

**IN THE FLORIDA SUPREME COURT**

**WILLIAM SWEET,**

**Petitioner,**

**v.**

**CASE NO. SCO3-1818**

**Lower Court Case No. 91-2899CFA**

**STATE OF FLORIDA,**

**Respondent.**

**APPEAL FROM THE CIRCUIT COURT  
IN AND FOR DUVAL COUNTY  
STATE OF FLORIDA**

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**INITIAL PETITION**

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On behalf of Mr. Sweet

## **JURISDICTIONAL STATEMENT**

In *Trepal v. State*, 754 So.2d 702, 707 (Fla. 2000), this Court established the parameters of interlocutory appeals in collateral proceedings noting that it accepted jurisdiction under Article V, Sec. 3 (b)(1), Fla. Const. This Court further held that:

... to obtain relief an appellant must establish that the order compelling discovery does not conform to the essential requirements of law and may cause irreparable injury for which appellate review would be inadequate.

*Trepal*, 754 So. 2d at 707. Mr. Sweet alleges both in this petition for extraordinary relief, and requests that this Court accept jurisdiction over this matter under Article V, Sec. 3 (b)(1) of the Florida Constitution.

## **ISSUE PRESENTED**

In light of the Office of the Capital Collateral Counsel for the Northern Region's (CCC-NR), elimination, effective July 1, 2003, D. Todd Doss, Mr. Sweet's designated attorney within CCC-NR, moved the circuit court for an order appointing him to continue to represent Mr. Sweet, but as Registry counsel. Mr. Sweet requested that Mr. Doss continue to represent him and seek the appointment of counsel.

The trial court failed to hold a hearing on the motion. The trial court denied Mr. Doss' request for appointment and appointed Frank Tassone to represent Mr.

Sweet.

Because of the failure to hold a hearing, neither Mr. Doss nor Mr. Sweet were given an opportunity to air the findings of the Eleventh Circuit in *Hardwick V. Crosby*, 320 F.3d 1127 (11<sup>th</sup> Cir. 2003) (finding Tassone's performance deficient and remanding for an evidentiary hearing on Mr. Hardwick's ineffective assistance claim). Nor were they given an opportunity to address the fact that Mr. Bateh of the Office of the State Attorney for the Fourth Judicial Circuit, the same office prosecuting Mr. Sweet, would be representing the State at the federal evidentiary hearing and would be attempting to defend Mr. Tassone's reputation by repudiating the Eleventh Circuit's finding that Mr. Tassone's performance had been unreasonable, a product of ignorance of capital law.<sup>1</sup> At Mr. Sweet's request, Mr. Doss filed a Motion for Rehearing in the circuit court of the order appointing Mr. Tassone alleging Mr. Sweet's right to continuity in his representation, effective assistance of counsel and due process were violated by the conflict that had been created as a result of the relationship between Mr. Tassone and Mr. Bateh. The

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<sup>1</sup>During the same time period undersigned counsel and Mr. Sweet learned that Mr. Tassone and Mr. Bateh were discussing and strategizing for the upcoming evidentiary hearing in *Hardwick*, according to Mr. Tassone's response to a bar grievance filed by Mr. Hardwick.

circuit court denied the rehearing motion.<sup>2</sup>

Thus, the issue presented is whether the circuit court deprived Mr. Sweet of his constitutional right to due process and his constitutional and statutory right to effective representation by counsel unburdened with a conflict of interest.

### **FACTS UPON WHICH PETITIONER RELIES**

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

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

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<sup>2</sup>Despite the fact that undersigned filed a Motion for Rehearing the files and records have been sent to Mr. Tassone.

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

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

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

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

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

Notably, Anthony McNish, whose testimony would have cast doubt on the State witnesses' identification of Mr. Sweet, was discovered by Mr. Sweet himself, and even then Mr. Adams' inexperience caused a glitch -- the witness was improperly subpoenaed, did not show up to trial despite his warning to Mr. Adams that he lacked transportation, and as a result, the jury that convicted Mr. Sweet never heard his testimony.

### **PROCEDURAL HISTORY AND DISPOSITION OF PRIOR CLAIMS**

The Circuit Court for the Fourth Judicial Circuit, in and for Duval County, Florida entered the judgment of convictions and death sentence at issue. Mr. Sweet was indicted by the grand jury in Duval County, Florida on March 21, 1991. He was charged with one count of first degree murder, three counts of attempted murder, and one count of burglary with an assault or battery. The jury trial commenced on May 20, 1991. The jury found Mr. Sweet guilty of all the crimes charged. The penalty phase began on June 4, 1991. The jury rendered an advisory sentence recommending death by a vote of ten to two. On



August 30, 1991, the trial court sentenced Mr. Sweet to death as to the first degree murder conviction and consecutive life sentences as to all other counts. The trial court entered its written findings at the sentencing hearing. Mr. Sweet appealed his conviction to the Florida Supreme Court. The Florida Supreme Court found that the trial court erred in failing to instruct the jury that they had to consider the individual circumstances of a prior conviction in order to determine if it was violent before weighing it as a prior violent felony. However, this error was found harmless. *Sweet v. State*, 624 So.2d 1138 (Fla. 1993). Furthermore, the Court held that the trial court erred in imposing four consecutive fifteen-year minimum mandatory sentences for the burglary and attempted murder convictions. *Id.* at 1143. The Florida Supreme Court upheld Mr. Sweet's convictions and sentences. Mr. Sweet filed a petition for writ of certiorari in the United States Supreme Court, which was denied on February 28, 1994. *Sweet v. Florida*, 510 U.S. 1170 (1994). On August 1, 1995, Mr. Sweet filed a Motion to Vacate Judgements of Convictions and Sentences with Special Request for Leave to Amend. His Amended Motion to Vacate Judgements of Convictions and Sentences was filed on June 30, 1997 His amended motion raised twenty-eight claims<sup>3</sup>.

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<sup>3</sup> The claims were delineated by the Florida Supreme Court as follows: "(I) Sweet was denied access to public records; (II) the one-year time limitation for filing a rule 3.851 motion for postconviction relief violates Sweet's due process and

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equal protection rights; (III) the “felony murder” statutory aggravating circumstance constitutes an unconstitutional “automatic statutory aggravating circumstance”; (IV) the “avoid arrest” statutory aggravator was inapplicable in this case and the jury was erroneously instructed regarding this aggravator because the trial court improperly failed to further instruct the jury that the aggravator can only be found where it is the “dominant or only” motive for the defendant’s commission of the murder; (V) the trial court's jury instruction on the "cold, calculated, and premeditated" aggravator was erroneous because it failed to instruct the jury that this aggravator required "heightened premeditation" and the evidence failed to establish the necessary heightened premeditation necessary to support this aggravator; (VI) the Jacksonville Sheriff's Office destroyed all of the evidence in this case, depriving Sweet of his right to conduct an independent analysis of this evidence using his own experts; (VII) ineffective assistance during the guilt phase by: (a) failing to conduct an adequate pretrial investigation and preparation of Sweet's case; (b) failing to investigate other possible sources who would have had a motive to kill Marcine Cofer; and (c) failing to properly cross-examine Marcine Cofer and Solomon Hansbury; (VIII) ineffective assistance by failing to investigate and prepare available mitigation evidence regarding Sweet's background; (IX) Sweet was denied his right to a fair trial as a result of his jury being subjected to improper influences; (X) the jury was given inadequate instructions on the "prior violent felony," "great risk," "avoiding arrest," and "cold, calculated, and premeditated" aggravators; (XI) Rule Regulating the Florida Bar 4 3.5(d)(4), which prohibits attorneys from interviewing jurors, caused his postconviction counsel to render ineffective assistance of counsel; (XII) Sweet is innocent of first-degree murder and innocent of the death penalty; (XIII) the record fails to show his presence or his counsel's presence at five sidebar conferences and counsel rendered ineffective assistance by failing to object; (XIV) improper prosecutorial comments during the penalty phase in arguing that the jury should not be sympathetic towards Sweet and ineffective assistance in failing to object to this comment and in failing to request a "mercy instruction"; (XV) alleged omissions in the record on appeal deprived him of meaningful appellate and postconviction review and trial counsel rendered ineffective assistance in failing to ensure a complete record; (XVI) the trial court's failure to ensure that Sweet had a complete record on appeal deprived him of a proper direct appeal; (XVII) Sweet received a fundamentally unfair trial due to the sheer number and types of errors committed; (XVIII) the penalty phase jury instructions improperly shifted the burden to Sweet

On May 13, 1998, the Court granted an evidentiary hearing as to four claims, ruled that nineteen claims were procedurally barred, and that five claims were facially insufficient and/or otherwise not a proper basis for relief<sup>4</sup>. The evidentiary hearing was held on January 25-26, 1999 in Duval County,

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to show that death was not the appropriate sentence for the jury to recommend; (XIX) the State's misleading evidence and improper argument deprived Sweet of a fair trial; (XX) Sweet's contemporaneous felonies were improperly used to support the prior violent felony aggravator; (XXI) the State failed to prove that Sweet "knowingly" created a great risk of causing the death of other persons given that his mental state at the time of the murder prevented him from knowing this fact; (XXII) the trial court improperly used a prior possession of a firearm by a convicted felon conviction as a statutory aggravator because the conviction was unconstitutionally obtained; (XXIII) Florida's death penalty statute is unconstitutional on its face and as applied; (XXIV) the trial court erred in failing to consider nonstatutory mitigating circumstances; (XXV) the State's introduction of and argument regarding nonstatutory aggravators deprived Sweet of a fair sentencing recommendation; (XXVI) the State's closing argument and the jury instructions during the penalty phase improperly diminished the jury's sense of responsibility in the sentencing process; (XXVII) trial counsel failed to provide the two court-appointed mental health examiners with sufficient background information to allow them to adequately evaluate Sweet's competency to stand trial; and (XXVIII) the mental health officials that examined Sweet failed to render adequate mental health assistance. *Sweet v. State*, 810 So.2d 834,858 fn. 4. (Fla. 2002).

<sup>4</sup> An evidentiary hearing was granted as to claims VII(b), VIII, XXVII, and XXVIII: Ineffective assistance of counsel during the guilt phase based on trial counsel's failure to investigate and present evidence to the jury on other suspects. Ineffective assistance of counsel at the penalty phase from failure to investigate Mr. Sweet's background history, to seek appointment of mental health experts, and to supply mental health experts with background information regarding Mr. Sweet.

Florida. On March 30, 2000, the trial court issued an order denying Mr. Sweet's motion to vacate conviction and sentence. Mr. Sweet appealed the trial court's order and simultaneously filed a Petition for Writ of Habeas Corpus with the Florida Supreme Court. Mr. Sweet raised six claims in his appeal of the trial court's ruling on his Amended Motion to Vacate Judgment and Sentence to the Florida Supreme Court.<sup>5</sup> The Florida Supreme Court denied all claims asserting ineffective assistance of counsel based upon trial counsel's alleged failure to investigate and present mitigation evidence.<sup>6</sup> Furthermore, Mr. Sweet's claim

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<sup>5</sup> "These issues are: (1) whether counsel was ineffective during the guilt phase for failing to investigate and present evidence of other suspects; (2) whether counsel was ineffective during the penalty phase; (3) whether the trial court erred in failing to consider the cumulative effect of the newly discovered evidence concerning Sweet's innocence with the evidence that was not presented due to trial counsel's ineffectiveness; (4) whether counsel was ineffective regarding Sweet's competency evaluation by a mental health expert; (5) whether the trial court erred in summarily denying a hearing on Sweet's claims related to trial counsel's ineffectiveness and the State's misconduct that must be considered for their cumulative effect on the outcome of the guilt and penalty phases; and (6) whether the record on appeal is so incomplete that Sweet cannot meaningfully raise claims in this appeal. We conclude that Sweet's sixth claim, that the transcript in this case is missing pages 1594-95 and page 1601, and as a result, he is 'being denied his right to appeal because this Court's review cannot be constitutionally complete,' is without merit because the State correctly explains that the record of the evidentiary hearing in this case is complete." *Sweet v. State*, 810 So.2d 854, 858 fn. 6. (Fla. 2002).

<sup>6</sup> "We agree with the trial court's conclusion that Adams' performance was not deficient in failing to pursue George as a possible suspect. There was no

regarding ineffective assistance of counsel during the penalty phase was denied based on his failure to meet the prejudice prong of *Strickland v. Washington* 466 U.S. 668 (1984). The background testimony presented was found cumulative of what was presented at trial.<sup>7</sup> Finally, the Florida Supreme Court denied Mr. Sweet's claim of ineffective assistance of counsel for inadequate mental health experts. The claims were found either legally insufficient or refuted by the record.<sup>8</sup> The Florida

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evidence in this case that George was involved in the shooting, and Sweet presented no evidence at the evidentiary hearing that George was a possible suspect. Further, there was no evidence that the police ever considered George to be a suspect so as to lead us to a conclusion that Adams was deficient in not pursuing George as an alternative suspect. See *Haliburton v. Singletary*, 691 So.2d 466, 470-71 (Fla.1997) (holding that counsel's decision not to use a possible witness was not 'so patently unreasonable that no competent attorney would have chosen' to forego the witness's testimony). . . We conclude that Adams was not deficient in deciding not to call Gaskins. The record demonstrates that Adams made a strategic decision not to call Gaskins as a witness based upon the possibility that Gaskins' out of court identification could have come in at trial. See *Maharaj v. State*, 778 So.2d 944, 959 (Fla.2000) (holding that counsel's strategic reason not to call alibi witness could not constitute deficient performance); *Rose v. State*, 675 So.2d 567, 570 (Fla.1996) (same). . . We agree with the trial court that Sweet demonstrated neither deficient performance nor prejudice with regard to McNish." *Sweet v. State*, 810 So.2d 854, 860-862 (Fla. 2002).

<sup>7</sup> "We conclude that it is not reasonably probable, given the nature of all the additional mitigation, that this 'altered picture would have led to the imposition of a life sentence, outweighing the multiple substantial aggravators at issue in this case.'" *Rutherford*, 727 So.2d at 226. *Sweet v. State*, 810 So.2d 854, 866 (Fla. 2002).

<sup>8</sup> "We have carefully reviewed the evidentiary hearing testimony of Dr. Miller and Dr. Toomer and agree with the trial court that, given the nature of the mental health mitigation presented by these experts at the evidentiary hearing, Sweet has

Supreme Court ruled that Mr. Sweet's claim of cumulative trial errors depriving him of due process did not warrant an evidentiary hearing because the claim was either facially insufficient or procedurally barred. *Sweet v. State*, 810 So.2d 854 at 871 (Fla. 2002). Mr. Sweet raised four claims in his Petition for Writ of Habeas Corpus filed with the Florida Supreme Court.<sup>9</sup> All claims regarding ineffective assistance of

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failed to demonstrate that he was deprived of a reliable penalty phase hearing. Moreover, we cannot conclude that the presentation of the testimony would have led to the imposition of a sentence other than death, given the four strong aggravators and the nature and extent of the additional mitigation evidence presented at the evidentiary hearing. We find this case similar to *Rutherford*: Even if the additional mitigation evidence Rutherford presented at the 3.850 hearing had been heard and considered by the jury and original judge, it is not reasonably probable, given the nature of the mitigation offered, that this altered picture would have led to the imposition of a life sentence, outweighing the multiple substantial aggravators at issue in this case (HAC, CCP, and robbery/ pecuniary gain). Rutherford was not deprived of a reliable penalty proceeding. . . We agree with the trial court and conclude that these claims are either legally insufficient or conclusively refuted by the record. Also, to the extent that Sweet did introduce evidence at the evidentiary hearing regarding Hansbury, the trial court's factual findings are supported by the record." *Sweet v. State*, 810 So.2d 854, 866, 870 (Fla. 2002).

<sup>9</sup> "Sweet raised the following claims in this petition: (1) whether the rule prohibiting Sweet's lawyers from interviewing jurors to determine if error occurred at his trial is unconstitutional; whether the rule denied Sweet adequate assistance of counsel in pursuing his postconviction remedies; and whether appellate counsel was ineffective in failing to raise these claims in Sweet's direct appeal; (2) whether the penalty phase jury instructions improperly shifted the burden to Sweet to prove that death was an inappropriate sentence in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments, and whether appellate counsel was ineffective in failing to raise this claim in Sweet's direct appeal; (3) whether Sweet received inadequate instructions regarding the avoid arrest aggravator in violation of the Eighth and

counsel were denied without merit,

as were the other remaining claims.<sup>10</sup> Mr. Sweet, through D. Todd Doss, filed his first successive Rule 3.850 motion on May 12, 2003<sup>11</sup>. On June 18, 2003, at Mr. Sweet's request, undersigned counsel filed a Motion for Appointment of Counsel. On June 24, 2003, at Mr. Sweet's request, undersigned counsel filed an Amended Motion for Appointment of Counsel. This motion was denied without hearing on July 3, 2003. On July 14, 2003, at Mr. Sweet's request, undersigned counsel filed a Motion for Rehearing. Despite the pending Motion for Rehearing, Mr. Tassone filed a Motion for Attorney's Fees on August 26, 2003 and the same day the judge granted the request. Following his appointment, despite the pending Motion for

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Fourteenth Amendments, and whether appellate counsel was ineffective for failing to raise this claim in Sweet's direct appeal; and (4) whether Sweet was denied a reliable and individualized capital sentencing because the jury was not instructed that it must find proof beyond a reasonable doubt that the aggravating factors outweigh the mitigating factors before sentencing Sweet to death." *Sweet v. Moore*, 822 So.2d 1269, 1273 fn.9. (Fla. 2002).

<sup>10</sup> Claim 1 - the Court held that Mr. Sweet has not demonstrated any error and therefore the claim is meritless. (*Sweet v. Moore*, 822 So.2d 1269 at 1274); Claim 2 - the Court held because Mr. Sweet failed to object at trial he cannot do so now. Therefore, appellate counsel was not ineffective. (*Id.*); Claim 3 - the Court again held that Mr. Sweet did not object to the jury instruction during trial. His counsel was not ineffective for failing to do so. (*Id.* at 1274). Claim 4 - the Court held this claim was meritless. (*Id.* at 1275).

<sup>11</sup> This motion raised claims primarily predicated upon the U.S. Supreme Court's decision in *Ring v. Arizona*, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002).

Rehearing, Mr. Tassone had arranged for Mr. Sweet's files and records to be removed from the CCC-NR office to Jacksonville. Mr. Sweet's case, along with eight (8) other cases had been assigned to three local Jacksonville attorneys.<sup>12</sup> These three attorneys, Frank Tassone, Dale Westling and Jefferson Morrow, arranged to have all of the files and records transported on the same day by John Bradley, a former Duval County homicide detective. Mr. Bradley worked for Duval County law enforcement for 18 years until his retirement in 1993. Mr. Bradley, who worked for the Duval County Sheriff at the time of Mr. Sweet's prosecution, received the confidential files and records in Mr. Sweet's case and transported the files and records back to Jacksonville. Mr. Bradley was accompanied by another individual who indicated to those at the old CCC-NR office the day the files were picked up that he was an employee of the Duval County Sheriff's Office. Those individuals had exclusive access to Mr. Sweet's confidential files and records. Those files are now in a storage facility in Jacksonville subject to Mr. Bradley's control.

At the time of Mr. Sweet's investigation and prosecution, Detective Bradley

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<sup>12</sup>Many of the cases which were assigned to the Jacksonville attorneys were cases in which former CCC-NR counsel, familiar with the cases, had made motions for appointment. The appointments were rejected. Counsel later learned that there was a agreement to appoint local Jacksonville attorneys in order to provide them with work as part of a patronage system.



was employed by the Duval County Sheriff's Office and, due to the inaccessibility of the records, Mr. Sweet does not know if Mr. Bradley participated in investigating his case.<sup>13</sup> It is clear that Mr. Bradley still has unfettered access to Mr. Sweet's confidential files and records.

On September 11, 2003, the Court denied the Motion for Rehearing. On October 1, 2003, at Mr. Sweet's request, undersigned counsel filed a Motion for Appointment of Counsel Pursuant to the Criminal Justice Act in the United States District Court for the Middle District of Florida.<sup>14</sup> This appeal follows.

### **NATURE OF THE RELIEF SOUGHT**

Mr. Sweet, through Mr. Doss, asserts that his right to due process of law have been violated. Mr. Sweet is entitled to an effective, conflict-free attorney.

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<sup>13</sup>Mr. Bradley was also responsible for receiving, transporting and maintaining the files for eight other former clients of CCC-NR. Mr. Bradley was in fact a lead homicide detective for an 18 year period. He had investigated the cases against many of these nine former CCC-NR clients. When picking up the files, Mr. Bradley commented to the former CCC-NR employee acting as custodian, that one particular client whose files he held in his hands was where he needed to be, on death row. A clearer conflict of interest is hard to imagine. Providing Mr. Bradley unfettered access to confidential files and records of clients who he and his co-workers had actively prosecuted, was serious breach of Mr. Sweet's right to confidentiality.

<sup>14</sup> The motion has not yet been ruled upon.

The appointment of Mr. Tassone rather than Mr. Doss does not conform to the essential requirements of law and will cause irreparable injury for which appellate review would be inadequate in violation of the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, and the corresponding provisions of the Florida Constitutions for each of the reasons set forth below.

Accordingly, Mr. Sweet seeks to have the order appointing Mr. Tassone vacated and requests that Mr. Doss be appointed to represent him.

### **ARGUMENT IN SUPPORT OF PETITION**

#### **THE TRIAL COURT VIOLATED DUE PROCESS OF LAW BY TERMINATING THE ATTORNEY-CLIENT RELATIONSHIP BETWEEN MR. SWEET AND MR. DOSS, AND BY APPOINTING FRANK TASSONE A CONFLICT OF INTEREST EXISTS BETWEEN MR. TASSONE AND MR. SWEET.**

##### **A. Introduction.**

In *Arbelaez v. Butterworth*, 738 So. 2d 326 (Fla. 1999), this Court acknowledged it has "a constitutional responsibility to ensure the death penalty is administered in a fair, consistent, and reliable manner...." *Id.* In a special concurrence, two Justices discussed the right to counsel in capital postconviction in terms of State Due Process. Counsel was characterized as an "essential requirement" in capital postconviction proceedings. *Id.* at 329.

As noted in *Arbelaez*, all capital litigation is particularly unique, complex and difficult. The basic requirement of due process in an adversarial system is that an accused be zealously represented at "every level"; in a death penalty case such representation is the "very foundation of justice". *Wilson v. Wainwright*, 474 So. 2d 1162, 1164 (Fla. 1985). The special degree of reliability in capital cases, which can only be provided by competent, effective and conflict-free representation in postconviction proceedings, is necessary to ensure that capital punishment is not imposed in an arbitrary and capricious manner and that no one who is innocent or who has been unconstitutionally convicted or sentenced to death is executed. *Arbelaez v. Butterworth*, 738 So. 2d 331 at n. 12.

Furthermore, this Court stated in *Peede v. State*, 748 So. 2d 253 (Fla. 1999), that ineffective representation at any level of the capital punishment process will not be tolerated. The Court felt "constrained to comment on the representation afforded Peede in these proceedings [appeal from summary denial of motion for postconviction relief]", which included criticism of the length, lack of thoroughness, and conclusory nature of the initial brief, and reminded counsel of "the ethical obligation to provide coherent and competent representation, **especially in death penalty cases**, and we urge the trial court, upon remand, to **be certain that Peede receives effective representation**". *Id.* at 256, n. 5

(emphasis added).

In *Spalding v. Dugger*, 526 So. 2d 71, 72 (Fla. 1988), this Court recognized that “ under section 27.702, each defendant under sentence of death is entitled, as a statutory right, to effective legal representation by the capital collateral representative in all collateral relief proceedings.” In addition, this Court has found that an attorney who lacks the necessary resources and/or capital trial experience will be deemed not competent to continue representation of a death-sentenced client. See *Spaziano v. State*, 660 So. 2d 1363, 1369-1370 (Fla. 1995). Thus, this Court has explicitly acknowledged the need for effective representation in capital postconviction proceedings. *Id.*

In fact, this Court adopted minimum standards for certain attorneys litigating capital cases. *In Re: Amendment to Florida Rules of Criminal Procedure -- Rule 3.112 -- Minimum Standards for Attorneys in Capital Cases*, 759 So. 2d 610 (Fla. 1999). The opinion adopting new rules acknowledged the complexities, convoluted doctrines of procedural default, and uniqueness of capital law. This Court stated that under our system of justice, “the quality of lawyering is critical” in capital cases and acknowledged the Court’s “inherent and fundamental obligation to ensure that lawyers are appointed to represent indigent capital defendants who possess the experience and training necessary to handle the complex and difficult issues

inherent in death penalty cases". *Id.* at 613-614. Indeed, federal and state due process requires that Mr. Sweet be effectively represented by conflict-free counsel throughout his postconviction proceedings. In *Ohio Adult Parole Authority v. Woodard*, 523 U.S. 272 (1998), the United States Supreme Court most recently addressed the general due process guarantees afforded a capital postconviction defendant in the context of Ohio's clemency scheme. 523 U.S. 272 (1998). A majority of the Court found that the Ohio clemency scheme did not violate due process, however, the court divided on the issue of the extent of due process rights which attach in capital postconviction proceedings. *Id.* In delivering the plurality opinion for the Court, Justice O'Connor, along with three (3) other justices held that: "[a] prisoner under a sentence of death remains a living person and consequently has an interest in his life." *Id.* at 288 (J. O'Connor concurring in part and concurring in judgment).

In finding that due process may attach to postconviction proceedings, Justice O'Connor referenced her concurring opinion in *Ford v. Wainwright*, 477 U.S. 399 (1986). At issue in *Ford* was Florida's statute requiring that a capital postconviction defendant be competent to be executed. Justice O'Connor, relying on precedent, found that "[l]iberty interests protected by the Fourteenth Amendment may arise from two sources -- the Due Process Clause and the laws of

the States." 477 U.S. 399, 428, (J. O'Connor concurring in part, dissenting in part) (quoting *Hewitt v. Helms*, 459 U.S. 460, 466 (1983)). Justice O'Connor made clear: "[R]egardless of the procedures the State deems adequate for determining the preconditions to adverse official action, federal law defines the kind of process a State must afford prior to depriving an individual of a protected liberty or property interest." *Ford*, 377 U.S. at 428-429. In analyzing Mr. Ford's liberty interest at the time of his execution, Justice O'Connor noted that the Florida Statute governing postconviction procedures provided for mandatory action by the State. *Id.* at 428 ("The relevant provision of the Florida Statute, however, provides that the Governor "*shall*" have the prisoner committed . . . ") (emphasis in original).

Similarly, the Florida statute governing appointment of capital collateral counsel is mandatory. Fla. Stat. § 27.701 ("It is the intent of the Legislature . . . to provide for the collateral representation of any person convicted and sentenced to death in this state . . ."). The State of Florida has created a right by which Mr. Sweet is appointed capital collateral counsel. Therefore, as in *Ford*, due process is required. Because Mr. Tassone and Mr. Sweet's interests conflict and because Mr. Doss is in the best position to represent Mr. Sweet, Mr. Sweet's right to due process has been violated.

## **B. Due Process and Effective Representation.**

Mr. Doss was Mr. Sweet's designated counsel at the time of the elimination and defunding of CCC-NR. This elimination and defunding was touted as a pilot project, the purpose of which to find the most cost efficient method of providing effective representation. It was not to be a method of depriving capital defendants of knowledgeable and qualified counsel in whom they had confidence. Certainly if the purpose was to close the office with a track record of winning post-conviction relief and to provide capital defendants with less qualified counsel, the provisions would be unconstitutional as a violation of due process. Having extended a statutory right, the State of Florida cannot denigrate that right without regard to due process.

In this instance, the trial court seized upon the new statutory provisions as a vehicle for removing counsel who would zealously challenge Mr. Sweet's capital conviction and appointed an attorney with a conflict of interest. In Mr. Tassone, the trial court found counsel who faced his own bar problems over the recent Eleventh Circuit opinion questioning his competence in capital cases.<sup>15</sup> *Hardwick v. Crosby*. In Mr. Tassone, the trial court also found a lawyer who was to be the State's principle witness at the federal evidentiary hearing ordered by the Eleventh

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<sup>15</sup>The bar grievance filed by John Hardwick has been dismissed on statute of limitations grounds.

Circuit in Mr. Hardwick's case. Together, the State and Mr. Tassone will be working to save Mr. Hardwick's death sentence and Mr. Tassone's tattered reputation. In this endeavor, the office of the State Attorney and Mr. Tassone are clearly allies trying to assist each other.<sup>16</sup>

The ill-advised appointment of Mr. Tassone deprived Mr. Sweet of his statutory and constitutional right to effective assistance of counsel. *See* Fla. Stat. 27.7001 (2002); U.S. Const., Amends. 5 & 14. The Florida legislature intended that the elimination of CCC-NR would be more cost effective and expedite capital postconviction cases. Removing the attorney who is most familiar with Mr. Sweet's case and has already spent extensive time working on his case and filed the Motion to Vacate Judgments of Convictions and Sentence with Special Request for Leave to Amend serves neither of these purposes. The removal of Mr. Doss and appointment of an attorney unfamiliar with Mr. Sweet's case violated not just Mr. Sweet's right to effective assistance of counsel, but his due process right to the continuation of the representation. Mr. Doss has consulted with Mr. Sweet on numerous occasions and is quite familiar with his case.<sup>17</sup> Mr. Sweet requested that

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<sup>16</sup> The very State Attorney's office that convicted Mr. Sweet and is now endeavoring to enforce the death sentence he faces.

<sup>17</sup> Surely, if the Florida legislature's actions caused Mr. Sweet to be deprived of effective assistance of counsel and due process, this Court should not tolerate



Mr. Doss remain on his case. Mr. Doss has sought to remain on his case. That attorney-client relationship cannot consistent with due process be terminated without cause.<sup>18</sup>

This Court has stated that the requirement of due process in an adversarial system is that an accused be zealously represented at “every level” and that in a death penalty case, such representation is the “very foundation of justice.” *Wilson v. Wainwright*, 474 So. 2d 1162, 1164 (Fla. 1985). Yet here, the judge has used the new statute to remove Mr. Sweet’s counsel, and has appointed counsel that has an actual conflict of interest with him. The trial court’s actions have interfered with Mr. Sweet’s right to have the effective assistance of counsel in his postconviction litigation.

To allow the trial court to arbitrarily remove counsel with an extensive relationship with Mr. Sweet without cause, taints the judicial system which is designed to work only when a criminal defendant is represented by a zealous

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such an action and should ensure that Mr. Sweet receive the process to which he is due. In this case, such process includes appointing Mr. Doss to represent Mr. Sweet.

<sup>18</sup>This is not a situation where the duly appointed CCC-NR within the attorney-client relationship determined that the designated counsel needed to be replaced . This a situation where the trial judge and the legislature are arbitrarily choosing who will and will not be representing Mr. Sweet.

advocate who is not burdened with a conflict and has no *quid pro quo* relationship with the prosecutor. Mr. Tassone and the State have a relationship that precludes Mr. Tassone from representing Mr. Sweet. Mr. Tassone was the defense attorney who represented John Hardwick. *Hardwick v. Crosby*, 320 F.3d 1127 (2003) (finding Tassone's performance deficient and remanding for an evidentiary hearing on Mr. Hardwick's ineffective assistance claim). Mr. Bateh, on behalf of the State Attorney's Office, has entered an appearance in federal district court to represent the State in proceedings ordered by the Eleventh Circuit. In those proceedings, Mr. Bateh will be representing the State and defending Mr. Tassone against Mr. Hardwick's claims of ineffectiveness. Moreover, when ordering the evidentiary hearing, the Eleventh Circuit specifically found Mr. Tassone's legal skills wanting. 320 F. 3d at 1181; *see also* at 1156 ("Tassone's testimony further reveals that misunderstanding of mitigating factors critical to the penalty phase."); *Hardwick* at 1168, n. 154 ("Tassone's awareness of Hardwick's drunk and drugged state and his failure to present this mitigating evidence during the sentencing phase demonstrates his misunderstanding of mitigation law."); *Id.* at 1173 ("Regarding nonstatutory mitigating factors, Tassone failed to recognize Hardwick's dysfunctional family life and the mental and physical abuse that he endured during his childhood and teen years."). The Court also found Mr. Tassone did not

understand guilt phase concepts. *Id.* at 1149, n. 109. Rather, Mr. Tassone believed Mr. Hardwick was guilty and advised him to plead guilty. *Id.* at 1161.

The Eleventh Circuit also found: “Tassone appears to have given up on defending Hardwick and seemingly expended no effort, either in presentation of mitigating evidence or in understanding mitigation law, to prevent Hardwick’s receiving the death penalty.” 320 F.3d at 1189. Finally, the Court commented that the record directly contradicted Mr. Tassone’s testimony about his representation of Mr. Hardwick. *Id.* at 1131, n.1; *see also* 1175-6 (“The reasons given by Tassone and the state for not calling family members . . . are not substantiated by the record.”).

Following the Eleventh Circuit opinion, Mr. Hardwick filed a bar grievance against Mr. Tassone. In his June 18, 2003, response, Mr. Tassone contested the allegation of incompetent representation. Mr. Tassone noted that an evidentiary hearing will soon be held at which he hoped the errors in the Eleventh Circuit analysis would be revealed. He stated that he has conferred with Mr. Bateh, the original prosecutor in Mr. Hardwick’s case regarding the status of the proceedings. In fact, Mr. Bateh has filed his notice of appearance in federal district court in Mr. Hardwick’s pending case and indicated that he will participate in the evidentiary hearing when it occurs on the issue of Mr. Tassone’s ineffectiveness. In essence,

Mr. Bateh, on behalf of the State of Florida, is representing Mr. Tassone. Clearly, Mr. Tassone wants to use the evidentiary hearing in Mr. Hardwick's case to restore his tattered reputation and is relying upon Mr. Bateh to assist him in that regard.

Given his relationship with Mr. Bateh, the circumstances establish that Mr. Tassone possesses a conflict of interest that precludes him from representing Mr. Sweet. Mr. Tassone is seeking Mr. Bateh's assistance to restore his reputation. He is hardly the person who should be challenging the State's case on behalf of Mr. Sweet.

The trial court's actions, if not rectified, will deprive Mr. Sweet of an effective advocate who is not burdened with conflicting personal loyalty to Mr. Bateh and the State of Florida.<sup>19</sup> Due to the relationship between the State of Florida and Mr. Tassone, such representation at this time creates a conflict of interest.

Additionally, the events that transpired in appointing Mr. Tassone demonstrate a violation of Mr. Sweet's right to due process of law. The trial judge removed Mr. Sweet's previous counsel, D. Todd Doss, without cause or justification. The State did not oppose the Amended Motion for Appointment of

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<sup>19</sup>Mr. Bateh's involvement, on behalf of the State of Florida, in *Hardwick* will benefit Mr. Tassone and Mr. Tassone's involvement in Mr. Sweet's case will benefit the State, particularly if Mr. Tassone "gives up on defending" Mr. Sweet.

Counsel wherein Mr. Sweet, through counsel, requested that Mr. Doss be appointed and remain on the case. While no Florida case has been found expressly dealing with a defendant's right to proceed with appointed counsel wherein he has already established an attorney-client relationship, the Georgia Supreme Court dealt with the issue both in *Davis v. State*, 403 S.E. 2d 800 (Ga. 1991), and *Amadeo v. State*, 384 S.E. 181 (Ga. 1989).

In *Davis*, the Georgia Supreme Court recognized that an accused has no right to appointed counsel of his choice and generally the trial court's decision appointing counsel will not be disturbed absent an abuse of discretion. *Davis* at 222. The Georgia Supreme Court went on to hold that "However, when a defendant's choice of counsel is supported by objective considerations favoring the appointment of the preferred counsel, and there are no countervailing considerations of comparable weight, it is an abuse of discretion to deny the defendant's request to appoint the counsel of his preference." *citing Amadeo v. State*, 259 Ga. 469, 384 S.E. 2d 181 (1989), *Davis* at 222. Interestingly, *Davis* came to the court upon a denial of appointment of counsel wherein the trial court acknowledged the requested counsel's experience in handling death penalty cases and long-standing relationship with the defendant; however, the trial court denied the motion and stated the requested counsel would not be appointed because he

“has a record of antagonizing the Court, the jury, and everyone involved in this type of case...” *Davis* at 222.

Previously in the cited *Amadeo* case, the Georgia Supreme Court faced the “issue of the extent to which a trial court must consider the reappointment of lawyers with whom the defendant has already developed a close relationship.” *Amadeo* at 470. The Court in *Amadeo* cited the California Supreme Court’s holding in *Harris v. People*, 19 Cal.3d 786, 140 Cal. Rptr. 318, 567 P.2d 750 (1977) that a “statement of preference, timely made, is supported by objective considerations of the consequence here involved, and where there are no countervailing considerations of comparable weight, it is an abuse of sound judicial discretion to deny the defendant’s request to appoint the counsel of his preference.” *Amadeo* at 471.

A Texas Court of Appeals held likewise in *Hercules v. Harmon*, 864 S.W. 2d 752, 754 (Tex. Crim. App. 1993) by stating:

“Once an accused and an attorney, whether retained or appointed, establish an attorney-client relationship, that relationship should be protected by law. (internal citations omitted). With limited exceptions, a trial court may not remove such an attorney, over the objections of both the accused and counsel, in the absence of a showing of actual or potential conflict.” (citation omitted).

In Mr. Sweet’s case, the trial court arbitrarily decided to remove Mr. Doss on its own motion. The order appointing Mr. Tassone does not state any reason

whatsoever for not appointing Mr. Doss. The Order on Motion for Rehearing likewise fails to allege any reason for removing Mr. Doss as counsel. The Order on Motion for Rehearing does, however, demonstrate the court's refusal to acknowledge the U.S. Eleventh Circuit Court of Appeals findings that Mr. Tassone lacked knowledge and competence in handling capital cases. The Order states in part, "Mr. Tassone has a reputation in the legal community as a competent and forceful advocate."

The events surrounding the transfer of Mr. Sweet's files and records also creates an actual conflict between Mr. Sweet and Mr. Tassone. Interestingly, the trial court rather than avoiding a conflict has arbitrarily created one. Mr. Tassone employed a former detective from the Jacksonville Sheriff's Office to receive and transport Mr. Sweet's confidential files; an individual who was previously involved in the investigation and prosecution of homicides for the very agency that arrested Mr. Sweet. The integrity of the records that had been collected and maintained in order to establish misconduct by the State and the Sheriff's Department has been breached. Such an egregious failure to protect and preserve the confidence of a client cannot be ignored. A conflict-free, effective attorney must be appointed to represent Mr. Sweet.

Clearly, Mr. Sweet has been deprived of due process by the actions of the

trial court, by the removal of Mr. Doss as his counsel contrary to his wishes, and by the appointment of Mr. Tassone as his counsel.

**WHEREFORE**, for the foregoing reasons, Mr. Sweet respectfully requests that this Court vacate the order appointing Mr. Tassone and appoint Mr. Doss to represent him.

**CERTIFICATE OF SERVICE**

**I HEREBY CERTIFY** that a true copy of the foregoing Petition for Extraordinary Relief has been furnished by U.S. Mail, overnight delivery, certified, return receipt requested to the Clerk of Court and by United States Mail, first class postage prepaid to all counsel of record on October 10, 2003.

**CERTIFICATION OF TYPE SIZE AND STYLE**

This is to certify that the Initial Petition has been reproduced in a 14 point Times New Roman type, a font that is not proportionally spaced.

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**IN THE FLORIDA SUPREME COURT**

**WILLIAM SWEET,**

**Petitioner,**

**v.**

**CASE NO.**

**Lower Court Case No. 91-2899CFA**

**STATE OF FLORIDA,**

**Respondent.**

**APPEAL FROM THE CIRCUIT COURT  
IN AND FOR DUVAL COUNTY  
STATE OF FLORIDA**

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**APPENDIX**

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On behalf of Mr. Sweet

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