

IN THE SUPREME COURT OF FLORIDA

CASE NO. SCOO-1509

WILLIAM EARL SWEET,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

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

REPLY BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

References in this brief will be consistent with those made in Appellant's Initial Brief, with the following addition:

"AB. at ____." Appellee's Answer Brief.

TABLE OF CONTENTS

	<u>Page</u>
PRELIMINARY STATEMENT	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
SUMMARY OF ARGUMENTS IN REPLY	1
REPLY TO ARGUMENT I	3
REPLY TO ARGUMENT II	14
REPLY TO ARGUMENT III	26
REPLY TO ARGUMENT IV	27

TABLE OF AUTHORITIES

	<u>Page</u>
<u>Battle v. Delo,</u> 64 F.3d 347 (8th Cir. 1995)	27
<u>Blanco v. Wainwright,</u> 943 F.2d 1477 (11th Cir. 1991)	15
<u>Brady v. Maryland,</u> 373 U.S. 83 (1963)	26
<u>Chandler v. United States,</u> 193 F.3d 1297 (11th Cir. 1999)	22
<u>Collier v. Turpin,</u> 177 F.3d 1184 (11th Cir. 1999)	26
<u>Deaton v. Dugger,</u> 635 So. 2d 4 (Fla. 1994)	15
<u>Eddings v. Oklahoma,</u> 455 U.S. 104 (1982)	25
<u>Koon v. Dugger,</u> 619 So. 2d 246 (Fla. 1993)	15
<u>Middleton v. Evatt,</u> 77 F.3d 469 (4th Cir. 1996)	27
<u>Morton v. State,</u> Slip Opinion 95,171 (Fla. June 28, 2001)	25
<u>Robinson v. State,</u> 761 So. 2d 269 (Fla. 1999)	25
<u>Rutherford v. State,</u> 727 So. 2d 216 (Fla. 1998)	25
<u>Snipes v. State,</u> 733 So. 2d 1000 (Fla. 1999)	25
<u>Tafero v. Wainwright,</u> 796 F.2d 1134 (11th Cir. 1986)	15
<u>Thompson v. Wainwright,</u> 787 F.2d 1447 (11th Cir. 1986)	15
<u>United States v. Burgos,</u> 94 F.3d 849 (4th Cir. 1996)	27

<u>United States v. Rivenbark,</u> 81 F.3d 152 4th Cir. 1996)	27
<u>Wournos v. State,</u> 676 So. 2d 966 (Fla. 1995)	25

SUMMARY OF ARGUMENTS IN REPLY

Mr. Sweet addresses four (4) issues in his Reply Brief: whether the lower court erred in denying Mr. Sweet's claim that he was denied the effective assistance of counsel in the guilt phase of his trial when his attorney failed to investigate and present evidence of other suspects (Argument I); whether the lower court erred in denying Mr. Sweet's claim that he was denied effective assistance of counsel in the penalty phase of his trial (Argument II); whether the lower court erred in failing to consider the cumulative effect of newly discovered evidence of Mr. Sweet's innocence along with other evidence not presented due to trial counsel's ineffectiveness (Argument III); and, whether the lower court erred in denying Mr. Sweet's claim that he was denied a competent mental health evaluation (Argument IV).

Reply Argument I: The State, like the lower court, ignores trial counsel's admission of incompetence in arguing that Mr. Sweet should be denied relief. The State also ignores the fact that trial counsel's admission was supported by the testimony of the trial investigator, as well as co-counsel. The lower court ignored the same testimony in denying relief to Mr. Sweet. Trial counsel did almost nothing to prepare for Mr. Sweet's trial. The State, like the lower court, attempts to explain (and justify) trial counsel's performance while ignoring the fact that trial counsel utterly failed to investigate Mr. Sweet's case and failed to adequately prepare for trial.

Reply Argument II: The State defends the lower court's findings that Mr. Sweet's trial attorney was not ineffective for failing to investigate because he was following his client's wishes, but this is contrary to the law establishing the minimum responsibilities imposed on defense lawyers investigating mitigation in capital cases. Trial counsel's lack of investigation prevented any informed decision on the part of Mr. Sweet. The evidence presented at the hearing below was not cumulative to the evidence presented at Mr. Sweet's trial, which consists of the testimony of one unprepared witness and takes up only five pages of transcript. The lower court's findings that the expert presented at the hearing below would have been rebutted by the State expert, and that the jury would have chosen to believe the State expert over Mr. Sweet's expert, is nothing more than an assumption made without the competent substantial evidence required to support fact-findings.

Reply Argument III: The lower court was required by law to consider the cumulative effect of all of the newly presented evidence and its failure to do so cannot be excused by the fact that Mr. Sweet failed to allege or prove a violation of Brady v. Maryland.

Reply Argument IV: The State's argument that a diagnosis of antisocial personality disorder is not a mitigating circumstance is contrary to this Court's decision in Morton v. State, Slip Opinion 95, 171, and such a diagnosis would not have

prevented a life sentence, especially when considered in conjunction with the mitigation outlined in Argument II.

REPLY TO ARGUMENT I

The State's Answer Brief repeats the mistakes committed by the circuit court in denying relief. The State quotes the circuit court order at length and summarizes the legal standard that applies to ineffective assistance of counsel claims. However, the State's Answer does not read like an "answer" at all because it fails to address the substance of Mr. Sweet's argument. The State attempts to defend the circuit court order without responding to any of the valid criticisms raised in Mr. Sweet's Brief. Most significantly, the State ignores Mr. Adams' admission of his incompetence, which is supported by the testimony of his investigator and co-counsel, and instead focuses on irrelevant factors that cannot justify or explain his representation of Mr. Sweet.

Mr. Adams admitted that he lacked experience in capital defense work, that he made no efforts to educate himself regarding the law in this area, that when he sought assistance he turned to an equally inexperienced lawyer, that he did not know how much money he needed to effectively defend his client, and that he did not adequately investigate and prepare this case. (PCR. 1768). The circuit court and the State make no mention of these admissions. Mr. Adams admitted that he did not use the available exculpatory evidence. He did not investigate the evidence pointing to other suspects. Due to his inexperience, he

did not even know how to direct his investigator. (PCR. 1765, 1768). Mr. Adams' preparation was so inadequate that the investigator who worked on Mr. Sweet's case for about a week did not even know that his client was facing the death penalty. (PCR. 1442). The State attempts to defend Mr. Adams' performance, despite his own admissions that his performance was substandard, by relying on irrelevant factors that do not explain Mr. Adams' failures. Mr. Adams himself never tried to justify his poor decisions and failures to adequately represent his client as "strategic decisions." His performance was inadequate and he has admitted that Mr. Sweet was deprived of his right to the effective assistance of counsel.

The circuit court relied on Mr. Adams' health problems to excuse his deficient performance, ignoring the more significant explanation - his inexperience and lack of judgment. The circuit court also attempted to shift responsibility from Mr. Adams to the court itself, relying on the court's denial of a continuance as the cause of Mr. Adams' performance. (PCR. 1081). The circuit court also referred to the breakdown in communication between Mr. Sweet and Mr. Adams, in effect blaming Mr. Sweet for the inadequate representation he received. (PCR. 1081). All of these factors were referred to in Mr. Sweet's brief in order to provide this Court with a complete picture of what happened at Mr. Sweet's trial. However, these issues were not the primary cause of Mr. Adams' deficient performance, and they were not relied upon by Mr. Sweet as the basis for relief on this claim.

In relying on these factors and finding them insufficient, the circuit court pretended that there was no other evidence of Mr. Adams' deficient performance that was offered at the hearing. The circuit court ignored the testimony of the investigator Charles Abner and co-counsel Lindsay Moore which supports Mr. Sweet's argument that his counsel was ineffective. The court did not make credibility findings or explain in any other way its refusal to consider the testimony of these two witnesses who readily admitted the mistakes that they made on Mr. Sweet's case. Mr. Moore testified that he agreed to get involved in Mr. Sweet's case only out of pity for Mr. Adams because he was so overburdened by his caseload and was chronically sick during the time that he should have been preparing for Mr. Sweet's trial. (PCR. 1455). He agreed to help with the understanding that his involvement would be limited to cross-examining a few witnesses. (PCR. 1455). He did not help Mr. Adams develop the evidence, conduct the investigation, or strategize how to best represent Mr. Sweet. Despite his lack of involvement in these crucial areas, Mr. Moore's role did expand beyond his expectations - and beyond what he was prepared to do - once the trial started because Mr. Adams was so desperately in need of assistance. Mr. Moore freely admitted that he was neither competent nor prepared to do the work he did on Mr. Sweet's case beyond the cross-examination of a few State witnesses which was all that he expected to do. (PCR. 1469). None of this testimony was addressed by the circuit court or the State.

This testimony is consistent with that of Charles Abner, the investigator who briefly worked on Mr. Sweet's case. Mr. Abner's primary area of expertise is insurance fraud, a background that did not prepare him to work on a capital murder case. (PCR. 1436). Despite Mr. Adams' testimony that he believed Mr. Sweet was innocent, he inexplicably failed to instruct Mr. Abner to search for other suspects or otherwise provide him with a theory of the defense. Of course, Mr. Adams could not have formulated a defense theory to guide his investigator because even a few weeks before trial he was unable to articulate a defense theory when asked by the court. (PCR. 1445). He gave his investigator only general instructions to find out what had happened. Perhaps if Mr. Adams had the foresight to hire an investigator who was experienced at working on murder cases, he could have entrusted him with Mr. Sweet's case without explicit instructions about what should be done to prepare for trial. However, in light of Mr. Abner's inexperience, the attorney responsible for proving Mr. Sweet's innocence and saving his life should have directed his investigator more closely to ensure that the case was properly investigated and that the relevant evidence was discovered. This was simply a case of the blind leading the blind.

Mr. Abner testified that during the brief time that he worked on this case, he "didn't accomplish a whole lot" because there was insufficient money to fund a full investigation. However, he testified that there were sufficient leads on the

case at that point that he could have developed an investigation if only Mr. Adams had gotten more money from the court. (PCR. 1451). This testimony proves that Mr. Sweet was prejudiced by his attorney's failures - as in any case, there was evidence that could have been discovered and presented but was not. The result is that an innocent man was convicted. The circuit court and the State ignore Mr. Abner's testimony and its relevance to Mr. Sweet's claim that he was denied the effective assistance of counsel. The State's Answer simply misses the point that Mr. Adams did nothing to prepare for Mr. Sweet's trial and that his inexperience and lack of judgment resulted in a deficient performance that prejudiced his client.

In regard to the evidence that was not presented at Mr. Sweet's trial, the State urges this Court to accept the circuit court finding that none of this evidence would have made a difference if it had been presented to the jury. To make this argument, the State must rely on the persuasiveness of the State witnesses' identification of Mr. Sweet at the trial. However, the identifications of Mr. Sweet at his trial were not as strong as the State would like this Court to believe. Marcine Cofer testified that the shooter had a piece of clothing covering his face and that she saw only his eyes and nose. (R. 517). Although Ms. Cofer testified that when she looked at the man through the peephole she recognized him as Mr. Sweet, Sharon Bryant directly contradicted this testimony when she explained that Ms. Cofer told her that she did not recognize the man. (R.

619). Miss Bryant's testimony regarding the identity of the shooter is even weaker than Ms. Cofer's - she admitted that she noticed the man's jewelery and clothing and did not even see his face. (R. 629, 665). The State essentially had one witness who saw the eyes and nose of a man who entered her apartment shooting and another witness who noticed a white T-shirt and jeans. Neither identification of Mr. Sweet is so rock solid that this Court can assume that the evidence that was not presented would not have made a difference.

In regard to Mr. Adams' failure to present the testimony of Jesse Gaskins, the State repeats the circuit court rationale for denying relief but does not respond to Mr. Sweet's Brief which explained why the circuit court finding on this issue is erroneous. Both the circuit court and the State misrepresent what Mr. Gaskin's testimony at trial would have been. The circuit court excused Mr. Adams' failure to call Mr. Gaskins because "Gaskins never said that the defendant was not the man." (PCR. 1082). The defense does not have to meet this burden at trial and any witness who could cast reasonable doubt on the State's evidence against Mr. Sweet should have been called. The truth is that Mr. Gaskins could not identify the man he saw outside Ms. Cofer's apartment, but that the man he saw does not match the descriptions given by Ms. Cofer and Miss Bryant, thereby casting doubt on the already shaky identifications of the State's witnesses.

The State refers to Mr. Gaskins' "identification of Sweet as the man who forced him to knock on Cofer's door" on the night of the murder as the explanation for Mr. Adams' failure to call him as a witness. (AB. at 27) This was the same excuse that Mr. Adams offered at the hearing. (PCR. 1799). However, both the circuit court and Mr. Adams are wrong. Mr. Gaskins never identified Mr. Sweet and if he testified at trial he would have told the jury that Mr. Sweet was not the man who was outside Ms. Cofer's door. Significantly, the State pretends that Mr. Gaskins' hearing testimony does not exonerate Mr. Sweet and attempts to convince this Court that his testimony at trial would have been inculpatory. Mr. Gaskins did make an out-of-court statement to his wife when he saw Mr. Sweet on television after his arrest. The statement, which the State wants this Court to believe was so prejudicial as to justify not calling him as a witness, was that Mr. Sweet had the "same build" as the man he saw outside Ms. Cofer's door. (PCR. 1800). Even a defense attorney with Mr. Adams' limited experience and skill would be able to minimize the impact of this statement in front of the jury by simply asking how many other men in Jacksonville have that "same build". Rather than being another "identification" of Mr. Sweet, as the State contends, this statement is meaningless and has no evidentiary value at all. This prior statement, which Mr. Salmon explained would not even be admissible at Mr. Sweet's trial, is insufficient to justify the failure to present Mr. Gaskins as a witness.

In further support of its argument that Mr. Adams made a sound strategic decision to not call Mr. Gaskins, the State claims 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." (AB. at 27) This is an accurate representation of Mr. Salmon's answer to a hypothetical question; of course, any defense attorney, even one of Mr. Adams' caliber, would not present a witness whose testimony bolsters the State's case. However, this was not Mr. Salmon's only testimony regarding the decision to not present Mr. Gaskins' testimony. Mr. Salmon's real position on this issue is that Mr. Adams was ineffective for not presenting Mr. Gaskins. Mr. Salmon was unequivocal on this point, explaining that Mr. Gaskins' hearsay statement would have been inadmissible and that Mr. Gaskins' out-of-court statement "wouldn't have troubled me a bit. I don't think it would have hindered the effect it would have had to the benefit of Mr. Sweet." (PCR. 1942). Contrary to the State's representations, Mr. Salmon never defended or explained Mr. Adams' failure to present Mr. Gaskins as a witness. Mr. Salmon expressly disagreed with this decision and provided a sound legal basis for his criticism of Mr. Adams.

The fact that Mr. Adams believed that Mr. Gaskins had identified Mr. Sweet is further evidence of his failure to prepare for trial. The statement that Mr. Sweet had the "same build" is not an identification. If Mr. Adams had prepared for trial, he would have known this. If he had done some research,

he would have known how to exclude the statement. Basically, if Mr. Adams had done the minimal work required of a defense attorney, Mr. Gaskins would have testified and the outcome of the trial could have been different because the State's witnesses would have been contradicted.

Both the circuit court and the State chose to ignore the testimony supporting Mr. Sweet's argument that he was denied the effective assistance of counsel. Contrary to the State's characterization of Mr. Gaskins as a witness who would identify Mr. Sweet, his testimony actually supports his claim that he is innocent and contradicts the State's evidence. If he had been called as a witness by Mr. Adams, Mr. Gaskins would have told the jury that Mr. Sweet was not the man he saw outside Ms. Cofer's apartment on the night of the shooting. Even if his hearsay statement was admissible, it would not have undermined the effect that he could have had on the outcome of Mr. Sweet's trial. Mr. Gaskins' statement that Mr. Sweet, as seen on television, had the "same build" as the man outside the apartment is not, as the State describes it, an identification, it would not have supported a conviction, and it should not have deterred Mr. Adams from presenting him as a witness. Mr. Adams admits that he lacked experience and judgment and that he made errors that prejudiced his client. The failure to present Mr. Gaskins is one such mistake. The "decision" to not present exculpatory evidence is not the effective representation to which Mr. Sweet is entitled.

In regard to Anthony McNish, the State again ignores all the evidence that supports Mr. Sweet's claim. The State excuses Mr. Adams' failure to get Mr. McNish to court on the day of trial by stating that 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." (AB. at 27) This statement is directly contradicted by the trial record which shows that Mr. Adams told the court that when he interviewed Mr. McNish, he sounded like he did not want to testify. (R. 925). Clearly, Mr. Adams was on notice that one of the most important witnesses in Mr. Sweet's defense was a reluctant witness who could not be relied upon to appear on his own initiative. The State also ignores that Mr. McNish was not even properly subpoenaed so that even if he had wanted to appear at the trial he lacked the necessary information of when to appear. (PCR. 1936). After glossing over the issue of Mr. Adams' responsibility to ensure the presense at court of reluctant witnesses, the State defends and repeats the circuit court's erroneous finding that Mr. Adams did all he could to protect Mr. Sweet's rights when the witness did not appear. In fact, as Mr. Adams and Mr. Moore admitted at the evidentiary hearing, they did not take advantage of all the remedies available. In particular, neither attorney sought an extended continuance to look for the witness or asked the court to issue a *capias*.

The State finally dismisses McNish's importance to Mr. Sweet's defense by claiming that his testimony was "riddled with

inconsistencies." (AB. at 27) The circuit court similarly made a credibility finding against Mr. McNish without providing a single example of an inconsistency. Mr. McNish testified that he was outside Ms. Cofer's apartment on the night of the murder. He saw three men leaving the apartment. He was familiar with Mr. Sweet and knows that he was not one of the three men he saw coming from the apartment that night. (PCR. 1864-66). Mr. McNish was also able to provide details regarding the physical differences between Mr. Sweet and the men he saw at the apartment. (PCR. 1864, 1868). Mr. Salmon explained that Mr. McNish's testimony would have been particularly persuasive to a jury because he is Ms. Cofer's cousin and therefore has no incentive to testify for the defense. (PCR. 1940). In addition, while he was familiar with Mr. Sweet, they were not friends and he had no motive to provide false testimony to help him. There was nothing inconsistent about Mr. McNish's testimony and the State's mere description of it as "riddled with inconsistencies" is an insufficient basis to uphold the circuit court's credibility finding.

The circuit court and the State attempt to justify or explain all of Mr. Adams' decisions regarding the guilt phase without addressing his greatest mistake - the failure to investigate and adequately prepare for trial. This is the most fundamental duty of a criminal defense lawyer and without adequate investigation, no other decision can be reasonable. As the Supreme Court established in Strickland v. Washington,

"counsel has a duty to make reasonable investigations" and strategic decisions to not present evidence can be made only after "thorough investigation of law and facts relevant to plausible options." 466 U.S. 668, 690-1 (1984). In this case, there was an inexperienced lawyer who did not educate himself in preparation for a capital trial. There was inexperienced co-counsel who became involved out of pity for his overburdened and overwhelmed friend. And there was an inexperienced investigator who had insufficient money or direction to even begin to prepare the case for trial. And there was Mr. Sweet who, through a combination of factors, was denied his right to the effective assistance of counsel.

REPLY TO ARGUMENT II

The circuit court made the following errors that cannot be defended by the State and should not be overlooked by this Court: (1) the court erroneously found that following a client's instructions can excuse the complete failure to investigate a capital case for mitigation; (2) the court assumed without the competent substantial evidence that is required to support fact-findings that if Dr. Toomer testified, he would have been rebutted by a State expert and that the jury would believe the State's expert over Dr. Toomer; (3) the court held that all of the mitigation evidence presented at the evidentiary hearing was cumulative to the meager five pages that was presented at Mr. Sweet's penalty phase.

The circuit court's finding that a defense attorney cannot be ineffective for following his client's wishes is not supported by this Court's precedent. It is clear that one of the duties imposed on a defense attorney is to investigate the case so that his client may make an informed decision regarding the presentation of mitigation. Blanco v. Wainwright, 943 F.2d 1477, 1502 (11th Cir. 1991); Tafero v. Wainwright, 796 F.2d 1134 (11th Cir. 1986); Thompson v. Wainwright, 787 F.2d 1447 (11th Cir. 1986); Deaton v. Dugger, 635 So. 2d 4, 7-9 (Fla. 1994); Koon v. Dugger, 619 So. 2d 246 (Fla. 1993). The State argues that "a client's direct instructions must be taken into consideration." (AB. at 37) While this statement is true, it does not excuse the failure to investigate so that the client's decisions are informed. Clearly, Mr. Adams did not do this. As he admitted, he is not sure if he was familiar with the Supreme Court decisions regarding mitigation, so that he would know what kind of evidence could be presented. In addition, due to his failure to investigate, Mr. Adams did not know what evidence was available in this case. It was his responsibility to save Mr. Sweet's life. His failure cannot be blamed on or excused by his client's uninformed decisions. The circuit court's finding that Mr. Adams' failure to investigate is excused because he was following his client's wishes is contrary to the law establishing the minimum responsibilities imposed on defense lawyers. The circuit court's finding should not be upheld by this Court.

Despite the testimony of Mr. Adams, Mr. Abner, and Mr. Moore, the State asserts that this is not a case "where counsel failed to prepare." (AB. at 37) Mr. Adams testified that he thinks he may have spoken to Mr. Sweet's mother, girlfriend, and foster mother in preparation for the penalty phase. (PCR. 1805-06). However, there is no documentation in his records, such as notes or even billing records, confirming this memory and these witnesses contradict this testimony. (PCR. 1690, 1744). Although he insists that he spoke to Mr. Sweet's mother, Mr. Adams could not remember what they talked about, even when he was specifically asked about Mr. Sweet's childhood, her alcoholism and her abandonment of her children. (PCR. 1843). Mr. Adams did speak to Deone Sweet about the case, but she remembers that these conversations rarely focused on Mr. Sweet's background or character and that meeting with Mr. Adams was "mostly like friends." (PCR. 1720). At the conclusion of the State's penalty phase evidence, Mr. Adams requested a continuance. (R. 1241). He explained that he needed time to check the hallway of the courthouse to "see who our witnesses are out there." (R. 1241). Apparently, despite his failure to investigate and discover mitigation witnesses, Mr. Adams held out hope that someone would miraculously appear to save Mr. Sweet's life. Yet, the State claims that this is not a case where counsel failed to prepare.

Despite the fact that he sought the help of an investigator and co-counsel, Mr. Adams made no effort to involve them in the preparation of the penalty phase. (PCR. 1806-07). Mr. Adams'

failures in regard to the penalty phase extend even further - although he had documentary evidence from Mr. Sweet's childhood that had been gathered by the public defender's office he did not use any of it. (PCR. 1808). This evidence was literally in his hands and required no effort on his part and yet he still failed his client by not presenting it to the jury. Mr. Adams blamed these failures on his "inexperience" and admitted that the evidence that could have been discovered through investigation should have been presented and that it could have made a difference to the outcome of the penalty phase.

Mr. Abner did not know that Mr. Sweet was facing the death penalty. (PCR. 1442). He did nothing to discover potential mitigating evidence. Mr. Adams never instructed him to investigate Mr. Sweet's family background, his substance abuse history, or his school or juvenile history. (PCR. 1443). He did not even visit Mr. Sweet at the jail to discuss his background because he does not like to go to the jail. (PCR. 1450).

Mr. Moore was similarly uninvolved in penalty phase preparation. He never discussed the penalty phase with Mr. Adams because he assumed that his participation was limited to cross-examining a few State witnesses. Although he presented the testimony of the one penalty phase witness, he had never met her before and did not know what evidence she could possibly provide. (PCR. 1463-64). He testified that he did not know what questions he was going to ask and that he "played it by ear." (PCR. 1464). The State ignores all of this evidence, which essentially amounts

to confessions of gross incompetence by the men responsible for saving Mr. Sweet's life, and blithely asserts that this is not a case "where counsel did not prepare." If this is not such a case, then one does not exist.

Because Mr. Moore was unprepared and did not know that he was expected to present Deone Sweet's testimony, his cursory examination of her ("playing it by ear" as he described it) failed to elicit crucial testimony that should have been presented to the jury. Mr. Adams was ineffective for failing to investigate his client's life and to uncover the compelling evidence that was presented at the evidentiary hearing. He did not even prepare the one penalty phase witness for her testimony and at the last minute passed this responsibility on to his equally unprepared and inexperienced co-counsel. At trial, Deone Sweet testified for five transcript pages about the following facts:

- that she and her brothers grew up without a father;
- that their mother was an alcoholic "off and on;"
- that she filled the mother role for her brother;
- that he is a good uncle to her child.

(R. 1241-46). That is all the mitigating evidence the jury heard about Mr. Sweet. The potential mitigating effect of this testimony is further eroded by Ms. Sweet's testimony that her childhood was "normal" and that she was unsure whether her mother's alcoholism had any effect on her brother.

At the evidentiary hearing, other witnesses in addition to Ms. Sweet provided a more complete picture of Mr. Sweet. The additional testimony not presented at trial included the following facts: that Mr. Sweet spent a significant portion of his childhood in foster care because his mother was an alcoholic who abandoned her children; that he was prescribed Ritalin as a child and was able to control his behavior while on the medication (PCR. 1688); that he got along well with the other children in his foster home (PCR. 1689); that his father never acknowledged his existence (PCR. 1725); that his mother was involved in a series of violent relationships and that her children saw her being abused (PCR. 1729); that his mother admitted to beating her children when she was drunk (PCR. 1729); that his mother drank when she was pregnant with him and continued her alcohol abuse throughout his childhood (PCR. 1727-8); that his mother suffered an injury during the seventh month that she was pregnant with William and that prior to that incident she received no prenatal care (PCR. 1727); that Mrs. Sweet would abandon her children to go out drinking (PCR. 1732); that she sometimes did not return home for days with no regard to whether her children had food or even electricity (PCR. 1732); that the children were returned to her custody before she was ready to become a suitable parent (PCR. 1737); that she sometimes took William with her when she went out to parties and that she gave him beer when he was a toddler (PCR. 1735); that she stopped giving William the Ritalin which was the only way that he could

control his behavior (PCR. 1739); that William suffered a head injury and spinal meningitis as a child (PCR. 1734); that she once abandoned William alone in Texas with a former boyfriend (PCR. 1740). Mrs. Sweet did all of this because alcohol had taken over her life; she explained that drinking "had top priority." (PCR. 1725). When Mrs. Sweet wanted to escape the mess she had made of her life, she "just left," moving to Miami with no concern for the future or welfare of her children. (PCR. 1743). None of this evidence was heard by the jury that sentenced Mr. Sweet to death. These witnesses were available to testify if only they had been contacted.

Deone Sweet's hearing testimony was also remarkably different from that at trial. At trial, she said only that their mother was an alcoholic. Yet, she also said she did not know if this had an effect on William and that her childhood was "normal." This testimony reveals a complete lack of preparation by Mr. Sweet's lawyers. Ms. Sweet had significantly more to say about her brother's childhood that a jury should have heard before deciding his fate. Because she was not interviewed and prepared to testify, this information was not elicited. It was the responsibility of Mr. Sweet's lawyers to determine whether Deone had valuable information that could help to save their client's life. This was not done. As Mr. Moore explained, he had never met Ms. Sweet before he presented her testimony and he simply "played it by ear." Mr. Moore and Mr. Adams failed their client and result is that the jury did not hear compelling

mitigation evidence that could have been presented through a witness who was present, cooperative, and convincing. As with the documentary evidence that had been gathered by the public defender's office, Mr. Adams had readily available mitigation and simply failed to present it.

Deone Sweet's hearing testimony includes the following details about William's childhood that were not presented to the jury: that the children witnessed Mrs. Sweet's boyfriends beat her (PCR. 1698-1700; 1704); that they had to flee for their lives when one of Mrs. Sweet's boyfriends threatened to kill her (PCR. 1700); that Mrs. Sweet failed to protect her children from these men because of her addiction to alcohol (PCR. 1704); that the children were abandoned by their mother without food and electricity (PCR. 1702-03); that Mrs. Sweet would try to hide from her children when they searched for her while she was partying (PCR. 1703); that while the children were separated in foster care their mother would sometimes be drunk for scheduled visits (PCR. 1709). Ms. Sweet tried to help her brother. However, it was beyond her ability to know what information could have made a difference. She had this information and was willing to share it with the jury if only Mr. Sweet's lawyers had taken the time to properly interview her and educate themselves about their duties to Mr. Sweet during the penalty phase.

The State dismisses the mitigation evidence that was presented at the hearing by stating that "more is not better." However, the evidence that trial counsel failed to discover and

present is not merely more of the same testimony that the jury had. Trial counsel could have presented a complete picture of their client's childhood and the deprivations he suffered. The circuit court erred in finding that the new evidence is cumulative to that which was presented at trial. This finding is directly contradicted by the evidentiary hearing testimony and it should not be upheld by this Court. The State also attempts to defend the circuit court finding in regard to Emily Shealy (that trial counsel made a "strategic decision" to not present her because she would have told the jury that Mr. Sweet was "a pretty bad individual"). Contrary to the circuit court's order, there is no "wealth" of information that would have prejudiced Mr. Sweet if Ms. Shealy had testified. In addition, the State cannot respond to Mr. Sweet's argument, based on Chandler v. United States, 193 F.3d 1297, 1305 (11th Cir. 1999), that failing to present mitigation based on the belief that doing so will result in the jury hearing some negative information about the defendant (especially one they had just found guilty of murder) is not a strategic decision.

The third error committed by the circuit court that cannot be defended by the State is the conclusion that Dr. Toomer's testimony would not have made a difference. The circuit court assumes with no factual basis that even if Dr. Toomer testified, the jury would have disbelieved him and accepted the testimony of a State expert. The court explains: "Had Dr. Toomer's testimony been presented at trial it would have lead [sic] to contrary

evidence by the State, which would have lead [sic] the jury to the conclusion that the defendant has an anti-social personality disorder." (PCR. 1095). The circuit court assumes without explanation that the defense expert would not be believed. Apparently, the circuit court believes that the jury would share its bias in favor of the State. As explained below, even if the jury accepted Dr. Miller's diagnosis of antisocial personality disorder, it would not necessarily result in a death recommendation.

The State also misrepresents Dr. Miller's testimony to support its argument that the circuit court properly denied Mr. Sweet's claim. The State claims that Mr. Sweet's Brief distorts Dr. Miller's testimony: "Sweet's claim that Dr. Miller stated that the statutory mental mitigators applied (initial brief at 80-1) is incorrect as is his claim that Miller said the CCP aggravator did not apply to this homicide. (Initial brief at 81)." (AB. at 39) In fact, Dr. Miller's testimony supports Mr. Sweet's argument regarding the aggravating and mitigating factors. At the evidentiary hearing, Dr. Miller was asked whether Mr. Sweet "would lack the capacity to engage in cold, calculated, premeditation?" (PCR. 2042). Dr. Miller answered in the affirmative: "Oh, sometimes he might. I think that basically he's able to do this but I think at times when faced with emotional override he could act out impulsively. This is one of the signal features. They act out on instant, pass a bank, let's rob it. I don't like that guy's look, let's shoot him, or

let's snatch her purse or whatever the impulse might be." (PCR. 2042).

In regard to the statutory mitigating factors, Dr. Miller was asked whether the murder in this case "was committed while the defendant was under the influence of extreme mental or emotional disturbance.?" (PCR. 2043). Dr. Miller's affirmative answer relied on his diagnosis of Mr. Sweet as having antisocial personality disorder. He explained: "Well, depends on where you're coming from. He has, I think he's an extreme example of antisocial personality. He's not a garden variety or mild version of it if you will. So if that means extreme the answer is yes." (PCR. 2043).

Dr. Miller was also asked whether Mr. Sweet's capacity "to appreciate the criminality of his conduct, or to conform his conduct to the requirements of law was substantially impaired." (PCR. 2044). Dr. Miller's answer again relied on the antisocial personality disorder diagnosis: "The sociopath does not, cannot govern themselves as hopefully most of the rest of us who are supposedly normal can. They are impulsive, they do not learn, they do not care what happens in terms of future because it's not considered. And so whether or not they conform is diminished thereby." (PCR. 2044). Dr. Miller concluded: "But he's going to be under extreme duress and not be able to perform the basis of his character which prevents him from doing this. At the same time, it is antisocial personality, it's not the fact that he's

driven by starvation, or by somebody threatening to kill him if he doesn't do it or something of that sort." (PCR. 2045).

In addition, the circuit court conclusion that Dr. Toomer's testimony does not contradict Dr. Miller's diagnosis of antisocial personality disorder does not defeat Mr. Sweet's claim. As this Court recently recognized, antisocial personality disorder is a mitigating factor. Morton v. State, Slip Opinion 95,171 (Fla. June 28, 2001)(citing Eddings v. Oklahoma, 455 U.S. 104, 107, 115 (1982); Robinson v. State, 761 So. 2d 269, 273 (Fla. 1999), Snipes v. State, 733 So. 2d 1000, 1003 (Fla. 1999); Rutherford v. State, 727 So. 2d 216, 224 (Fla. 1998); Wournos v. State, 676 So. 2d 966, 968, 971 (Fla. 1995)). In Morton, three mental health experts agreed that the defendant suffered from antisocial personality disorder but the trial court failed to find it as a mitigating circumstance. This Court found that the trial court had erred in failing to consider this evidence.

The circuit court order in this case assumes that Dr. Miller's diagnosis would result in a death recommendation. The State repeats this error: "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." (AB. at 39) In Mr. Sweet's case, there was no expert testimony at trial. Even if Dr. Miller's opinion would not change, Mr. Sweet has still proved that the presentation of a mental health expert, in conjunction with the other mitigation witnesses who were not presented, would have made a difference in

the outcome of his penalty phase. The State's admission that "counsel could have done more," (AB. at 41), is a gross understatement of what occurred in this case.

In Collier v. Turpin, 177 F.3d 1184 (11th Cir. 1999), the Eleventh Circuit Court of Appeals found trial counsel to be ineffective for failing to investigate and present mitigation evidence. As in Mr. Sweet's case, there was one defense witness who testified at trial. The Court of Appeals did not rely on that one witness's testimony to find that the additional evidence was cumulative. Instead, the Court found that the trial attorney had presented only "a hollow shell" of the evidence that was available and necessary for a fair sentencing hearing. The jury in this case sentenced Mr. Sweet to death after hearing only five pages of testimony from his sister, presented by an attorney who met her for the first time only minutes earlier. The evidence presented at the hearing is not cumulative, and, if heard by a jury, would have resulted in a life recommendation.

REPLY TO ARGUMENT III

The State urges this Court to deny Mr. Sweet's claim that the circuit court erred by failing to consider the cumulative effect of all the evidence not presented at trial because Mr. Sweet did not raise a Brady claim. The State argues that the authority cited by Mr. Sweet in his brief are "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." (AB. at 42) The State's position is that

this claim has no merit because "Sweet . . . made no definite Brady claim in his amended motion and failed utterly to prove that any Brady violation occurred." (AB. at 42-3) The State misunderstands the law in this area which applies to cases such as this one even when there is not a Brady claim. United States v. Burgos, 94 F.3d 849 (4th Cir. 1996)(applying Kyles to a sufficiency of the evidence claim); United States v. Rivenbark, 81 F.3d 152 4th Cir. 1996)(same); Middleton v. Evatt, 77 F.3d 469 (4th Cir. 1996)(applying Kyles to ineffective assistance of counsel claims); Battle v. Delo, 64 F.3d 347 (8th Cir. 1995)(newly discovered evidence claim). The requirement that a circuit court in postconviction consider the cumulative effect of all the new evidence applies to Mr. Sweet's case. The circuit court erred.

REPLY TO ARGUMENT IV

In its answer to this Argument, the State repeats the same error that undermines its position on Argument II: the assumption that a diagnosis of antisocial personality disorder necessarily dooms a defendant's case. The State urges this Court to deny this claim because Mr. 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." (AB. at 47) The State's argument is contrary to this Court's recent decision in Morton v. State, Slip Opinion 95,171, where this Court confirmed that antisocial personality disorder is

mitigating and that a circuit court that ignores such evidence in sentencing a defendant to death commit error.

I HEREBY CERTIFY that a true copy of the foregoing Reply Brief of Appellant has been furnished by United States Mail, first class postage prepaid, to all counsel of record on July 16, 2001.

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CERTIFICATE OF FONT SIZE

I hereby certify that the foregoing document is in compliance with the Florida Rules of Appellate Procedure 9.210.

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