IN THE SUPREME COURT OF FLORIDA

NO. SC01-2867

WILLIAM EARL SWEET,

Petitioner,

v.

MICHAEL W. MOORE,
Secretary, Florida Department of Corrections,

Respondent.

PETITION FOR WRIT OF HABEAS CORPUS

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PRELIMINARY STATEMENT

This is Mr. Sweet's first habeas corpus petition in this Court. Art. 1, Sec. 13 of the Florida Constitution provides: "The writ of habeas corpus shall be grantable of right, freely and without cost." This petition for habeas corpus relief is being filed in order to address substantial claims of error under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, claims demonstrating that Mr. Sweet was deprived of the right to a fair, reliable, and individualized sentencing proceeding and that the proceedings resulting in his convictions and death sentences violated fundamental constitutional imperatives.

Citations shall be as follows: The record on appeal from Mr. Sweet's 1987 trial shall be referred to as "R.__" followed by the appropriate page number. All other references will be self-explanatory or otherwise explained herein.

INTRODUCTION

Significant errors which occurred at Mr. Sweet's capital trial and sentencing were not presented to this Court on direct appeal due to the ineffective assistance of appellate counsel. For example, significant errors regarding Mr. Sweet’s right to a fair and individualized sentencing, as well as other Eighth Amendment errors, are presented in this petition for writ of habeas corpus. Furthermore, Mr. Sweet’s fundamental rights to a fair trial were

violated.

Appellate counsel's failure to present the meritorious issues discussed in this petition demonstrates that his representation of Mr. Sweet involved "serious and substantial" deficiencies. Fitzgerald v. Wainwright, 490 So. 2d 938, 940 (Fla. 1986). The issues which appellate counsel neglected to raise demonstrate that his performance was deficient and the deficiencies prejudiced Mr. Sweet. "[E]xtant legal principle[s] . . . provided a clear basis for . . . compelling appellate argument[s]," which should have been raised in Mr. Sweet's appeal. Fitzpatrick, 490 So. 2d at 940. Neglecting to raise such fundamental issues, as those discussed herein, "is far below the range of acceptable appellate performance and must undermine confidence in the fairness and correctness of the outcome." Wilson v. Wainwright, 474 So. 2d 1162, 1164 (Fla. 1985). Had counsel presented these issues, Mr. Sweet would have received a new trial, or, at a minimum, a new penalty phase. Individually and "cumulatively," Barclay v. Wainwright, 444 So. 2d 956, 969 (Fla. 1984), the claims omitted by appellate counsel establish that "confidence in the correctness and fairness of the result has been undermined." Wilson, 474 So. 2d at 1165 (emphasis in original).

As this petition will demonstrate, Mr. Sweet is entitled to habeas relief.

PROCEDURAL HISTORY

The Circuit Court of the Fourth Judicial Circuit, Duval County, entered the judgments of conviction and sentence under consideration.

Mr. Sweet was charged by indictment on March 21, 1991, with one count of first degree murder, three counts of attempted murder, and burglary with an assault or battery. (R. 182-86) Mr. Sweet's trial began on May 20, 1991. He was found guilty on all five counts. (R. 1170). Specifically, Mr. Sweet received three consecutive life sentences for the attempted murders of Marcine Cofer, Sharon Bryant, and Mattie Mae Bryant in the same incident that resulted in Felicia Bryant's death, which occurred in Ms. Cofer's apartment at about one o'clock in the morning on June 27, 1990. (R. 1313-15). Mr. Sweet received a fourth consecutive life sentence on armed burglary charges. He was also convicted for the murder of Felicia Bryant.

On Mr. Sweet's first-degree murder conviction, the jury recommended the death penalty by a vote of ten to two, and the trial court followed this recommendation. (R. 1278). The court found the following aggravating circumstances: prior violent felony convictions; avoid arrest; during commission of a burglary; and cold, calculated, and premeditated. (R. 1309-10). The court found no statutory mitigation but did find that the lack of parental guidance was a nonstatutory mitigating factor. (R. 1310).

On direct appeal, on August 5, 1993, this Court affirmed the convictions and the death sentence imposed as to Mrs. Bryant. See

Sweet v. State, 624 So. 2d 1138, 1143 (Fla. 1993). The other sentences imposed against Mr. Sweet were also affirmed, except that the minimum mandatory sentences of the non-death sentences were "deemed to run concurrently with each other." Id.

On August 1, 1995, Mr. Sweet filed his first motion under Rule 3.850, Fla. R. Crim. P and amended it on June 30, 1997. Pursuant to Huff v. State, 622 So. 2d 982 (Fla. 1993) and Rule 3.851(c), Fla. Crim. P., the circuit court held a hearing on Mr. Sweet's motion for post-conviction relief. Subsequently, on May 13, 1998, the circuit court issued an order, granting Mr. Sweet an evidentiary hearing on aspects of his ineffective assistance of counsel at the guilt and penalty phase, as well as the insufficiency of the mental health experts who evaluated Mr. Sweet. This evidentiary hearing was conducted January 25, 1999 through January 28, 1999. On March 30, 2000, the circuit court entered an order that denied Mr. Sweet relief on all of his claims. This Court heard oral arguments on the circuit court's order on October 4, 2001 but has yet to issue its decision.

In accordance with Mann v. Dugger, 794 So. 2d 595 (Fla. 2001), Mr. Sweet now files this petition seeking habeas corpus relief.

JURISDICTION TO ENTERTAIN PETITION AND GRANT HABEAS CORPUS RELIEF

This is an original action under Fla. R. App. P. 9.100(a). See Art. 1, Sec. 13, Fla. Const. This Court has original jurisdiction pursuant to Fla. R. App. 9.030(a)(3) and Article V, sec. 3(b)(9),

Fla. Const. The petition presents constitutional issues which directly concern the judgment of this Court during the appellate process, and the legality of Mr. Sweet's sentence of death.

Jurisdiction in this action lies in the Court, see, e.g., Smith v. State, 400 So. 2d 956, 960 (Fla. 1981), for the fundamental constitutional errors challenged herein arise in the context of a capital case in which this Court heard and denied Mr. Sweet's direct appeal. See Wilson, 474 So. 2d at 1163; Baggett v. Wainwright, 229 So. 2d 239, 243 (Fla. 1969); cf. Brown v. Wainwright, 392 So. 2d 1327 (Fla. 1981). A petition for a writ of habeas corpus is the proper means for Mr. Sweet to raise the claims presented herein. See, e.g., Way v. Dugger, 568 So. 2d 1263 (Fla. 1990); Downs v. Dugger, 514 So. 2d 1069 (Fla. 1987); Riley v. Wainwright, 517 So. 2d 656 (Fla. 1987); Wilson, 474 So. 2d at 1162.

This Court has the inherent power to do justice. The ends of justice call on the Court to grant the relief sought in this case, as the Court has done in similar cases in the past. The petition pleads claims involving fundamental constitutional error. See Dallas v. Wainwright, 175 So. 2d 785 (Fla. 1965); Palmes v. Wainwright, 460 So. 2d 362 (Fla. 1984). The Court's exercise of its habeas corpus jurisdiction, and of its authority to correct constitutional errors such as those herein pled, is warranted in this action. As the petition shows, habeas corpus relief would be more than proper on the

basis of Mr. Sweet's claims.

GROUNDS FOR HABEAS CORPUS RELIEF

By his petition for a writ of habeas corpus, Mr. Sweet asserts that his capital conviction and sentence of death were obtained and then affirmed during this Court's appellate review process in violation of his rights guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the Florida Constitution.

CLAIM I

THE RULES PROHIBITING MR. SWEET'S LAWYERS FROM INTERVIEWING JURORS TO DETERMINE IF CONSTITUTIONAL ERROR OCCURRED AT HIS TRIAL VIOLATES EQUAL PROTECTION PRINCIPLES, THE FIRST, SIXTH, EIGHT AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION. THE RULES ALSO DENY MR. SWEET ADEQUATE ASSISTANCE OF COUNSEL IN PURSUING HIS POSTCONVICTION REMEDIES. APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE THIS CLAIM IN MR. SWEET'S DIRECT APPEAL.

Under the Eighth and Fourteenth Amendments, Mr. Sweet is entitled to a fair trial before an impartial jury. Furthermore, under Florida law, outside influence of the jurors is prohibited in order to assure that jurors remain impartial:

> It is improper for jurors to receive any information or evidence concerning the case before them, except in open court and in the manner prescribed by laws. 23 C.J.S. Criminal

Law sec. 1362, p. 1022.

Russ v. State, 95 So. 2d 594, 600 (Fla. 1957). Contrary to these fundamental precepts, Mr. Sweet's jury was subjected to outside influences that affected their ability to make a fair determination of Mr. Sweet's guilt.

After one of the recesses during the presentation of the state's case, defense counsel informed the trial court that police officers had been in the courthouse snack bar during the recess declaring out loud that Mr. Sweet was guilty. Worse still, the officers had done so in front of several jurors who were also in the snack bar. The trial court conducted a hearing, during which two individuals who had witnessed the officers' conduct testified. Rachael Russell testified that during the recess she had gone down to the snack bar on the first floor of the courthouse. (R. 578) While she waited in line at the snack bar, Russell observed two police officers standing approximately four feet away from three of the jurors in Mr. Sweet's case. (R. 581) Russell testified that the two uniformed officers were speaking loudly to each other about Sweet's trial and saying Sweet was guilty. (R. 581-582; 592) Stacey Williams was also present when the officers commented on Sweet's guilt in front of the jurors. (R. 590-591) Williams stated that in addition to the three jurors Russell saw, there were two other jurors in the proximity of the conversation between the two officers who would have

heard the comments. (R. 593)

The Court brought the jury in and generally inquired whether any of them had overheard any statements regarding the case. (R. 600-01) None of the jurors indicated that they had overheard anything. No other inquiry was made of the jury. The officers involved were never located and questioned regarding the incident. No attempt was ever made to locate or question other individuals who had witnessed the incident. Thus, the possibility that constitutional error had occurred in Mr. Sweet's case was for the most part ignored.

The record was clear that this had occurred but appellate counsel failed to address it in Mr. Sweet's direct appeal brief. More importantly, it should also have been clear to appellate counsel that Mr. Sweet would wish to investigate this matter further in postconviction, and that he would be prevented from doing so by rules that prohibit attorneys from interviewing jurors. Appellate counsel should have challenged these unconstitutional rules on direct appeal.

The rules that regulate attorney behavior in Florida expressly prohibit counsel from directly or indirectly communicating with jurors. The rule states that:

> A lawyer shall not . . . after dismissal of the jury in a case with which the lawyer is connected, initiate communication with or cause another to initiate communication with any juror regarding the trial except to determine whether the verdict is subject to legal

> challenge; provided, a lawyer may not interview jurors for this purpose unless the lawyer has reason to believe that grounds for such challenge may exist.

Rule 4-3.5(d)(4), R. Regulating Fla. Bar.

To the extent the rule precludes postconviction counsel from investigating and presenting claims that can only be discovered through interviews with jurors, Rule 4-3.5(d)(4), Rules Regulating the Florida Bar, is unconstitutional. Mr. Sweet should have the ability to interview the jurors in this case, but since he is on death row he must rely upon counsel provided by the State of Florida. Yet, the attorneys provided to him are prohibited from contacting the jurors in his case. The state's action in providing Mr. Sweet with counsel who cannot fully investigate well-recognized claims for relief is a denial of access to the courts of this state under article I, section 21 of the Florida Constitution and the fundamental right of access to courts guaranteed by the United States Constitution. See Bounds v. Smith, 430 U.S. 817, 828 (1977). Thus, Rule 4-3.5(d)(4) is unconstitutional on both state and federal grounds.

Mr. Sweet may have constitutional claims for relief that can only be discovered through juror interviews. These claims may come from the incident detailed above or from various other parts of his trial. Certainly, juror misconduct during Mr. Sweet's case would warrant a new trial in the lower court, See Burton v. Johnson, 948

F.2d 1150 (10th Cir. 1991), and the situation detailed above presents a strong possibility that Mr. Sweet's jurors could provide information regarding misconduct that was not solicited by the trial court during its brief examination of the jurors.

Mr. Sweet was entitled to a competent, fair, and impartial jury during his trial. U.S. CONST. amend. VI. This is especially true in a capital case because, in Florida, the jury acts as co-sentencer. Espinosa v. Florida, 112 S. Ct. 2926 (1992); Walls v. State, 641 So. 2d 381 (Fla. 1994); Jackson v. State, 648 So. 2d 85 (Fla. 1994); Johnson v. Singletary, 612 So. 2d 575 (Fla. 1993); Kennedy v. Singletary, 602 So. 2d 1285, 1286 (Fla. 1992) (Kogan, J., concurring). The process by which a jury renders a death sentence is also subject to the scrutiny demanded by the Due Process Clause of the Fourteenth Amendment. Gardner v. Florida, 97 S. Ct. 1197, 1204 (1977). Due process requires not only formalistic procedural fairness, but vindication of the defendant's "legitimate interest in the character of the procedure which leads to the imposition of sentence." Id., at 1205, citing Witherspoon v. Illinois, 88 S. Ct. 1770, 1776-1778 (1968); see also, Morgan v. Illinois, 112 S. Ct. 2222 (1992). The possibility that the jurors sentencing decision was influenced by comments from state authority figures (uniformed officers) shows an even greater need for juror inquiries by postconviction counsel.

Likewise, the strictures of due process govern postconviction challenges to a capital conviction or sentence. Huff v. State, 622 So. 2d 982 (Fla. 1993). The essence of due process is the opportunity to be heard. See Id.; Ford v. Wainwright, 105 S. Ct. 2595 (1986). The opportunity to have one's claims to postconviction relief considered fully by a fair and impartial tribunal is also the essence of a prisoner's right of access to the courts. See Ex parte Hull, 312 U.S. 546, 61 S.Ct. 640 (1941); Johnson v. Avery, 393 U.S. 483, 89 S. Ct. 747 (1969); Cornett v. Donovan, 51 F.3d 894, 899 (9th Cir. 1993). The foundation for these constitutional principles existed at the time of Mr. Sweet's direct appeal, as did Rule 4-3.5(d)(4). Furthermore, the importance of counsel in assuring that capital postconviction proceedings comply with due process was also recognized by the courts at the time of Mr. Sweet's direct appeal. See Spalding v. Dugger, 526 So. 2d 71 (Fla. 1988); Zeigler v. Wainwright, 805 F.2d 1422, 1426 (11th Cir. 1986). Appellate counsel should have protected Mr. Sweet's rights to fair and adequate postconviction proceedings by challenging the constitutionality of Rule 4-3.5(d)(4) in his direct appeal.

"A trial by jury is fundamental to the American scheme of justice and is an essential element of due process." Scruggs v. Williams, 903 F.2d 1430, 1434-1435 (11th Cir. 1990), citing Duncan v. Louisiana, 391 U.S. 145 (1968). Convictions and sentences are

subject to constitutional challenge based on allegations of juror misconduct. Matters extrinsic to the verdict include "overt acts committed by or in the presence of the jury or a juror that might have compromised the integrity of the fact-finding process." Baptist Hospital of Miami, Inc. v. Maler, 579 So. 2d 97, 101 (Fla. 1991); Powell v. Allstate Insurance Co., 652 So. 2d 354, 356 (Fla. 1995) (Court emphasizing "might"). Where jurors consider evidence in a manner other than "the manner prescribed by law" those considerations must be considered extrinsic to the verdict. See Russ v. State, 95 So. 2d 594, 600 (Fla. 1957).

It is well established law in capital and non-capital cases, civil cases as well as criminal, that the consideration of extralegal matters or information received from sources other than properly admitted evidence can constitute reversible error. See, e.g., Powell, 652 So. 2d 354 (racial prejudice in civil suit); Hamilton v. State, 574 So. 2d 124 (Fla. 1991) (no error where car magazines in jury room were totally unrelated to case) (but see cases cited therein, Smith v. State, 95 So. 2d 525 (Fla. 1957) (presence of dictionary in jury room required reversal); Yanes v. State, 418 So. 2d 1247 (Fla. 4th DCA 1982) (reversal required where court sent entire book of jury instructions into jury room); Grissinger v. Griffin, 186 So. 2d 58 (Fla. 4th DCA 1966) (reversal in negligence case where jury consulted a dictionary)). See also, Preast v. Amica

Mutual Ins. Co., 483 So. 2d 83, 86 (Fla. 2d DCA 1986) ("jurors' determination of the amount of damages by lot was clearly illegal").

In Jeffries v. Blodgett, 5 F.3d 1180, 1190, 1195 (9th Cir. 1993), the court found sufficient "potential for prejudice" to warrant relief where jurors received extrinsic information that the defendant previously committed an act similar to the one of which he was being accused. Jeffries, 5 F.3d at 1190-1191. The Ninth Circuit relied on Dickson v. Sullivan, 849 F.2d 403 (9th Cir. 1988), which presented similar facts. In Mr. Sweet's case, the jurors overheard police officers pronouncing Sweet guilty before the jury made their own decision. This was not evidence or testimony that was properly admitted during the trial proceedings. Thus, it is more than possible that the police officers' statements prevented the jury from considering Sweet innocent until proven guilty.

This Court must also consider the possibility that what the jurors overheard may have had an improper influence in the jury's sentencing determination. "[B]ecause there is a qualitative difference between death and any other permissible form of punishment, 'there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.'" Zant, 103 S. Ct. at 2747, quoting, Woodson v. North Carolina, 96 S. Ct. 2978, 1991 (1976) (plurality opinion). The decision making of jurors deciding the guilt or

innocence of a criminal defendant is relatively unfettered compared to the circumspection required in the capital sentencing process.

If Mr. Sweet were not incarcerated, he could conduct juror interviews himself. If he had money, he could hire investigators (anyone who is not a member of the Florida Bar or operating under the direction of a Bar member) to interview jurors and determine what if any constitutional challenges exist that would invalidate his conviction or sentence. However, because undersigned counsel are members of the Florida Bar, juror interviews cannot be conducted and Mr. Sweet is being denied his ability to investigate constitutional challenges arising from juror misconduct. This barrier to the presentation of claims is akin to saying Mr. Sweet's counsel cannot investigate claimed violations of Brady v. Maryland, 83 S. Ct. 1194 (1963), until they can prove a violation occurred. Such a rule would be patently unconstitutional.

Mr. Sweet was denied due process of law and access to the courts because his postconviction counsel was not permitted to interview jurors in preparation for postconviction proceedings. If a state chooses to create a statutory right to postconviction review of criminal convictions and sentences, the state's operation of the postconviction system must comply with the Due Process Clause of the federal Constitution's Fourteenth Amendment. See Evitts v. Lucey, 469 U.S. 387, 393, 105 S. Ct. 830, 834 (1985). Of course, Florida

provides for such postconviction review,[1] and the Florida Supreme Court has recognized that principles of due process govern Florida capital postconviction proceedings. See, e.g., Huff v. State, 622 So. 2d 982 (Fla. 1993) (holding that trial court violated postconviction petitioner's due process rights by signing state's proposed order denying motion to vacate murder convictions and death sentence without affording petitioner opportunity to raise objections or submit alternative order). See also Rose v. State, 601 So. 2d 1181 (Fla. 1992).

Mr. Sweet has a "fundamental constitutional right of access to the courts." Bounds v. Smith, 430 U.S. 817, 828, 97 S.Ct. 1491, 1498, 52 L.Ed.2d 72 (1977); Lewis v. Casey, 116 S.Ct. 2174 (1996). "Because a prisoner ordinarily is deprived of the right to vote, the right to file a court action might be said to be his remaining most 'fundamental political right, because preservative of all rights.'" McCarthy v. Madigan, 112 S.Ct. 1081, 1091 (1992), quoting Yick Wo v. Hopkins, 6 S.Ct. 1064, 1071 (1886). In a long line of cases beginning more than fifty years ago with Ex parte Hull, 61 S.Ct. 640 (1941), the Supreme Court has maintained that the fundamental constitutional right of prisoners to have their habeas corpus petitions and civil rights complaints be considered by the courts is essential to the fair and equal administration of criminal

[1]See Fla. R. Crim. P. 3.850, 3.851 (1996).

adjudication and punishment. See Cornett v. Donovan, 51 F.3d 894, 899 (9th Cir. 1995), citing Hooks v. Wainwright, 775 F.2d 1433, 1436 (11th Cir. 1985).

Article 1, section 21 of the Florida Constitution also guarantees to every person the right to free access to the courts on claims of redress of injury free of unreasonable burdens and restrictions. Swain v. Curry, 595 So. 2d 168 (Fla. 1st DCA 1992). That right is fundamental and restrains the legislature from abolishing or abrogating pre-existing access and causes of action and sharply restricts imposition of financial barriers to the assertion of claims. G.B.B. Investments, Inc. v. Hinterkopf, 343 So. 2d 899 (Fla. 3d DCA 1977); Psychiatric Associates v. Siegel, 610 So. 2d 419 (Fla. 1992). Furthermore, the legislature may abrogate or restrict access to the courts only if it shows an overpowering public necessity for abolishment of the right.

Essential to due process whether considered writ large or in the context of a prisoner's right to sue for his liberty is the notion that a litigant must be able to present claims to an impartial tribunal and have them heard. See Huff, 622 So. 2d at 983. As stated above, the opportunity to have one's claims to postconviction relief fully considered by a fair and impartial tribunal is also the essence of a prisoner's right of access to the courts. See Ex parte Hull, 312 U.S. 546, 61 S.Ct. 640 (1941); Johnson v. Avery, 393 U.S.

483, 89 S. Ct. 747 (1969); Cornett v. Donovan, 51 F.3d 894, 899 (9th Cir. 1993); see also, Ford v. Wainwright, 105 S. Ct. 2595 (1986).

Rule 4-3.5(d)(4), Rule Regulating Florida Bar, is a barrier to the investigation and presentation of legitimate claims for postconviction relief. "The right [of access] is designed to ensure that a habeas corpus petition or civil rights complaint of a person in state custody will reach a court for consideration." Cornett v. Donovan, 51 F.3d 894, 896, 899 (9th Cir. 1995) (emphasis added). The doctrine forbids encumbrances on the exercise of a prisoner's access to the courts in order "to 'prevent effectively foreclosed access.'" Bounds v. Smith, 97 S.Ct. 1491, 1495 (1977), quoting Burns v. Ohio, 79 S.Ct. 1164, 1168 (1959). In cases such as this where evidence of prejudicial juror misconduct is very likely to be present but cannot be gathered or presented to the court, Rule 4-3.5(d)(4) is just as much of a barrier preventing access to the courts as the rules condemned in Ex parte Hull, supra, and Johnson v. Avery, supra.

In Hull, the Court held unconstitutional a rule requiring state prisoners' habeas petitions to be approved by a state officer before they would be forwarded to the Supreme Court. Rule 4-3.5 operates in a similar, if less constitutionally offensive manner. It prevents the presentation of claims by denying their merits before the merits can be established. Similarly in Avery, the State of Tennessee prohibited inmates from assisting one another in formulating or

drafting claims for postconviction relief. Avery, 89 S. Ct. at 748. Although part of the barrier faced by Tennessee inmates was their indigence, a rule that prevents counsel, once appointed, from investigating and presenting viable claims is no less restrictive of the fundamental right to have such claims heard by a court.

Claims of juror misconduct at various stages of litigation from voir dire through capital sentencing deliberations implicate state and federal constitutional rights to a fair and impartial jury, to freedom from cruel and unusual punishment, and to due process and equal protection of the laws. All of these claims are cognizable in state and federal postconviction proceedings. The state may not "exercise[its power to regulate the practice of law] so as to abrogate federally protected rights." Avery, 89 S. Ct. at 751 n.11. Yet, this is how Rule 4-3.5(d)(4) has operated in Mr. Sweet's case. Because Rule 4-3.5(d)(4) existed at the time of Mr. Sweet's appeal, appellate counsel should have challenged the rule in Mr. Sweet's direct appeal brief.

The right of access to the courts is derived from the right to due process, Procunier v. Martinez, 94 S. Ct. 1800, 1814 (1974), but contains an equal protection component as well. See generally, Bounds, supra. The Fourteenth Amendment forbids a state from erecting rules that restrict access to the courts on the basis of a defendants ability to meet a financial requirement. Williams v.

Oklahoma, 89 S. Ct. 1818, 1819 (1969) (invalidating requirement that defendant pay for a "case-made" in order to perfect his right to criminal appeal); Rinaldi v. Yeager, 86 S. Ct. 1497 (1966) (invalidating state law requiring only unsuccessful criminal appellants who were incarcerated to reimburse state for transcripts); Coppedge v. United States, 82 S. Ct. 917, 923 (1962) (courts must provide poor with same procedures as paying litigants); Smith v. Bennett, 81 S. Ct. 895 (1961) (violation of equal protection to allow petition for writ of habeas corpus but to make it contingent upon paying filing fee); Burns v. Ohio, 79 S. Ct. 1164 (1959) (violation of due process and equal protection for state to refuse indigent's request for leave to appeal unless he paid filing fee); Griffin v. Illinois, 76 S. Ct. 585 (1956) (state law granting right of appeal to all but requiring indigents to pay for transcripts violates due process and equal protection).

Similarly, the state cannot disadvantage incarcerated defendants through the erection of barriers that would not exist for unincarcerated defendants. Rinaldi, 86 S. Ct. at 1500 (invidious discrimination to impose financial burden only on imprisoned appellants); see Cornett, 51 F.3d at 894. The constitutional doctrine providing prisoners with a right of access to the courts

> simply removed barriers to court access that imprisonment or indigence erected. They in effect tended to place prisoners in the same position as non-prisoners and indigent

> prisoners in the same position as non-indigent prisoners.

Hooks v. Wainwright, 775 F.2d 1433, 1436 (11th Cir. 1985). Because a criminal defendant who is not incarcerated could speak to the jurors in his case for purposes of preparing an appeal or postconviction motion, even though his counsel could not, the barrier before Mr. Sweet constitutes an invidious discrimination which Appellate counsel should have challenged in Mr. Sweet's direct appeal.

Rule 4-3.5(d)(4) has prevented Mr. Sweet from investigating any claims of jury misconduct that may be inherent in the jury's verdict. Thus, it is invalid because it is in conflict with the Eighth and Fourteenth Amendments to the United States Constitution, as well as a denial of access to the courts of this state under article I, section 21 of the Florida Constitution. This claim should have been raised in Mr. Sweet's direct appeal before his postconviction investigation began. Unfortunately, Mr. Sweet was forced to investigate his case in postconviction without access to the individuals who were exposed to the improper comments of police officers during his trial, the same individuals who determined his guilt and recommended that he be executed. Appellate counsel was ineffective for failing to raise this claim in Mr. Sweet's appeal.

CLAIM II

MR. SWEET'S SENTENCE OF DEATH VIOLATES THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION BECAUSE THE PENALTY PHASE JURY INSTRUCTIONS SHIFTED THE BURDEN TO MR. SWEET TO PROVE THAT DEATH WAS AN INAPPROPRIATE SENTENCE. APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE THIS CLAIM IN MR. SWEET'S DIRECT APPEAL.

Under Florida law, a capital sentencing jury must be:

> [T]old that the state must establish the existence of one or more aggravating circumstances before the death penalty could be imposed . . .
>
> [S]uch a sentence could be given <u>if the state showed the aggravating circumstances outweighed the mitigating circumstances</u>.

<u>State v. Dixon</u>, 283 So. 2d 1 (Fla. 1973)(emphasis added). This straightforward standard was never applied at the penalty phase of Mr. Sweet's capital proceedings. To the contrary, the court shifted to Mr. Sweet the burden of proving whether he should live or die. <u>Hamblen v. Dugger</u>, 546 So.2d 1039 (Fla. 1989), advises that these claims should be addressed on a case-by-case basis in capital

postconviction actions. Mr. Sweet urges this Court to address this claim and, for the foregoing reasons, grant him the relief he is entitled to.

Shifting the burden to the defendant to establish that mitigating circumstances outweigh aggravating circumstances conflicts with the principles of Dixon, for such instructions erroneously shift to the defendant the burden with regard to the ultimate question of whether he should live or die. In so instructing a capital sentencing jury, a court injects misleading and irrelevant factors into the sentencing determination, thus violating Caldwell v. Mississippi, 472 U.S. 320 (1985), Hitchcock v. Dugger, 107 S. Ct. 1821 (1987), and Maynard v. Cartwright, 108 S. Ct. 1853 (1988).

Judicial instructions at Mr. Sweet's capital penalty phase required that the jury impose death unless mitigation was not only produced by Mr. Sweet, but also unless Mr. Sweet proved that the mitigation he provided outweighed and overcame the aggravation. The trial court then employed the same standard in sentencing Mr. Sweet to death. This standard obviously shifted the burden to Mr. Sweet to establish that life was the appropriate sentence and limited consideration of mitigating evidence to only those factors proven sufficient to outweigh the aggravation. The standard given to the jury violated state law. The instructions gave the jury inaccurate and misleading information regarding who bore the burden of proof as

to whether a death recommendation should be returned.

As explained below, the standard upon which the judge instructed Mr. Sweet's jury is a distinctly egregious abrogation of Florida law and therefore Eighth amendment principles. According to the standard used in Mr. Sweet's case, the jury could not give a "full consideration", or "give effect to", the mitigating evidence presented at sentencing. Penry v. Lynaugh, 109 S.Ct. 2934, 2951 (1989). Thus, this burden shifting standard "interfered with the consideration of mitigating evidence" by Mr. Sweet's jury, Boyd v. California, 110 S.Ct. 1190, 1196 (1990), **and** limited the jury's "consideration of any relevant circumstance[s]" that Mr. Sweet put forward during his sentencing. McClesky v. Kemp, 481 U.S. 279, 306 (1987).

The instructions provided to Mr. Sweet's jury, and employed by the trial court, violated the Eighth Amendment's "requirement of individualized sentencing in capital cases [which] is satisfied by allowing the jury to consider all relevant mitigating evidence." Blystone v. Pennsylvania, 110 S.Ct. 1078, 1083 (1990). See also Lockett v. Ohio, 438 U.S. 586 (1978); Hitchcock v. Dugger, 481 U.S. 393 (1987). The instructions gave the jury inaccurate and misleading information regarding who bore the burden of proof as to whether a death recommendation should be returned.

In his instructions to the jury, the judge explained that once

aggravating circumstances were found the jury was to recommend death unless the mitigating circumstances outweighed the aggravating circumstances:

> [H]owever, it is your duty to follow the law that will now be given you by the Court and render to the Court an advisory sentence based upon your determination as to whether sufficient aggravating circumstances exist to justify the imposition of a death penalty **and whether sufficient mitigating circumstances exist to outweigh any aggravating circumstances found to exist**.

(R. 1271)(emphasis added).

The trial court gave the jury the same erroneous instruction a second time:

> Should you find sufficient aggravating circumstances to exist, **it will then be your duty to determine whether mitigating circumstances exist that outweigh the aggravating circumstances**.

(R. 1273)(emphasis added)

From these instructions, the jury understood it to be Mr. Sweet's burden of proving whether he should live or die. Furthermore, this Court must presume that the trial court applied the law in the same erroneous manner that it instructed Mr. Sweet's jury. See Zeigler v. Dugger, 524 So.2d 419 (Fla. 1988).

The instructions violated Florida law and the Eighth and Fourteenth amendments in two ways. First, the instructions shifted

the burden of proof to Mr. Sweet on the central sentencing issue of whether he should live or die. Under Mullaney, this unconstitutional burden-shifting violated Mr. Sweet's due process and eighth amendment rights. See also Sandstrom v. Montana, 442 U.S. 510 (1979); Jackson v. Dugger, 837 F.2d 1469 (11th Cir. 1988).[2] Moreover, the application of this unconstitutional standard at the sentencing phase violated Mr. Sweet's right to a fundamentally fair and reliable capital sentencing determination, i.e., one which is not infected by arbitrary, misleading and/or capricious factors. The jury was not instructed in conformity with the standard set forth in Dixon.

Second, in being instructed that mitigating circumstances must outweigh aggravating circumstances before the jury could recommend life, the jury was effectively told that once aggravating circumstances were established, it need not consider mitigating circumstances unless those mitigating circumstances were sufficient to outweigh the aggravating circumstances. Cf. Mills v. Maryland, 108 S. Ct. 1860 (1988); Hitchcock v. Dugger, 481 U.S. 393, 107 S. Ct. 1821 (1987). Thus, the jury was precluded from considering

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[2]The jury instruction had the same effect as an instruction which told the jury to "presume" death appropriate once any aggravating factors were established. For a presumption to arise the word "presumed" need not be used. When the jury is told that once certain predicate facts have been established, i.e., aggravating circumstances, it must reach a particular result, i.e., death is the appropriate sentence, a mandatory presumption has been employed. That is what occurred here.

mitigating evidence, Hitchcock, and from evaluating the "totality of the circumstances" in considering the appropriate penalty. Dixon v. State, 283 So. 2d at 10. According to the instructions, jurors would reasonably have understood that only mitigating evidence which rose to the level of "outweighing" aggravation need be considered.

Therefore, at the time of his direct appeal, Mr. Sweet was (and is) entitled to relief in the form of a new sentencing hearing due to the fact that his sentencing was tainted by improper instructions. Appellate counsel was ineffective for failing to raise this issue in Mr. Sweet's direct appeal.

CLAIM III

MR. SWEET'S JURY RECEIVED INADEQUATE INSTRUCTIONS REGARDING THE AVOID ARREST AGGRAVATING FACTOR, IN VIOLATION OF HIS EIGHTH AND FOURTEENTH AMENDMENT RIGHTS. APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE THIS CLAIM IN MR. SWEET'S DIRECT APPEAL.

In sentencing Mr. Sweet to death, the trial court found the aggravating factor of avoiding arrest (R. 399-402). However, the instructions to the jury regarding this aggravator did not include a limiting construction of this aggravating circumstance in finding

this factor. (R. 1272-73) As a result, this aggravating factor was improperly applied, see Godfrey v. Georgia, 446 U.S. 420 (1980); Maynard v. Cartwright, 108 S. Ct. 1853 (1988), and failed to genuinely narrow the class of persons eligible for the death sentence, see Zant v. Stephens, 462 U.S. 862, 876 (1983), in violation of Mr. Sweet's Eighth and Fourteenth Amendment rights.

Florida's capital sentencing statute provides that this aggravating circumstance applies when:

> (e) The capital felony was committed for the purpose of avoiding or preventing a lawful or effecting an escape from custody.

Fla. Stat. § 921.141 (5)(e)(emphasis added). The plain language of the statute clearly contemplates that the factor applies when the homicide is committed for this reason. That is, for the factor to apply, the motive for the homicide must be to avoid arrest. Mr. Sweet's jury was not told this.

Under the facts of this case, it cannot be said that Mr. Sweet's actions were solely for the purpose of avoiding arrest. The State never proved any motive for the shootings beyond a reasonable doubt, and Mr. Sweet was never charged or convicted of any criminal episode which preceded the shootings in this case. The Florida Supreme Court has provided a limiting construction of the avoiding arrest aggravating circumstance. These decisions demonstrate the impropriety of the application of this aggravator in this case. In

Menendez v. State, 368 So. 2d 1278 (Fla. 1979), appeal after remand, 419 So. 2d 312 (Fla. 1982), the Court, in vacating a death sentence, held that where the facts fail to establish that the dominant or only motive for the homicide was the elimination of witnesses, the finding of the avoiding arrest aggravator is improper. Id. at 1282, citing Riley v. State, 366 So. 2d 19 (Fla. 1978). Accord Clark v. State, 443 So. 2d 973, 977 (Fla. 1983); Pope v. State, 441 So. 2d 1073, 1076 (Fla. 1983); Herzog v. State, 439 So. 2d 1372, 1378-79 (Fla. 1983); White v. State, 403 So. 2d 331 (Fla. 1981). The mere fact that the victim knew and could have identified his assailant is insufficient to prove intent to kill to avoid lawful arrest. Perry v. State, 522 So. 2d 817, 820 (Fla. 1988).

The instructions to Mr. Sweet's jury did not include the Florida Supreme Court's limiting construction of this aggravating circumstance. The application of this factor thus violated the Eighth Amendment and rendered the death sentence unreliable and arbitrary. Stringer v. Black. 112 S. Ct. 1130 (1992). The factor was applied overbroadly, directly contrary to the statute and the settled standards articulated by the Florida Supreme Court. Godfrey; Cartwright. Such instruction violates Espinosa v. Florida, 112 S. Ct. 2926 (1992); Stringer v. Black, 112 S. Ct. 1130 (1992); Sochor v. Florida, 112 S. Ct. 2114 (1992); Maynard v. Cartwright, 108 S. Ct. 1853 (1988), and the Eighth and Fourteenth Amendments to the United

States Constitution. Appellate counsel was ineffective for failing to raise this claim in Mr. Sweet's direct appeal.

CLAIM IV

MR. SWEET WAS DENIED A RELIABLE AND INDIVIDUALIZED CAPITAL SENTENCING IN VIOLATION OF HIS SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS BECAUSE THE JURY WAS NOT INSTRUCTED THAT THEY MUST FIND PROOF BEYOND A REASONABLE DOUBT THAT THE AGGRAVATING FACTORS OUTWEIGH THE MITIGATING FACTORS BEFORE SENTENCING MR. SWEET TO DEATH.

Mr. Sweet's jury was instructed regarding the "prior violent felony", "great risk", "avoid arrest", "cold, calculated", and "in the course of a felony" aggravating circumstances. (R. 1271-73) However, Mr. Sweet's jury was not instructed that they must find beyond a reasonable doubt that the aggravators outweigh the mitigators before sentencing Mr. Sweet to death. As a result, Mr. Sweet was denied a reliable and individualized capital sentencing determination, in violation of the Sixth, Eighth, and Fourteenth Amendments. See Godfrey v. Georgia, 446 U.S. 420 (1980); Maynard v. Cartwright, 108 S. Ct. 1853 (1988); Zant v. Stephens, 462 U.S. 862, 876 (1983); Stringer v. Black. 112 S. Ct. 1130 (1992); Espinosa v. Florida, 112 S. Ct. 2926 (1992); Sochor v. Florida, 112 S. Ct. 2114 (1992); State v. Wood, 648 P.2d 71 (Utah, 1982), *cert. denied* Wood v. Utah, 459 US 988, 103 S.Ct. 341 (1982). But see, Borchardt v.

Maryland, No. 55, September Term, 2000 (Maryland Court of Appeals, December 14, 2001).

This Court should re-examine this issue in light of a change in the law since Mr. Sweet's direct appeal. In Apprendi v. New Jersey, 120 S. Ct. 2348 (2000), the Supreme Court held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Id. at 2362-63. Although Mr. Sweet recognizes that this Court refused to extend Apprendi to Florida's death penalty scheme, see Mann v. Moore, 794 So. 2d 595, 599 (Fla. 2001), Mr. Sweet pleads this claim in order to preserve this issue for later litigation. Mr. Sweet argues that the rights to which he is guaranteed, under the federal and state constitutions, have been violated by the Court's refusal to extend Apprendi to Florida's capital sentencing scheme.

Mr. Sweet was denied a reliable and individualized capital sentencing determination, in violation of the Sixth, Eighth, and Fourteenth Amendments. This Court should re-examine this issue and thereafter grant relief.

CONCLUSION AND RELIEF SOUGHT

For all the reasons discussed herein, Mr. Sweet respectfully urges this Court to grant habeas corpus relief.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Petition has been furnished by United States Mail, first-class postage prepaid, to Barbara Yates, Assistant Attorney General, Office of the Attorney General, PL-01, The Capital, Tallahassee, FL, 32399-1050, on December 31, 2001.

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CERTIFICATE OF TYPE SIZE AND STYLE

This brief is presented in 12 point Courier, a font that is not proportionately spaced.

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JOHN M. JACKSON