IN THE SUPREME COURT OF FLORIDA

CASE NO. SC17-1987

WILLIAM EARL SWEET,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

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

INITIAL BRIEF OF APPELLANT

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REQUEST FOR ORAL ARGUMENT

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

STATEMENT OF THE CASE

> **"[I]f he wasn't the one that pulled the trigger, I don't want him to do time for something that – do death row for something he didn't do."[1]**

These are the exonerating words of the victim and only adult eyewitness against William Earl Sweet, an innocent man who has served nearly thirty years on death row. Mr. Sweet requests a fair hearing of his claims before this Court.

1. Statement of Facts Pertaining to the Trial Proceedings

On June 28, 1990, merely one day after the fatal shooting in the urban morass of Jacksonville's Springfield neighborhood, William Earl Sweet was arrested for one count of first degree murder, three counts of attempted murder, and one count of

[1] Testimony of Marcene Cofer at T/563.

burglary with an assault or battery.[2] A jury trial began on May 20, 1991. There was no physical evidence tying Mr. Sweet to the crime scene. The State's case was based solely on circumstantial evidence and eyewitness testimony.[3] *See Sweet v. State*, 624 So. 2d 1138, 1139 (Fla. 1993) (this Court affirmed Sweet's conviction without reference to any physical evidence or facts other than eyewitness accounts). The murder weapon was never recovered. There were no fingerprints, no hair, no blood, no DNA, nor any specific ballistics evidence that tied Sweet to Marcene Cofer's apartment in the early morning hours of June 27, 1990. Although witnesses testified that the shooter wore a ski mask or that his face was obscured by dark clothing, none of these items were ever recovered.

The jury found Mr. Sweet, who was represented by lawyers without any capital trial experience, guilty on all charges. R6/1170; R10/1780.[4] There were three

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[2] The facts of Mr. Sweet's convictions and sentences are discussed in this Court's opinion on direct appeal at *Sweet v. State*, 624 So. 2d 1138, 1139 (Fla. 1993).

[3] The trial judge, Judge Frederick Tygart, remarked, "I can see that obviously credibility of the witnesses is going to play a very big part in this trial." R2/478.

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

witnesses whose testimony sealed Mr. Sweet's guilty verdict: 1) Marcene Cofer, the only adult eyewitness and a victim of the shooting; 2) Sharon Bryant,[5] the twelve-year old eyewitness and victim; and, 3) Solomon Hansbury, who falsely testified to Mr. Sweet's "jailhouse confession" and later recanted his testimony during the first post-conviction hearing. *See Sweet v. State*, 810 So. 2d 854, 867 (Fla. 2002). After a penalty phase presentation including a sole, unprepared witness, the jury recommended death by a vote of ten to two on June 4, 1991. R/1278. The court imposed Mr. Sweet's death sentence on August 30, 1991. Mr. Sweet's judgment and sentence were affirmed on appeal.[6] *Sweet v. State*, 624 So. 2d 1138 (Fla. 1993), *cert. denied*, 510 U.S. 1170 (1994).[7]

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on appeal will be cited as T/[page number].

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

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

[7] Constitutional protections afforded to Mr. Sweet in 1991 would be significantly expanded today. The ABA didn't publish the landmark *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* until more than a decade after Mr. Sweet was convicted. 31 Hofstra L. Rev. 913, 914 (2003).

2. Statement of Facts Pertaining to Previous Post-Conviction Proceedings

On August 1, 1995, Mr. Sweet timely filed his first post-conviction motion (the "First Motion"). An Amended Motion to Vacate Judgments of Convictions and Sentences was later filed on June 30, 1997. He raised twenty-eight claims for relief.[8]

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

In 1991 when Mr. Sweet was sentenced to death, Florida executed people with intellectual disabilities and juveniles. *See Atkins v. Virginia*, 536 U.S. 304 (2002) (barring execution of the mentally retarded); *Roper v. Simons*, 543 U.S. 551 (2005) (outlawing execution of juveniles). A failure to obtain funds for investigators and experts was not considered ineffective assistance of counsel. *Hinton v. Alabama*, 134 S. Ct. 1081, 1088 (2014) (trial attorney's failure to request additional funding in order to replace an inadequate investigator constituted deficient performance). None of the modern Sixth Amendment jury guarantees for capital defendants were in place. *Hurst v. Florida*, 136 S. Ct. 616 (2016) (advisory jury barred by 6th Amendment); *Ring v. Arizona*, 536 U.S. 584 (2002) (6th Amendment right to jury in capital sentencing); *Hurst v. State*, 202 So. 3d 40 (2016) (unanimous jury required for capital sentencing under Florida law). *See* John D. Bessler, *Tinkering Around the Edges: The Supreme Court's Death Penalty Jurisprudence*, 49 Am. Crim. L. Rev. 1913, 1941-42 ("For the time being, the gears of America's badly broken machinery of death grind on. The facts, though, unmistakably show that the death penalty is 'cruel and unusual' in both a legal and factual sense. Not only is the system riddled with error and discrimination, but executions fly in the face of what the Supreme Court itself says the Eighth Amendment is designed to do").

[8] Mr. Sweet's First Motion argued: 1) Access to the file and records pertaining to Sweet's case in the possession of certain State agencies were withheld in violation of constitutional rights; 2) Requiring Sweet to file a motion under Rule 3.850 one year after his final conviction violated his rights of due process and equal protection; 3)

Sweet's sentences rest upon an unconstitutionally automatic aggravating circumstance; 4) The avoiding arrest aggravating factor was improperly applied and the jury received inadequate instructions; 5) The CCP aggravating instruction failed to limit the jury's consideration and was not supported by the evidence; 6) Sweet's right to due process, equal protection, and an adversarial testing were violated by the Duval County Sheriff's Department's illegal destruction of evidence; 7) Sweet was denied the effective assistance of counsel at the guilt phase as counsel failed to adequately investigate and prepare a defense or challenge the State's case; 8) Sweet's trial counsel was ineffective in the penalty phase by failing to investigate and present available mitigating evidence and this failure rendered Sweet's waiver of mitigating evidence involuntary; 9) Sweet was denied his right to a fair trial before an impartial jury because of improper influences on the jurors during trial; 10) The jury's death recommendations were tainted by consideration of invalid aggravating circumstances; 11) The rules prohibiting Sweet's lawyers from interviewing jurors to determine if constitutional error was present violated his constitutional rights and denied Sweet adequate assistance of counsel; 12) Sweet is innocent of first degree murder and innocent of the death sentence; 13) Sweet's absence from critical stages of the proceedings prejudiced his guilt and penalty phases; 14) Prosecutorial argument and inadequate jury instructions misled the jury regarding its ability to exercise mercy and sympathy and deprived Sweet of a reliable and individualized capital sentencing determination and Sweet's counsel was ineffective for not proposing that the jury be instructed on mercy and for not objecting to the improper prosecutorial argument; 15) Sweet cannot meaningfully petition for review under Rule 3.850 and is denied effective assistance of counsel since the record on appeal is incomplete; 16) Sweet was denied a proper direct appeal due to the omissions in the record; 17) Sweet's trial court proceedings were fraught with procedural and substantive errors which cannot be harmless when viewed as a whole since the combination of errors deprived him of the fundamentally fair trial; 18) Sweet's penalty phase jury instructions improperly shifted the burden to Sweet to prove that death was inappropriate and the judge employed this improper standard in sentencing; 19) The State's use of misleading testimony and improper argument violated Sweet's constitutional rights and his counsel was ineffective for not objecting; 20) The use of contemporaneous acts to support the finding of the prior violent felony violated Sweet's constitutional rights; 21) The State failed to prove that Sweet knowingly created a great risk of death to many persons; 22) Sweet's sentence of death was based upon an unconstitutionally obtained prior conviction;

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

During the evidentiary hearing on the First Motion, it came to light that Mr.

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23) Florida's capital sentencing statute is unconstitutional on its face and as applied for failing to prevent the arbitrary and capricious imposition of the death penalty and for violating the constitutional guarantee prohibiting cruel and unusual punishment; 24) Sweet was denied a reliable sentencing because the judge refused to find the existence of mitigation established by the evidence in the record; 25) The introduction of non-statutory aggravating factors and the State's argument upon these factors rendered Sweet's death sentence fundamentally unfair and unreliable; 26) Sweet's sentencing jury was misled by comments and instructions which unconstitutionally diluted its sense of responsibility; 27) Sweet was denied the effective assistance of counsel in that counsel failed to provide mental health experts with available information which the experts needed to make an accurate competency determination, counsel failed to request the appointment of a confidential defense expert, and the State withheld exculpatory information needed to reach such a determination; and 28) The mental health experts who evaluated Sweet for competency did not render adequate assistance as required by *Ake v. Oklahoma*.

Sweet's capital trial counsel, Charlie Adams, had never represented a client facing the death penalty. PC9/1765. Mr. Adams suffered "health problems" throughout his representation. PC10/1777. Lindsey Moore, second chair counsel who joined Mr. Sweet's case fifty days before jury selection, worked primarily in federal civil litigation and had no capital experience. PC8/1454. Moore believes that Adams was "burdened by the work that he had" and asked him to cross examine two to three witnesses. PC8/1455. "Beyond cross examining the witnesses," Moore did not feel he was competent and qualified to do what Adams asked him to do. PC8/1468-69. Yet Moore was given the important responsibility of preparing the mitigation phase and questioned the only mitigation witness without even meeting her.[9] R8/1463-64.

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

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

Sweet's capital case "[p]robably off and on about a week-and-a-half" to find additional witnesses. PC8/1438-41. This was the first time Adams ever utilized an investigator in any of his cases. PC9/1768. Mr. Abner "didn't accomplish a whole lot at the time" because investigating a capital case like this one would, at a minimum, cost $5000 to $6000 in fees. PC8/1439, 1441. *See generally Hinton v. Alabama,* 134 S. Ct. 1081, 1088 (2014) (trial attorney's failure to request additional funding in order to replace an inadequate investigator constituted deficient performance under *Strickland v. Washington*, 466 U.S. 668 (1984)).

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

Mr. Sweet filed five additional post-conviction motions over nearly two decades, with more than 21 different lawyers representing him, including: 1) Defendant's Second Successive Motion to Vacate Judgments of Convictions and Sentences (raising claims related to *Ring v. Arizona*, 536 U.S. 584 (2002)); 2)

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

3. Statement of the Facts Pertaining to Mr. Sweet's Sixth Successive Motion to Vacate Judgments of Conviction and Sentence

Mr. Sweet filed this Sixth Successive Motion to Vacate Judgments of Conviction and Sentence, based on the newly discovered exculpatory evidence by eyewitness Eric Wilridge, on October 28, 2016. T/1. Mr. Wilridge's new testimony stated that he observed a man outside Marcene Cofer's apartment moments before the shooting occurred and the man was not Mr. Sweet. The motion also discussed a recantation from the only adult eye-witness and victim to the shooting, Marcene

Cofer, made in 2013.[10] After one amendment and two responses from the State, the trial court entered its Order Granting Defendant an Evidentiary Hearing on March 24, 2017 (the "Court Order").[11] T/164-68. The Court Order thoroughly examined the parties' submissions, the proffered statements of Eric Wilridge and Marcene Cofer, and binding Florida precedent. *Id.* Citing *Swafford, Marek* and *Jones,* the Court explained the need to conduct a "cumulative analysis of all the evidence, including evidence that was previously excluded as procedurally barred or presented in another post-conviction proceeding." T/165; *see Swafford v. State*, 125 So. 3d 760, 776 (Fla. 2013); *Marek v. State*, 14 So. 3d 985, 990 (Fla. 2009); *Jones v. State*, 709 So. 2d 512, 521 (Fla. 1998). The Order specifically addressed the inclusion of powerful changed testimony by Marcene Cofer. T/166-67. The Court held that, "the fact that identity of the perpetrator was an issue at trial, Mr. Wilridge's testimony could have a material impact at retrial." T/166. The Order also specifically allowed Mr. Sweet, "to present

[10] Mr. Sweet's *pro se* motion for post-conviction relief, filed August 12, 2014, raised the claim regarding Marcene Cofer's recantation. The trial court struck the *pro se* motion on November 21, 2014, because Mr. Sweet was represented by attorney Frank Tassone, who failed to adopt the *pro se* motion.

[11] During the pendency of Mr. Sweet's Sixth Successive Motion, collateral counsel filed Defendant's Seventh Successive Motion to Vacate Judgments of Conviction and Sentence regarding *Hurst v. Florida* on January 4, 2017. The trial court denied this motion without hearing on March 3, 2017. T/154-58. Mr. Sweet's appeal is currently pending at the Florida Supreme Court. *See Sweet v. Florida*, SC17-699.

additional evidence at the evidentiary hearing to support his claim that Ms. Cofer recanted her testimony." T/166-67. A hearing, including Wilridge and Cofer's testimony, was necessary and proper. *Freeman v. State*, 761 So. 2d 1055, 1061 (Fla. 2000) (Defendant is entitled to an evidentiary hearing unless records conclusively show the prisoner is entitled to no relief or a particular claim is legally insufficient). *See* Fla. R. Crim. P 3.851(f)(5)(B) & (D) (2017).

During discovery, Marcene Cofer unambiguously stated under oath that Tommy Williams, the father of one of her sister's children, shot her in 1990. T/263-64, 290-91. She also explained that she did not know Sweet or Sweet's family. T/254. In response, the State conceded that, it was "manifestly necessary" to further investigate Cofer's claims that Sweet is innocent. T/300. Given the 27 years since the murder, the State confessed that it would be much more "difficult" to investigate and prosecute a retrial against Mr. Sweet. T/301. Since both Marcene Cofer and jailhouse informant Salomon Hansbury have recanted their testimony, the State could not use them as witnesses. Retrial would require a unanimous jury verdict beyond a reasonable doubt based solely on the testimony of a young girl who admits she saw the shooter for less than one minute and seven seconds.

At the evidentiary hearing held July 13, 2017 (the "2017 Hearing"), Mr. Sweet presented former post-conviction counsel Frank Tassone, Marcene Cofer, and Eric

Wilridge as witnesses. Mr. Wilridge, a witness who was never found during Sweet's 1991 trial, testified that Sweet was taller, more slender, and darker than the shooter he saw at Ms. Cofer's door on June 27, 1990. T/600. Ms. Cofer, the State's star witness at trial, explained she does not, "want Earl Sweet to die on death row and he wasn't the one that pulled that trigger." T/562. Mr. Tassone explained how the documents pertaining to Mr. Wilridge and Ms. Cofer came into his possession and how he failed to file a post-conviction motion based on Ms. Cofer's recantation. T/502, 517-519. The State presented no witnesses.

The Court permitted the parties to submit written closing arguments. On September 29, 2017, the court filed its Order Denying Defendant's Sixth Successive Motion for Post-Conviction Relief. T/416-33. Mr. Sweet timely filed his Notice of Appeal on October 27, 2017. T/469-70.

JURISDICTION

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

STANDARD OF REVIEW

To obtain a new trial based on newly discovered evidence, a defendant must meet two requirements. First, the evidence must not have been known by the trial court, the party, or counsel at the time of trial and it must appear that the defendant or defense counsel could not have known of it by the use of diligence. *Hildwin v. State*, 141 So. 3d 1178, 1184 (Fla. 2014); *Swafford v. State*, 125 So. 3d 760, 775-76 (Fla. 2013); *Jones v. State*, 709 So. 2d 512, 521 (Fla. 1998). Second, the new evidence must be of such nature that it would probably produce an acquittal on retrial. *Jones v. State*, 709 So. 2d at 521. New evidence satisfies the second prong of the *Jones* test if it "weakens the case against [the defendant] so as to give rise to a reasonable doubt as to his culpability." *Jones*, 709 So. 2d at 526*; Hildwin v. State*, 141 So. 3d at 1184.

In determining whether the new evidence compels a new trial, the trial court must, "consider all newly discovered evidence which would be admissible," and must "evaluate the weight of both the newly discovered evidence and the evidence which was introduced at the trial." *Jones*, 709 So. 2d at 521; *Swafford*, 125 So. 3d at 775-76 (emphasis added). In determining the impact of the newly discovered evidence, the court must conduct a cumulative analysis of all the evidence from trial and prior post-conviction proceedings so that there is a "total picture" of the case and "all the circumstances of the case." *Swafford*, 125 So. 3d at 776 (quoting *Lightbourne v. State*,

742 So. 2d 238, 247 (Fla. 1999)) (emphasis added). *See also Hildwin*, 141 So. 3d at 1184-85. A post-conviction court must also consider testimony that was previously excluded as procedurally barred in determining if there is a probability of an acquittal. *Id. See also Roberts v. State*, 840 So. 2d 962, 972 (Fla. 2002). The *Jones* test is satisfied when the quantum of all the evidence gives rise to a reasonable doubt as to culpability. *Hildwin*, 141 So. 3d at 1184-85. Of course, upon retrial, the State would have the burden of proving Mr. Sweet guilty beyond any reasonable doubt. *Patterson v. New York*, 432 U.S. 197 (1977); Florida Standard Jury Instructions in Criminal Cases §§ 7.2-7.3.

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

In *Hildwin*, for example, this Court reversed a conviction based on newly discovered DNA evidence that exonerated the defendant and supported the defense

theory of an alternate suspect. *Hildwin*, 141 So. 3d 1180-83. Similarly, in *Swafford*, where scientific evidence debunked the prosecution's theory of sexual assault, a new trial was warranted. *Swafford*, 125 So. 2d at 762-63. This Court has not hesitated to affirm new trials when newly discovered evidence raises doubts about a defendant's culpability, especially in cases where the quantum of evidence against a defendant is weak and circumstantial. *Id*. In Mr. Sweet's case, the only remaining evidence is the testimony of a twelve year old girl. The circuit court erred in its poorly reasoned opinion and should be reversed.

SUMMARY OF THE ARGUMENTS

If the Court allows Mr. Sweet's conviction to stand, he will be subject to the death penalty based on the testimony of a twelve year old girl. The cumulative effect of the State's weak, circumstantial case at trial, the evidence of ineffective assistance of trial counsel, the admission of perjury by Salomon Hansbury, Marcene Cofer's recantation, the eyewitness testimony of Mr. Wilridge at the 2017 Hearing, and the 1999 post-conviction testimony of eyewitness Anthony McNish leave no reliable evidence against Mr. Sweet and a plethora of reasonable doubts. The circuit court clearly erred in its credibility findings regarding Marcene Cofer's testimony and in its application of the *Jones* standard for new evidence. In addition, the circuit court erred in allowing into evidence State's Exhibit 1 and by improperly relying on this

irrelevant and prejudicial document when making credibility findings regarding Eric Wilridge's testimony, and by failing to consider the plethora of previously presented evidence which support's Wilridge's overall reliability. This Court should vacate the judgement of conviction and sentence and finally provide justice to Mr. Sweet after nearly thirty years on death row.

ARGUMENT I

THE CIRCUIT COURT REPEATEDLY ERRED IN CREDIBILITY FINDINGS OF MARCENE COFER'S TESTIMONY IN VIOLATION OF FLORIDA LAW AND THE DUE PROCESS GUARANTEES OF THE FLORIDA AND FEDERAL CONSTITUTIONS

The circuit court repeatedly erred in credibility findings about Ms. Cofer's post-conviction testimony in violation of Florida law and state and federal due process standards. First, the circuit court erred in making dispositive credibility findings based on a transcript. Second, the circuit court ignored testimonial evidence in favor of nontestimonial evidence from its *sua sponte* questions. Finally, the circuit court insinuated that Ms. Cofer has a "vested interest" in Sweet's case, based on Cofer's demeanor alone. These findings, based on nothing more than speculation, far exceed what is permitted under Florida law, even when given due deference.

It was clearly erroneous to base a credibility finding on unfounded speculation contradicted by the evidence at the 2017 Hearing. Court findings cannot be based on

speculation and conjecture. 24 Fla. Jur. 2d Evidence and Witnesses § 1069. Factual findings will be reversed where they are "clearly shown to be without basis in the evidence or predicated upon an incorrect application of the law." *State v. Riocabo,* 372 So. 2d 126, 127 (Fla. 3d DCA 1979), dismissed, 378 So. 2d 348 (Fla. 1979); *State v. Navarro,* 464 So. 2d 137, 139 (Fla. 3d DCA 1984) (*en banc*); *State v. Smith,* 529 So. 2d 1226 (Fla. 3d DCA 1988). Deference to the trial court's findings of fact does not fully apply when the findings are based on evidence other than live testimony. *Parker v. State,* 873 So. 2d 270, 279 (Fla. 2004); *Thompson v. State,* 548 So. 2d 198, 204 n. 5 (Fla. 1989) ("[T]he clearly erroneous standard does not apply with full force in those instances in which the determination turns in whole or in part, not upon live testimony, but on the meaning of transcripts, depositions or other documents reviewed by the trial court, which are presented in essentially the same form to the appellate court.").

The circuit court held that, "Marcene Cofer's testimony at trial that Defendant was the person who shot her was credible and consistent." T/426. Next, the circuit court balanced trial testimony against the 2017 Hearing testimony and found that, "[w]hile Ms. Cofer's testimony was credible at trial, her testimony during the Evidentiary Hearing was not." T/427. Judge Frederick Tygart, now retired, presided over Mr. Sweet's 1991 trial and 1999 post-conviction hearing. Judge Cox presided

over the 2017 Hearing. It was error and an abuse of discretion for Judge Cox to make credibility determinations based on trial transcripts and to weigh a transcript against live testimony. Judge Cox did not have the benefit of hearing live testimony in 1991 and 1999 and she was working from a cold transcript.[12] To hold that a transcript is more credible than a live witness defies any reasonable application of Florida law, as well as the *Parker* and *Thompson* standards.

While the judge has broad discretion to determine the credibility of witnesses in a bench trial, that discretion has boundaries. This Court has recognized that the clearly erroneous standard is not a mechanism through which appellate courts can simply rubber-stamp the trial court's ruling. In *Nowell v. State*, 998 So. 2d 597 (Fla. 2008), when reversing a trial court's finding of genuineness because it was unsupported by the record, this Court explained that "deference does not imply abandonment or abdication of judicial review . . . because '[d]eference does not by definition preclude relief.'" *Id*. at 602 (quoting *Dorsey v. State*, 868 So. 2d 1192, 1200 (Fla. 2003); *Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003)); *Hayes v. State*,

[12] Cofer admitted she was a heavy marijuana smoker throughout her lifetime. T/427 n. 9. The fact that she admitted she had smoked marijuana before the 2017 Hearing was really no different than any of her prior testimony given under oath. T/249-50. Most importantly, at the time of the shooting and when she originally identified Mr. Sweet as the shooter, Ms. Cofer was found to have ***both*** cocaine and marijuana in her system. PC5/992.

94 So. 3d 452 (Fla. 2012). A credibility finding by the lower court must be based on competent, substantial evidence in the record. *Way v. State*, 760 So. 2d 903, 911 (Fla. 2000). Here, the competent, substantial evidence is the same transcript in the record of appeal before this Court. The circuit court's opinion is entitled to no deference.

The circuit court also explicitly relied on nontestimonial queries in making credibility determinations. "The Court noted on the record that Ms. Cofer smiled at Defendant as she was walking to the witness stand. When questioned about the smile, Ms. Cofer became agitated and defensive." T/427 n. 10. In fact Cofer's testimony was, "I smiled because I do smile all the time . . . and it's just something in my heart just made my smile." There was nothing defensive in Ms. Cofer's response.

The conclusion that Ms. Cofer "was on friendly terms with Defendant and had a vested interest in seeing Defendant's conviction overturned despite his culpability" was sheer speculation by the circuit court. T/427. The record is devoid of any evidence that Cofer knew Sweet. Cofer testified that, "I don't know him, I never met him, I never talked to him. He never wrote me a letter. It's just something that came over my heart when I walked in, because I am a smiling person, and that's something that came from my heart." T/564. Similarly, in her deposition, Cofer testified consistently with her testimony at the 2017 Hearing and at trial. Cofer has consistently testified under oath on three occasions that she does not know Sweet.

T/254; T/564, PC2/525. It takes vivid imagination to create a scenario in which the alleged perpetrator of a violent crime befriended the victim who was seriously injured, scared, and hospitalized for days, from the confines of death row in Starke, Florida. Death row convictions should not be based on creative flights of fancy. There was no evidence presented to support the circuit court's suspicion that Cofer recanted because she befriended Sweet or somehow developed a "vested interest" in his exoneration. In fact, Cofer explained the only "vested interest" she had was in clearing her conscience. For years, Cofer has worried that her erroneous 1991 testimony might result in the execution of an innocent man. T/563.

The circuit court's unfounded insinuation that Sweet, through his sister, somehow got to Cofer and caused her to change her story, would have caused a mistrial if a prosecutor had said it. "Her fading memory was then influenced by statements made to her by her sister and Defendant's sister that Defendant was not the true perpetrator." T/427-28. It is impermissible for a prosecutor to suggest, without evidentiary support, that a witness has changed his or her testimony due to contact with the defendant and/or defense counsel. *See Penalver v. State*, 926 So. 2d 1118, 1130 (Fla. 2006) ("This court has repeatedly held that it is impermissible for the state to suggest, without evidentiary support, that the defense has "gotten to" and changed a witness's testimony or that a witness has not testified out of fear,"); *Tindal*

v. State, 803 So. 2d 806, 810 (Fla. 4th DCA 2001); *Jones v. State*, 449 So. 2d 313, 314–15 (Fla. 5th DCA 1984); *Louzon v. State*, 78 So. 3d 678 (Fla. 5th DCA 2012); *Cooper v. State*, 712 So. 2d 1216, 1217 (Fla. 3rd DCA 1998); *Tran v. State*, 655 So. 2d 141, 142 (Fla. 4th DCA 1995). The fact that a witness is impeached may imply that the witness is lying, but it does not imply that someone else has made the witness change his or her story. *Henry v. State*, 651 So. 2d 1267, 1268 (Fla. 4th DCA 1995). Such comments are highly prejudicial because they imply that the defendant engaged in the separate criminal offenses of witness tampering and suborning perjury. *Id*. As noted above, Cofer denied that any such thing had happened, and no evidence was presented to contradict her.

Ms. Cofer was herself a teenager when the crime occurred, a victim of the crime, seriously injured, hospitalized, and traumatized. T/530-535. She said she had continued to worry over time that the wrong man was on death row. T/542. Ms. Cofer attended her deposition prior to this hearing, traveled to Duval County from Ft. Lauderdale for the evidentiary hearing, and appeared and willingly gave sworn testimony to exonerate Mr. Sweet. She was cogent, sensible and articulate on the witness stand. T/529-564. Cofer had no motive to fabricate her testimony. She said she testified for no other reason than she felt it was the right thing to do. T/563. The circuit court's credibility findings based on a transcript and other speculation should

be reversed.

ARGUMENT II

THE TRIAL COURT ERRED IN ADMITTING INTO EVIDENCE STATE'S EXHIBIT 1 AND BY IMPROPERLY RELYING ON THIS EXHIBIT WHEN MAKING CREDIBILITY FINDINGS PERTAINING TO ERIC WILRIDGE AT THE EXCLUSION OF OTHER EVIDENCE POINTING TOWARD HIS RELIABILITY IN VIOLATION OF FLORIDA LAW

Mr. Sweet filed his Sixth Successive Motion to Vacate Judgments of Conviction and Sentence based on the newly discovered evidence by eyewitness Eric Wilridge on October 28, 2016. T/1. This motion provided Wilridge's name and contact information, laid out the substance of Wilridge's proposed testimony, and attached the written affidavit Wilridge sent to post-conviction counsel Frank Tassone. The trial court entered an order granting an evidentiary hearing on March 24, 2017. T/164-68. The hearing was originally set for May 2, 2017. T/174. After an unopposed motion for continuance was granted, the evidentiary hearing was reset to July 13, 2017. T/195-96.

On March 27, 2017, within one week of the order granting an evidentiary hearing, Mr. Sweet filed witness and exhibit lists, disclosing Eric Wilridge, Marcene Cofer, and Frank Tassone as witnesses. The State failed to file any witness or exhibit

list for the evidentiary hearing or provide any reciprocal discovery until July 11, 2017.[13] The State likely investigated and prepared for Wilridge's deposition which was conducted on May 24, 2017, months before the July evidentiary hearing.

A few minutes prior to the July hearing,[14] the State provided collateral counsel with a copy of an arrest record, "based on some investigation the State of Florida has discovered." T/480. The record purported to demonstrate that Wilridge was "in custody" at the time of the 1990 shooting. *See* State Ex. 1, T/343-46. This document shows that Wilridge was arrested for possession of cocaine on June 22, 1990 and that his bail was set at $25,003. *Id*. The State did not allege that State's Exhibit 1 was recently discovered. T/480-85. State's Exhibit 1 was not disclosed to the defense prior to the hearing.

While the lawyers for the State, "have not found *consistent* jail records of the date that Mr. Wilridge was released," the State argued that Wilridge needed to be advised by the Court "of the possible ramifications of untruthful testimony, he could face perjury

[13] In the absence of a court order setting alternative deadlines, exhibit and witness lists are generally produced within sixty days of the Case Management Conference in post-conviction matters. Fla. R. Crim. P. 3.851(f)(5)(A). These deadlines apply to initial, rather than successive post-conviction motions, but should apply by analogy here. *Id*.

[14] To the State's credit, on the eve of the hearing, July 12, 2017, an email requesting a return phone call was sent to one of Mr. Sweet's lawyers. Because Mr. Sweet's defense team was traveling for the 2017 Hearing, the message was not received. The State's email neither included a copy of State's Exhibit 1 nor any reference to the substance of the document.

charges." T/480-81. The Court obliged and advised Wilridge of his right to counsel and the risk of perjury charges. T/566-69. Mr. Wilridge, who for the first time understood that his exculpatory testimony could subject him to five years in prison, still agreed to testify without any hesitation. T/566-69. The defense objected regarding the admissibility of State's Exhibit 1 as it was not relevant to the proceedings, never disclosed to the defense, nor included in the State's belated exhibit list.

At the close of the evidence, the State requested additional time to locate records proving Wilridge was in custody in the early hours of June 27, 1990. T/623. The trial court agreed to give the State ten days to find additional records. T/633. In the end, the State found no additional consistent or inconsistent records to support the contention that Wilridge was in custody at the time of the shootings. Collateral counsel again objected to the admission of State's Exhibit 1 into evidence. T/644-45. The court overruled the defense objection and formally closed the evidentiary hearing.

The trial court erred in admitting State's Exhibit 1 for several reasons. First, the disclosure of this material was untimely and provided defense counsel no opportunity to investigate the documents. Collateral counsel was denied the opportunity to prepare Wilridge in light of this new material. Thus, this last minute disclosure of evidence prevented Mr. Sweet any opportunity to properly rebut the material. The State was aware of Wilridge's purported testimony for more than nine

months prior to the evidentiary hearing. The State received a copy of the post-conviction motion, Wilridge's original affidavit, and a defense witness and exhibit list. The State deposed Wilridge on May 24, 2017. Still, the State failed to provide any notice that it was using Exhibit 1 until the morning of the 2017 Hearing. This document was also not included in the State's belated exhibit list, filed merely two days before the evidentiary hearing. The trial court erred in denying collateral counsel's objections to the timeliness of this evidentiary disclosure.

Despite the clear discovery violation, State's Exhibit 1 should never have been allowed in as substance evidence during the hearing because it is not relevant to the proceedings. *See* Fla. Stat. § 90.401 (relevant evidence is tending to prove or disprove a material fact). A "trial court has broad discretion in determining the relevance of evidence and such determination will not be disturbed absent an abuse of discretion." *Reed v. State*, 883 So. 2d 387 (Fla. 4th DCA 2004), citing *Heath v. State*, 648 So. 2d 660, 664 (Fla. 1994) (citation omitted). "However, a trial court's discretion is limited by the rules of evidence." *Nardone v. State*, 798 So. 2d 870, 874 (Fla. 4th DCA 2001) (citation omitted). State's Exhibit 1 merely shows the arrest and booking of Wilridge on June 22, 1990 and that the charges against Wilridge were officially dropped on June 29, 1990. An arrest on June 22 is not probative of Wilridge's whereabouts at the time of the shootings - June 27. State Exhibit 1 does not show that Wilridge was in

custody at the time of the shooting and thus it proves absolutely nothing regarding his new testimony.

State's Exhibit 1 also fails to qualify as impeachment evidence. During the evidentiary hearing, the State questioned Wilridge about the arrest on June 22. Wilridge testified that he did not recall the specific offense listed on State's Exhibit 1 but does recall being arrested a few days prior to the shootings and later released on his own recognizance. State's Exhibit 1 does not impeach Wilridge's testimony because it does not contradict his statements that he was out of custody at the time of the shootings. The State would have needed to produce actual jail custody records that show Wilridge's entry and release dates from the Duval County Jail to properly impeach his testimony. The State could not locate these specific records jail records, and thus, any attempt at impeachment is improper.

The State also cannot use State's Exhibit 1 to impeach Wilridge's testimony because it violates Fla. Stat. § 90.610(1) (stating that a party may attack the credibility of any witness, including an accused, by evidence that the witness has been convicted of a crime if the crime was punishable by death or imprisonment in excess of 1 year under the law under which the witness was convicted, or if the crime involved

dishonesty or a false statement regardless of the punishment).[15] The basic rule is that a witness may not be interrogated concerning prior arrests or pending charges, but only as to prior convictions as defined in § 90.610. *Torres-Arboledo v. State*, 524 So. 2d 403, 408 (Fla. 1988). "Arrest, without more, does not, in law any more than in reason, impeach the integrity of a witness." *Harmon v. State*, 394 So. 2d 121, 125 (Fla. 1st DCA 1980). Because State's Exhibit 1 showed only an arrest, as this charge was later "no filed", it is improper impeachment because it is not a conviction under § 90.610.

The prejudice of admitting State's Exhibit 1 is seen in the circuit court's written order as the circuit court heavily relied upon the document when making credibility findings regarding Wilridge's testimony. However, the circuit court failed to analyze the reliability of Wilridge's testimony in light of numerous evidence and witnesses previously presented throughout post-conviction proceedings.

Wilridge's eyewitness testimony adds to the list of other exculpatory evidence and provides a further probability of acquittal in Mr. Sweet's case. Wilridge testified that during the early morning on June 27, 1990, he was speaking on a pay phone

[15] In the context of § 90.610(1), this Court has defined a conviction as "an adjudication of guilt or judgment of conviction by the trial court." *State v. McFadden*, 772 So. 2d 1209, 1216 (Fla. 2000).

located near 4th and Market Streets when he observed three individuals standing near Cofer's front door. T/574, 578-79. Wilridge rode his bicycle to the corner of 3rd and Market Streets. T/580. While standing there, Jessie Gaskins approached Wilridge.[16] T/581. Gaskins was walking westbound, approaching 3rd and Market and acting "kind of hyper." T/581. After speaking with Gaskins, Wilridge rode his bike to about 25 yards from Cofer's front door. T/110-11. It was 1:30am. T/585. From this location, Wilridge observed one man he did not recognize standing outside Cofer's door. T/585. The man was wearing a short-sleeved shirt, dark jeans, and had his arm extended. T/586-87. Wilridge could not see this man's face because of the way he was positioned and because there was a dark colored item covering part of his head. T/587. The man was about 5'9", weighed about 160 pounds, and had light brown skin. T/588, 600. Wilridge stated that Mr. Sweet is taller, more slender and has darker skin than the man he saw that night. T/600. As he rode away towards 3rd Street and Liberty, he heard a gunshot. T/590.

The reliability of Wilridge's testimony is supported by other evidence that has

[16] Jessie Gaskins was a witness discovered by the State of Florida who Sweet's trial attorney listed as a defense witness and deposed prior to trial. PC10/1797. Gaskins gave a police statement that on the night of the shooting "somebody had pulled a gun on him and made him knock" on Ms. Cofer's door. PC10/1798. Gaskins described this person as wearing a ski mask with holes cut out and not wearing a shirt. PC10/1798.

already become part of Mr. Sweet's record, evidence that the circuit court did not consider when analyzing Wilridge's overall credibility. For example, Wilridge states he saw Gaskins in the early morning hours of June 27, approaching 3rd and Market Streets. T/581. Gaskins, a witness discovered by the State and deposed prior to trial, gave a statement to police that on the night of the shooting "somebody had pulled a gun on him and made him knock" on Cofer's door. PC10/1797-98. Wilridge describes speaking with Gaskins after observing him walking from the direction of Cofer's apartment and acting "kind of hyper." T/581. It would be likely to assume that Wilridge ran into Gaskins moments after he was held at gunpoint, giving explanation to Gaskin's general demeanor.

Further, Wilridge's testimony regarding multiple persons in the alley near Cofer's front door and then later, a single man at the door, is supported throughout the record. T/578-79. Mattie Mae Bryant stated at the guilt phase trial that at one point during the evening, she "peeped out and saw two heads, two guys standing [outside Marcene's door]." R3/730. McNish testified at the first post-conviction hearing that he observed three men enter the alley. PC10/1862. After McNish turned around and walked towards 4th Street, he looked back and observed just one man standing at Cofer's door. PC10/1863.

Wilridge's description of the single man at the door is independently

corroborated by other witnesses. Wilridge described the man as 5'9", weighing about 160 pounds, and with light brown skin and could not have been Sweet, who was taller, slender and had darker skin. T/588, 600. McNish's testimony was similar: he saw three men outside Cofer's apartment that were between 5'6" and 5'7" and stocky. PC10/1864. McNish stated that none of these men could have been Mr. Sweet because they had a different walk, skin complexion, and weight. PC10/1867-69. Wilridge could not see the man's entire face because there was a dark colored item covering part of his head. T/587. Gaskins described the person who held a gun to him as wearing a ski mask. PC10/1798. McNish believed one of the three men he observed was wearing a mask because his face was very dark compared to the skin tone on his hands. PC10/1868.

The documents which later entered into evidence as State's Exhibit 1 were thrusted on collateral counsel the day of the evidentiary hearing, without any prior notice, in violation of discovery rules, and affording collateral counsel on opportunity to properly investigate, rebut or respond. State's Exhibit 1 was irrelevant, improper impeachment evidence, and prejudicial to Mr. Sweet's case. The circuit court erred in allowing the document to come in as substantive evidence and erred to given any weight at all to the material. Over defense objections, the circuit court allowed the State to present an irrelevant and prejudicial document that impugns Wilridge's testimony based

on the assumption that Wilridge was in custody at the time of the shooting, without any real documentation that puts Wilridge behind bars. These documents obviously overwhelming influenced the circuit court's overall credibility findings of Wilridge. The circuit court erred in relying on State's Exhibit 1 when making such credibility determinations and erred in failing to consider the plethora of previously presented evidence which supports and provides reliability to Wilridge's testimony.

ARGUMENT III

THE CIRCUIT COURT ERRED IN THE APPLICATION OF THE *JONES* STANDARD FOR NEWLY DISCOVERED EVIDENCE AND BY AFFIRMING THE CONVICTION AND DEATH SENTENCE OF A MAN WHO IS ACTUALLY INNOCENT, IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND CORRESPONDING PROVISIONS OF FLORIDA LAW

Mr. Sweet was convicted on circumstantial evidence. At trial, only three witnesses identified him. Two of these witnesses have now recanted. Mr. Sweet is now facing a death sentence based on the testimony of a twelve-year-old child. This poorly-reasoned result could only be achieved with a clear misinterpretation of the *Jones* standard. *Jones* looks to a future new trial to determine if new evidence might "probably" produce an acquittal. *Jones* also requires a court weigh all of the evidence, from trial through post-conviction. Here, the circuit court erred by analyzing Mr. Sweet's newly discovered evidence claim in a piecemeal fashion, looking backwards,

to a flawed trial rife with constitutional error and unreliable circumstantial evidence.

In determining whether new evidence compels a new trial, the trial court must "consider all newly discovered evidence which would be admissible," and must "evaluate the weight of both the newly discovered evidence and the evidence which was introduced at the trial." *Jones*, 709 So. 2d at 521; *Swafford*, 125 So. 3d at 775-76. In determining the impact of the newly discovered evidence, the court must conduct a cumulative analysis of all the evidence from trial and prior post-conviction proceedings so that there is a "total picture" of the case and "all the circumstances of the case." *Swafford*, 125 So. 3d at 776 (quoting *Lightbourne v. State*, 742 So. 2d 238, 247 (Fla. 1999)) (emphasis added). *See also Hildwin*, 141 So. 3d at 1184-85. If the circuit court had properly applied the *Jones* standard, it would have ordered a judgement of acquittal or new trial for Mr. Sweet.

1. The Circuit Court Erred In Applying The *Jones* Standard Retrospectively Because Newly Discovered Evidence Would Probably Produce An Acquittal In A Future Retrial.

To obtain a new trial based on newly discovered evidence, a defendant must meet two requirements. First, the evidence must not have been known by the trial court, the party, or counsel at the time of trial and it must appear that the defendant or defense counsel could not have known of it by the use of diligence. *Hildwin v. State*, 141 So. 3d 1178, 1184 (Fla. 2014); *Swafford v. State*, 125 So. 3d 760, 775-76

(Fla. 2013); *Jones v. State*, 709 So. 2d 512, 521 (Fla. 1998).[17] Second, the new evidence must be of such nature that it would ***probably produce an acquittal on retrial***. *Jones v. State*, 709 So. 2d at 521 (emphasis added). New evidence satisfies the second prong of the *Jones* test if it "weakens the case against [the defendant] so as to give rise to a reasonable doubt as to his culpability." *Jones*, 709 So. 2d at 526*; Hildwin v. State*, 141 So. 3d at 1184. *Jones* requires courts to analyze evidence from the prospective point of view of a future retrial, rather than a retrospective review of the prior trial.

The *Jones* test is satisfied when the quantum of all the evidence gives rise to a reasonable doubt as to culpability ***upon retrial***. *Hildwin*, 141 So. 3d at 1184-85. Upon retrial, the State would have the burden of proving Mr. Sweet guilty beyond any reasonable doubt. *Patterson v. New York*, 432 U.S. 197 (1977); Florida Standard Jury

[17] During the 2017 Hearing, the State conceded that the Sixth Motion based on the Wilridge Affidavit was timely and has waived claims of procedural default or time bar. T/509. This motion is timely if filed within one year after the new facts were discovered, *i.e.* if filed on or before October 28, 2016. *Jimenez v. State*, 997 So. 2d 1056 (Fla. 2008), *as revised on denial of reh'g* (Sept. 29, 2008), *as revised on denial of reh'g* (Dec. 18, 2008); *see In re Amendments to the Fla. Rules of Judicial Admin.*, 2014 Fla. LEXIS 2913 (Fla. July 3, 2014) (rejecting proposal to shorten times for filing such claims from one year to ninety days). Mr. Sweet filed his Sixth Motion on October 28, 2016, exactly one year from the date attached to the Wilridge Affidavit. The State has conceded timeliness, this motion is timely filed, and prong one is satisfied.

Instructions in Criminal Cases §§ 7.2-7.3 (2014); *Huggins v. State*, 889 So. 2d 743, 765 (Fla. 2004). In Florida, acquittal is granted in circumstantial evidence cases if the state fails to present evidence from which the jury can exclude every reasonable hypothesis except that of guilt. *Id*. (citing *Orme v. State*, 677 So. 2d 258, 262 (Fla.1996)). *See Knight v. State*, 186 So. 2d 1005, 110 (Fla. 2016) (in first degree murder cases, a dead body is not direct evidence of a defendant's involvement in a murder and in such circumstantial cases, a special standard of review applies).[18]

At trial, the State's case hinged on the testimony of three witnesses, Marcene Cofer,[19] Sharon Bryant, and the jailhouse informant, Solomon Hansbury. Ms. Cofer

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[18] It would also be the State's burden on retrial to obtain a unanimous jury vote in favor of death. *Hurst v. Florida*, 136 S. Ct. 616 (2016); *Ring v. Arizona*, 536 U.S. 584 (2002); *Hurst v. State*, 202 So. 3d 40 (Fla. 2016) (unanimous jury required for capital sentencing under Florida law).

[19] The circuit court accused Cofer of lying and using drugs. *See supra* Argument I. Florida has a broad standard of witness competency. Fla. Stat. Ann § 90.601 (2017) (every person competent to be a witness unless unable to be understood or tell the truth). *See* Fla. Stat. Ann § 90.603 (2017). Ms. Cofer understood her solemn duty to tell the truth on the witness stand both in the 1991 trial and the 2017 Hearing:

> Q: Ms. Cofer, you changed your testimony both from 1991 to now. Is it possible you made a mistake?
>
> A: Yes.
>
> Q: --back in 1991?
>
> A: Yes

was the victim and the only adult witness who identified Mr. Sweet as the shooter.[20] R2/510. Sharon Bryant, twelve years old at the time of the shooting, identified Mr. Sweet in a suggestive lineup that was later suppressed. R3/653. At trial, Miss Bryant explained she identified Mr. Sweet after viewing his obscured face through a peephole for six or seven seconds. R3/622-24. Miss Bryant did not "really" get a good look at Mr. Sweet's face when she saw him for less than a minute during the

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> Q: And in your own words, what's the difference between a mistake and a lie?
>
> A: A mistake is when you -- When you identify something and you're not totally sure that that's what it is, but that's what you thought at the moment. A lie is just telling a complete lie and you knowing it's a lie.
>
> Q: You never intended to lie?
>
> A: No, no. I never -- I never intended to lie. At that time, 30 years ago it was just a lot of stuff, a lot of trauma going on, you know. Everything just happened so fast, you know, and that's what it was.

T/559-60. Ms. Cofer reiterated that, "if he wasn't the one that pulled the trigger, I don't want him to do time for something that – do death row for something he didn't do." T/563.

[20] The other adult victim, Mattie Mae Bryant, was never able to identify Mr. Sweet. R3/732 ("Q: Can you tell us anything at all about how he looked? A: He was tall and he was black").

shooting. R3/629-632. Solomon Hansbury[21] was a two-time felon who received a sentence of probation in exchange for his fabricated testimony against Mr. Sweet at trial and who later admitted he lied at trial. R5/931-33.

In discovery, Ms. Cofer confessed that a man named Tommy Williams shot her.[22] T/263-64, T/290-91. The State has repeatedly conceded in pleadings that investigation for retrial would be complicated. *See* State's Second Motion to Continue Evidentiary Hearing and Reply at T/206, T/230-296. The State averred that, it is appropriate, reasonable and "manifestly necessary" to further investigate Cofer's claims. T/208. Given the 27 years since the murder, the State explained that it would be much more "difficult" to investigate and prosecute a case against Mr. Sweet.

[21] At trial, Mr. Hansbury testified about a conversation with Sweet in which Mr. Sweet purportedly confessed to the murder and explained he wished he had killed Ms. Cofer and the Bryants. R5/943.

[22] The State's star witness has recanted and her current testimony provides more reasonable doubt about the guilt of the man who waits for relief from death row. When Ms. Cofer was 18 years old in 1990, she lived in a rough, drug-infested, crime ridden neighborhood near Fourth and Market in Jacksonville. T/530, 533. After she was shot on June 27, Ms. Cofer was admitted to the hospital for four or five days, felt stress, and had nightmares. T/535. Ms. Cofer was the first witness called by the State at trial. R2/505-06; T/536. Ms. Cofer was not only the State's sole adult eyewitness, she was the victim of a senseless, violent act. T/535. Nonetheless, Ms. Cofer does not "want Earl Sweet to die on death row and he wasn't the one that pulled that trigger." T/562. The issue of her prior testimony against Sweet has haunted her since 1991. T/542 ("every time it [the conclusion that William Sweet didn't shoot] comes back up in my life . . . I kind of go back over it in my head . . . that's something that I feel that's true").

T/209.

When the post-conviction court rules on a newly discovered evidence claim after an evidentiary hearing, this Court reviews findings on questions of fact, the credibility of witnesses, and the weight of the evidence for competent, substantial evidence. *Marek v. State*, 14 So. 3d 985, 990 (Fla. 2009) (citing *Green v. State*, 975 So. 2d 1090, 1100 (Fla. 2008)). The trial court's application of the law to the facts is subject to *de novo* review. *Id.* The newly discovered evidence in this case eviscerates any competent and substantial evidence of Mr. Sweet's guilt when the *Jones* standard is properly applied.

The circuit court misinterpreted *Jones* in its analysis, looking backwards to the discrepancies in the testimony of recanting witnesses and finding witnesses not credible, rather than looking forward to the probable effect on acquittal at a new trial. Both Marcene Cofer and Solomon Hansbury have recanted their testimony. Anthony McNish and Eric Wilridge have both testified that the shooter did not look like Sweet. PC10/1867-69, T/600. Leaving aside the question of whether this testimony is considered credible,[23] the state would never proffer Cofer or Hansbury in a new trial

[23] *See supra* Arguments I & II. This Court cited *State v. Gunsby*, 670 So. 2d 1996 (Fla 1996) when it affirmed the post-conviction court's finding that Hansbury's testimony was not credible. *Sweet*, 810 So. 2d at 867. However, when applying *Jones*, which looks forward, rather than backwards, there is a huge exculpatory effect of all

because these witnesses are now exculpatory rather than inculpatory. Instead, the consistent testimony of Wilridge and McNish, that Sweet was not the gunman would be given great effect when weighed against a child's impressions.

The circuit court did not consider that the newly discovered evidence of Wilridge, which ushered in the recantation of the State's star witness, would "probably" produce an acquittal on retrial because the circuit court failed to acknowledge that from the beginning, the State had a circumstantial case against Sweet. There was no weapon, no DNA, no fingerprints, and only the eyewitness testimony and the twisted lies of a jailhouse informant to convict him more than 25 years ago.[24] The only remaining evidence against Sweet is the testimony of a young girl who admits she saw the shooter for less than one minute and seven seconds. This hardly excludes every reasonable hypothesis of guilt in Sweet's case. *Huggins*, 889 So. 2d at 765 (citing *Orme v. State*, 677 So. 2d 258, 262 (Fla.1996); *Knight v. State*, 186 So. 2d at 1010. Even in 1991, Judge Tygart recognized that "credibility of

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of the evidence that has been lost, changed, and modified in Sweet's case. All of the new testimony, recantations by Cofer and Hansbury, and new evidence by McNish and Wilridge reinforce each other as they are consistent with Sweet's continued protest of his actual innocence. *See House v. Bell*, 547 U.S. 518 (2006); *Schlup v. Delo*, 513 U.S. 298 (1995).

[24] This Court cited erroneous findings from the post-conviction court's opinion that Sweet has possession of jewelry stolen from Cofer. *Sweet*, 810 So. 2d at 870. Cofer never testified that Sweet stole her jewelry.

witnesses" was going to play "a very big part" in the trial. R2/478. The same would be true in a future new trial and this would work against guilt beyond a reasonable doubt.

Jones requires the circuit court to analyze the total picture of a ***future*** new trial. *Swafford*, 125 So. 3d at 776 (quoting *Lightbourne v. State*, 742 So. 2d 238, 247 (Fla. 1999)) (emphasis added). *See also Hildwin*, 141 So. 3d at 1184-85. The circuit court failed in this analysis. The complete picture of a new trial ***without*** the inculpatory testimony of Ms. Cofer and Mr. Hansbury provides serious reasonable doubts. When the circuit court discredits testimony of post-conviction recanting witnesses, it supports Mr. Sweet's case. After all, in a hypothetical retrial, the State would be faced with presenting witnesses with numerous contradictory statements, or no witnesses at all. If the circuit court properly applied the *Jones* standard, prospectively, looking forward to a hypothetical new trial, the newly discovered recantations would probably produce an acquittal. *See House v. Bell*, 547 U.S. 518, 536-37 (2006) (comity and finality must yield to the imperative of correcting a fundamentally unjust incarceration on *habeas corpus* review); *Souter v. Jones*, 395 F.3d 577, 592 (6th Cir. 2005) (considering changed testimony as "new evidence" which "chips away" at slim circumstantial evidence supporting conviction). *See also Schlup v. Delo*, 513 U.S. 298 (1995).

The circuit court cited *Kormondy v. State*, 154 So. 3d 341 (Fla. 2015) in support of the proposition that Sweet's conviction should be affirmed. Yet *Kormondy* is distinguished from Sweet's case in several ways. First, in considering Kormondy's new evidence claim, this Court cited ample corroborating evidence that Kormondy was the shooter. After nearly a quarter of a century of post-conviction proceedings, recantations, and lost evidence, the only corroborating evidence in Sweet's case is the testimony of a twelve year old girl with limited opportunity to observe the shooter.[25] Second, recanted testimony in *Kormondy* was compared to other credible witnesses at trial. In Sweet's case, the circuit court compared its reading of a transcript of testimony by Marcene Cofer with Cofer's unambiguous statements that Sweet was not the man who shot her. Since Ms. Cofer is ***the only adult eyewitness***

[25]The obvious reliability problems of eyewitness identification during such a chaotic event cannot be understated. Lauren Talent, Note, *Through the Lens of Federal Evidence Rule 403: An Examination of Eyewitness Identification Expert Testimony Admissibility in the Federal Circuit Courts,* 68 Wash & Lee L. Rev. 765, 769 (2011) (nearly 80,000 suspects continue to be targeted every year based on eyewitness identification with a ***roughly forty percent rate of misidentification*** despite decades of research consistently revealing the inherent unreliability of eyewitness identifications); Scott Woller, Note, *Rethinking the Role of Expert Testimony Regarding the Reliability of Eyewitness Identifications in New York,* 48 N.Y.L. Sch. Rev. 323, 342 (2004) (violence can profoundly affect accurate recall of both the immediate violent event and the events that preceded it). See *Simmons v. State,* 934 So. 2d 1100, 1126 (2006) (Pariente, C.J., Anstead, J.J., and Cantero, J.J., concurring) ("Mistaken identity is the chief cause of wrongful convictions.").

and the victim of the crime in this case, her testimony has dramatically more weight than the recantin*g* witness in *Kormondy*. When this Court applies the *Jones* standard properly and looks forward to a new trial without Ms. Cofer, an acquittal is possible. The circuit court erred in analyzing the effect of the new evidence on a future new trial and Mr. Sweet's conviction and sentence should be reversed.

2. The Circuit Court Erred In Failing To Consider The Totality Of All Evidence From Trial Through Post-Conviction That Eviscerates Any Credible Case Against Mr. Sweet

The circuit court erred by failing to consider the total, cumulative effect of all of the new evidence exonerating Sweet. By analyzing Marcene Cofer's testimony as a stand-alone new evidence claim and failing to properly weigh the cumulative effect of all evidence offered at trial and in post-conviction proceedings, the circuit court achieved the unjust result that confines an innocent man to death row. When considered as a whole, the evidence gathered since Sweet's 1991 trial eviscerates the State's case. It would be legal, constitutional, and moral error to give this Court's official imprimatur to a death sentence based on nothing more than the testimony of a twelve year old girl who observed the shooter's obscured face for little more than one minute.

The circuit court established that testimony of Wilridge, Cofer, McNish, and Hansbury were not credible and would not produce an acquittal. T/430. However, in

the section about the cumulative effect of all of the new evidence, the circuit court only analyzed Wilridge, McNish, and Hansbury, but failed to include an analysis of the additional effect of Cofer's devastating testimony that Tommy Williams shot her.[26] T/428; T/263-64, 290-91. The circuit court erred in treating Cofer's recantation as a newly discovered evidence claim in its own right, as opposed to a full-scale amputation of the quantum of evidence against Sweet under *Jones*. T/425.

In 1991, before new evidence was brought to light, the case against Mr. Sweet was a weak and circumstantial one.[27] There was no physical evidence to prove Mr. Sweet's involvement in the shooting. *See Sweet*, 624 So. 2d at 1139. The murder weapon was neither found in a search of Sweet's apartment nor recovered elsewhere. There were no fingerprints, no hair, no blood, no DNA, nor any specific ballistics evidence that tied Sweet to Ms. Cofer's apartment in the early morning hours of June 27, 1990. Although witnesses testified that the shooter wore a ski mask or that his face was obscured by dark clothing, none of these items were ever recovered.

[26] Ms. Cofer identified an alternate suspect, Tommy Williams, in her deposition. T/263-64, T/290-91. Likewise, Ms. Cofer reiterated that, "I'm not sure. I'm not sure. I'm not sure. I'm not sure if I correctly identified the right person, to be honest" in reference to her testimony in 1991. *Id.*

[27] The State's theory was that Mr. Sweet attempted to murder Ms. Cofer because she had identified him as a suspect in an earlier robbery of her apartment. Mr. Sweet was never charged with this crime.

The incriminating substance of the State's case was the testimony of three witnesses at trial: two eyewitnesses, Ms. Cofer and Miss Bryant, and one jailhouse informant, Mr. Hansbury. Even this Court's version of the facts in Mr. Sweet's direct appeal and post-conviction appeals demonstrates the dearth of evidence other than eyewitness testimony that formed the basis of Sweet's conviction. *Sweet*, 624 So. 2d at 1139; *Sweet*, 810 So. 2d at 856-57.

Two of the three witness have since completely recanted. Under the *Jones* standard, this Court must imagine a new trial in which Mr. Sweet might be convicted beyond a reasonable doubt based on the testimony of a twelve year old child. Young Miss Bryant's testimony would be weighed against the credible exculpatory testimony of Marcene Cofer, her cousin, Anthony McNish, Solomon Hansbury, and Eric Wilridge. Putting aside the anemic constitutional and moral standards of capital litigation circa 1991,[28] the circuit court erred in finding that an acquittal would be improbable because it did not properly consider the dearth of evidence against Sweet as a whole.

This Court must conduct a *de novo* cumulative analysis of all the evidence from trial and prior post-conviction proceedings so that there is a "total picture" of

[28] *See supra* note 7.

the case and "all the circumstances of the case." *Id.* at 776; *see also Hildwin v. State*, 141 So. 3d at 1184. All of the facts and circumstances of the case include evidence that was previously excluded as procedurally barred. *Id. See also Roberts v. State*, 840 So. 2d at 972. A probable acquittal would result if Mr. Sweet's new trial included evidence of many very reasonable doubts as to his guilt, including the exculpatory testimony by Wilridge and McNish that was never heard by a jury. *See Patterson*, 432 U.S. 197 (1977); Florida Standard Jury Instructions in Criminal Cases §§ 7.2-7.3. The combination of the two recanting witnesses and the exonerating eyewitness testimony of McNish and Wilridge provide a probability of acquittal under the *Jones* and *Swafford* standards.

Under *Jones*, *Swafford*, and *Hildwin*, a new trial without testimony of Ms. Cofer and Mr. Hansbury leaves an incomplete picture of anything resembling guilt beyond a reasonable doubt. McNish adds important corroboration.[29] Because the

[29] When this Court reviews the exculpatory eyewitness testimony of Anthony McNish, it is apparent that it provides reasonable doubt. Anthony McNish, who was Marcene Cofer's cousin, was originally listed as a defense witness for trial. PC10/1788. Mr. McNish was also deposed by the State. *Id*. Mr. Sweet's trial counsel subpoenaed Mr. McNish, who was the only witness planned for the defense in the guilt phase of Mr. Sweet's trial. Mr. McNish did not appear. Mr. McNish's expected testimony was proffered to the trial court: he had known Sweet for five or six years; saw three people by Ms. Cofer's apartment in the early morning hours of June 27, 1990; and none of the three men were built like Sweet or walked like Sweet. R5/997-98. The trial court could not further delay the trial to accommodate Mr. McNish's

circuit court failed to weigh all the evidence, Cofer, McNish, Hansbury, and even

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exculpatory testimony. R5/997-1002. The defense rested without calling him as a witness. *Id*.

Mr. McNish appeared and testified as a witness during the 1999 evidentiary hearing on the First Motion. During the early morning of June 27, Mr. McNish left his grandmother's house to walk to his cousin, Ms. Cofer's apartment. PC10/1860. As he walked towards 4th and Market Streets, he decided to take a short-cut through the alleyway that ran towards 3rd Street. PC10/1861-62. As Mr. McNish walked through the alleyway from 4th Street, heading towards 3rd Street, he was close to Ms. Cofer's apartment when he saw some police officers. PC10/1862. He turned around and began to walk up the alley towards 4th Street. PC10/1862. When he decided to walk back towards Ms. Cofer's apartment, he observed three men enter the alley. PC10/1862. McNish turned around and walked towards 4th Street and away from the men. *Id*. When he looked back he observed just one man standing at Ms. Cofer's door. PC10/1863. After walking for a few moments, Mr. McNish heard gunshots, "but I didn't focus on it . . . as far as the gunshot because in that area it's normal for shooting and stuff going on so I kept going." PC10/1863.

Mr. McNish knew Mr. Sweet "from name and face" but they were not friends and did not socialize. PC10/1866. None of the three men Mr. McNish observed could have been Sweet because they had a different walk, skin complexions, and weight than Sweet. PC10/1867-69. The three men were between 5'6" and 5'7" and stocky – not tall and slim like Mr. Sweet. PC10/1864. Mr. McNish believed one of the three men was wearing a mask because his face was very dark compared to the skin tone on his hands. PC10/1868. Mr. McNish recognized one of the three men and while he would not identify the person by name, he knows it was not Mr. Sweet. PC10/1902.

Mr. McNish also testified that he received the subpoena for the trial but he could not attend court because of childcare and transportation issues. PC10/1872-73. He told Mr. Sweet's trial counsel that he would need transportation to court. PC10/1874. If the proper arrangements had been made, Mr. McNish would have testified at the trial as he did during this evidentiary hearing. PC10/1875. In 1991, before Ms. Cofer recanted at the 2017 Hearing, Mr. McNish's testimony might have been considered adverse to his cousin's interests. Mr. McNish's willingness to testify in a case in which his cousin was the victim, as well as the substance of his exculpatory testimony are powerful evidence that Mr. Sweet is an innocent man on death row.

Wilridge, its conclusions are dead wrong.

In routine newly discovered evidence cases, the changed testimony of one witness is not decisive, because there is significant alternative physical evidence of guilt. *See, e.g., Kormondy v. State*, 154 So. 3d 341. There is simply nothing left of the State's case but the testimony of a twelve-year-old girl who identified Mr. Sweet after seeing him for little more than a minute during a traumatic event during the middle of the night. All of the new evidence, when considered properly and cumulatively under the *Jones* standard, would never result in a unanimous death row conviction. There is so little weight in Miss Bryant's testimony that reasonable doubt would be relatively easy standard for the defense. Two out of three recanting witnesses coupled with exculpatory testimony by Mr. McNish and Mr. Wilridge would certainly produce a strong chance of acquittal on retrial.

3. Given The Paucity Of Evidence Against Mr. Sweet This Court Should Review His Conviction Under State And Federal Constitutional Standards that Protect the Innocent

Mr. Sweet has languished as an innocent man on death row for close to thirty years. This Court never explicitly conducted a thorough proportionality review following the direct appeal of Mr. Sweet's case. At a minimum, this Court should weigh the paucity of evidence that might still exist to convict Sweet in a hypothetical new trial and determine if his death sentence complies with state and federal constitutional

protections. *See* Editorial Board, *Capital Punishment Deserves a Quick Death*, N.Y. Times, December 31, 2017 ("In many . . . exonerations, prosecutors won convictions and sentences despite questionable or nonexistent evidence, pervasive misconduct or a pattern of racial bias. . . at least 4 percent of all death-row inmates are wrongfully convicted."). The excruciatingly high standard of reasonable doubt reflects a "fundamental value determination of our society is that it is far worse to convict an innocent man than to let a guilty man go free." *In re: Winship*, 397 U.S. 358, 371 (1970) (Harlan, J., concurring). Such protections for due process and against cruel and unusual punishment of the innocent apply with equal force in this case. *House v. Bell*, 547 U.S. at 536-38; *Schlup v. Delo*, 513 U.S. 298. *See* Jan Pudlow, *Panel: Death Penalty Needs Fixing – You Can Never Release an Innocent Person from the Grave*, 36 Fla. B. News 1 (October 1, 2009) (emphasizing that more than twenty innocent people have been executed in Florida since the death penalty was reinstated); Bruce P. Smith, *The History of Wrongful Execution*, 56 Hastings L.J. 1185, 1186 (2005) (the prospect that persons can be executed for crimes they did not commit provides the most compelling argument for abolishing the death penalty). If Florida chooses continue to execute its citizens, it must take unique precautions to avoid executing the innocent ones. This Court should reverse Mr. Sweet's unjust conviction and provide relief from the three decades of wrongful incarceration on death row.

CONCLUSION

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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing INITIAL BRIEF OF APPELLANT has been transmitted to this Court through the Florida Courts E-Filing Portal, which will send a notice of electronic filing to Lisa A. Hopkins, Assistant Attorney General, at capapp@myfloridalegal.com and Lisa.Hopkins@myfloridalegal.com, and mailed via United States Postal Service to William Earl Sweet, DOC #100063, Florida State Prison, P.O. Box 800, Raiford, Florida 32083 on this 2nd day of January, 2018.

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

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