claims raised under this ground would probably have resulted in a different outcome at trial. Williamson v. Dugger, 651 So.2d 84 (Fla. 1994); Kennedy v. State, 547 So.2d 912 (Fla. 1989).

(VI 1083-84). These findings are supported by the record of both the trial and the evidentiary hearing. E.g., DAR II 206; DAR II 219; DAR II 240; DAR XXIII 506 et seq.; DAR XXVI 929 et seq.; DAR XXVI 989; X 1908-23. The findings of fact are correct and should not be disturbed by this Court. Sweet has shown no error in the circuit court's conclusion that he suffered no prejudice, and that finding should be affirmed.

2. Outside influences on the jury. This was claim IX in the amended motion (II 254-56), and the circuit court found it procedurally barred because Adams objected at trial and the claim could have been raised on appeal. (VI 1085). The court fully explored this alleged incident at trial (DAR XXIV 572-601), and the summary denial should be affirmed.

3. Failure to object to vague aggravators. This is a combination of claims IV, V, and X in the amended motion. (II 226-30, 256-58). The circuit court summarily denied these claims as procedurally barred and, in the case of claims IV and V, devoid of merit. (VI 1078-80, 1085-86). Sweet has shown no error, and the summary denial should be affirmed. See Sireci v. State, 773 So.2d 34, 40, n.10 (Fla. 2000); Asay, 769 So.2d at 989.

4. Sweet's absence. This was claim XIII in the amended motion (II 283-84), and the circuit court found it to be procedurally barred, facially insufficient, and meritless. (VI 1087). The record supports this ruling (e.g., DAR XIX 145; DAR XX 150, 152; DAR XXII 309; DAR XXIII 367; DAR XXIV 607), and the summary denial should be affirmed. See Bottoson v. State, 674 So.2d 621, 622 n.1 (Fla. 1996).

5. Mercy. This was claim XIV in the amended motion (II 285-87), and the circuit court found it to be procedurally barred and without merit. (VI 1087). This ruling is correct, see Asay, 769 So.2d 989, and should be affirmed.

6. Burden shift. This was claim XVIII in the amended motion. (II 295-99). The court's holding this claim to be procedurally barred and meritless (VI 1088-89) is correct and should be affirmed. Arbelaez v. State, 775 So.2d 909, 915 (Fla. 2000); Asay, 769 So.2d at 989.

7. State misconduct - destruction of evidence. This was claim VI in the amended motion. (II 230-31). The circuit court denied this claim as facially insufficient because Sweet failed to allege bad faith as required by Arizona v. Youngblood, 488 U.S. 51 (1988), and Merck v. State, 664 So.2d 939 (Fla. 1995), and because it is meritless. Sweet has demonstrated no error and the summary denial should be affirmed.

8. Prosecutorial misconduct. This was claim XIX in the amended motion (II 299-304), and the circuit court held it to be procedurally barred. (VI 1089). No error has been demonstrated and the summary denial should be affirmed. See Asay, 769 So.2d at 989.

9. Nonstatutory aggravators. This was claim XXV in the amended motion (II 315-16), and the court found it to be procedurally barred. (VI 1091). Sweet has demonstrated no error in the summary denial, which should be affirmed. See Knight v. State, 746 So.2d 423, 431 (Fla. 1998).

10. Trial court's consideration of mitigators. This was claim XXIV in the amended motion. (II 310-14). The court held that the claim was procedurally barred and meritless. (VI 1090-91). Sweet has shown no error, and the summary denial should be affirmed. See Sireci, 773 So.2d at 40 n.10; Asay, 769 So.2d at 989.

11. Unconstitutional aggravators. This may be a repeat of claims IV, V, and X (see number 3 supra) or may be claim XVII (cumulative error) in the amended motion (II 292-94), which the court denied as procedurally barred. Whatever this allegation refers to, Sweet has demonstrated no error, and the court's summary denial should be affirmed. See Freeman v. State, 761 So.2d 1055, 1068-69 (Fla. 2000) ("A postconviction movant must specifically identify the claims which demonstrate the prevention of a fair

trial. Mere conclusory allegations do not warrant relief"); Duest; Shere.

12. State's misconduct. Undersigned counsel was unable to determine what in the amended motion this allegation refers to. It may be any or all of claims VI, XIV, XVII, XIX (see numbers 5, 7, 8, and 11, supra), and XXVI (violation of Caldwell v. Mississippi, 472 U.S. 320 (1985)). (II 317-19). The court found the last claim to be procedurally barred. (VI 1091). Sweet has shown no error in the summary denial of this claim, or the others, and that denial should be affirmed. See Arbelaez, 775 So.2d at 915.

As stated earlier, this issue is insufficiently briefed. Moreover, the allegations of ineffectiveness are insufficient to overcome the procedural bars and lack of merit. See Asay, 769 So.2d at 989. Therefore, this claim should be denied summarily.

ISSUE VI

WHETHER THE RECORD ON APPEAL IS SO INCOMPLETE THAT SWEET CANNOT MEANINGFULLY RAISE CLAIMS IN THIS APPEAL.

Sweet claims that three pages of the transcript of the evidentiary hearing (IX 1594-95, 1601) are missing and that he "is being denied his right to appeal because this Court's review cannot be constitutionally complete." (Initial brief at 100). There is no merit to this claim.

There are several problems with this claim. When counsel discovered the mistake in the transcripts, he could have asked this

Court for supplementation of the record and asked the court reporter to produce copies of these pages with the text complete. However, he did not do this.

More importantly, however, counsel has a copy of the complete transcripts. Appendix A contains pages IX 1594 through 1602 of the record on appeal. Appendix B contains the corresponding pages, 172 through 180, of the transcript of testimony taken on January 25, 1999 that was sent to the parties and the circuit court following the evidentiary hearing for use in preparing the parties' closing arguments and the court's order. In fact, collateral counsel cited what is now IX 1594 through 95 in his closing argument. (VI 1015). The state also cited the allegedly missing text in its closing argument. (VI 1044-45).

Apparently, the lack of text on pages IX 1594, 1595, and 1601 resulted from some malfunction in the court reporter's equipment when a copy of the transcripts was generated for transmittal to this Court. However, counsel has had a copy of the complete transcript since 1999 and has not shown that the current claim has any merit. Therefore, this issue should be denied.[7]

[7] Simultaneously with this brief the state is filing a motion to amend the record to substitute pages 172, 173, and 179 from the January 25, 1999 transcript for pages IX 1594, 1595, and 1601 of the record on appeal.

CONCLUSION

For the foregoing reasons the state of Florida asks this Court to affirm the circuit court's denial of Sweet's motion for postconviction relief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief has been furnished by U.S. Mail to John Jackson, Assistant Capital Collateral Regional Counsel, Office of the Capital Collateral Regional Counsel, Northern Region, Post Office Drawer 5498, Tallahassee, Florida 32314-5498, this 11th day of May 2001.

_____
BARBARA J. YATES
Assistant Attorney General

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the font requirements of Fla.R.App.P. 9.210.

_____
BARBARA J. YATES
Assistant Attorney General

IN THE SUPREME COURT OF FLORIDA

WILLIAM EARL SWEET,

Appellant,

v. CASE NO. SC00-1509

STATE OF FLORIDA,

Appellee.
_____/

INDEX TO APPENDICES

APPENDIX “A”

APPENDIX “B”