No. 20-5786

IN THE SUPREME COURT OF THE UNITED STATES

WILLIAM EARL SWEET,

PETITIONER

VS.

STATE OF FLORIDA,

RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

REPLY PETITION FOR WRIT OF CERTIORARI

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REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

A death penalty case requires due process at every stage in the proceedings. *Beck v. Alabama*, 477 U.S. 625, 637 (1980) ("death is a different kind of punishment from any other which may be imposed in this country . . . different in its severity and its finality, and the action of the sovereign in taking the life of one of its citizens also differs dramatically from any other legitimate state action"). Respondent's Brief in Opposition (BIO) claims that Mr. Sweet's numerous pleadings have simply managed to secure delay and that the surviving victims of Mr. Sweet's crimes deserve better. BIO p. 1-2. On the contrary, Mr. Sweet, an innocent man, is simply demanding justice.

During trial, Mr. Sweet was represented by an alcoholic attorney with no capital experience. The trial was fraught with errors from this defense attorney. The State's case was weak - no physical evidence, weapons, bullets, DNA, blood, or hair tying Mr. Sweet to the crime. Although witnesses testified that the shooter wore a ski mask or that his face was obscured by dark clothing, none of these items were recovered. The murder weapon was also never recovered. Since 1991, numerous errors committed by trial counsel have been discovered and the State's already weak case continued to crumple. State witness Solomon Hansbury admitted to fabricating the jailhouse confession used to convict Mr. Sweet. Eyewitness Marcene Cofer testified that she does not "want Earl Sweet to die on death row and he wasn't the one that pulled that trigger." T/88. The only original evidence left from the State's case-in-chief that barely ties Sweet to this crime is Sharon

Bryant; a twelve year old who identified Mr. Sweet in a suggestive lineup that was later suppressed; who viewed a man's obscured face through a peephole for a mere six or seven seconds, and failed to a good look at the perpetrator during the actual shooting.

Through postconviction investigations, Mr. Sweet was able to develop his own witnesses that both his trial attorney never offered in defense and whose testimony was never considered by the jury. Anthony McNish testified at the first postconviction hearing that he saw three people by Cofer's apartment in the early morning hours of June 27, 1990. None of the three men McNish observed could have been Sweet because they had a different walk, skin complexions, and weight than Sweet. Eric Wilridge testified at Mr. Sweet's Sixth Motion evidentiary hearing that during the early morning on June 27, 1990, moments before the shooting, he observed a man he did not recognize standing outside Cofer's door. Wilridge stated that Mr. Sweet is taller, more slender and has darker skin than the man he saw that night.

All the evidence developed since Mr. Sweet's faulty conviction, when examined as a whole and in conjunction with the evidence from trial gives rise to a reasonable doubt as to his culpability. If Mr. Sweet were tried again today, the evidence left for the State's case-in-chief could not pass constitutional muster and meet the standard of proof beyond a reasonable doubt.

With the State of Florida seeking the ultimate punishment against Mr. Sweet, this Court must demand higher standards of the death penalty scheme in Florida to ensure that due process is met at every stage of the proceedings. Failures made by trial and postconviction counsel must be considered by the courts when examining

underlying substantive claims. Procedural defaults should not prevent a full and fair hearing on the issues developed, particularly for a person claiming actual innocence. It is unconscionable and violates Mr. Sweet's constitutional rights to hold him on death row without a hearing conducted in accordance with full due process regarding his claims listed in the petition for writ of certiorari.

Respondent's Brief in Opposition raises several points that Mr. Sweet contests. Not all issues will be addressed in this Reply Brief and Mr. Sweet does not waive any argument previously made in his petition for writ of certiorari. Mr. Sweet responds to these points in the Brief in Opposition as follows:

I(1) –Respondent's BIO argues that no split has been identified to support Petitioner's argument that Florida should recognize a claim of ineffective assistance of postconviction counsel. BIO p. 9-10.

The State misapprehends the issue. Mr. Sweet does not seek to bring his case into conformance with other states; he seeks to bring his case into conformance with a fair procedure that ensures that justice will be done. Mr. Sweet argued that due process and the right to seek habeas corpus should allow him to have his claims heard in the forum that the federal and state system makes the primary forum for review of constitutional issues. He makes this argument from a position of innocence, which fundamental decency requires deference.

As seen in his case, more is at issue than mere postconviction state litigation. The failure of postconviction counsel has far wider implications than a mere state counsel failure. While Mr. Sweet may not have a right to counsel as a technical matter, Florida provides for such counsel. The State, having provided counsel, cannot provide counsel that results in a suspension of the writ and denies the writ of habeas

corpus' place in the United States Constitution. The failure to raise important claims only results in a bar in federal court after denying Mr. Sweet first impression complete review. *Martinez v. Ryan*, 566 U.S. 1 (2012), if even applicable, is a paltry replacement for the first review that is the responsibility of the state courts and, if federal review is even possible, forms the basis of the decisions that the federal courts review.

Failing to raise an important claim of ineffectiveness is more than a missed opportunity in State court, but rather, is such a harsh barrier to obtaining federal relief that it amounts to a suspension of the writ. A state cannot overlook claims of ineffectiveness as the primary forum for deciding such claims when the reason for declining review is that the state's own provided counsel performed inadequately and effectively denied habeas review, thus suspending relief the writ.

As far as the State's reliance on this Court's precedent regarding the issue of the right to counsel in postconviction, Mr. Sweet makes no such assertion. *Murray v. Giarratano*, 492 U.S. 1 (1989), addresses whether there is a right to counsel in postconviction, not whether there is a right to have claims heard and whether state provided counsel can frustrate the hearing of claims. Mr. Sweet has underlying claims of constitutional violation that were not considered in state court and will face such difficulties if he could even have a full and fair hearing in federal court that this amounts to a suspension of the writ.

The State's reliance on *Coleman v. Thompson,* 501 U.S. 722, 725 (1991), although slightly modified by *Martinez*, only proves the necessity for requiring the state courts to hear claims that were not presented because state counsel fumbled

them. *Coleman* shows that even pre-AEDPA, unmitigated harshness results in federal court upon the failure of state postconviction. While it is not necessary for a state to provide counsel in postconviction, it is unconstitutional for the state to provide counsel that precludes federal review because this amounts to a suspension of the writ.

Absent from the State's BIO is any acknowledgement of the particular responsibility that state courts, as the primary guardians of the federal constitution, have in handling cases with claims of actual innocence. The state courts, in this capacity, must adhere to a higher standard when innocence is at issue.

Because of postconviction counsel's failures, Mr. Sweet was denied review of claims that might have relieved him of a wrongful conviction. He has the right to ask for more from the state courts. This Court should require Florida to recognize ineffectiveness of postconviction as a vehicle to allow underlying claims to be heard in all cases in which the rights under the United States Constitution are at issue, and especially when those rights belong to an actually innocent individual awaiting relief after wrongly spending decades on death row.

I(2) – Respondent incorrectly argues that review is unwarranted because "the question presented is not an important question of federal law as it is unlikely to impact many prisoners' cases." BIO p. 13.

The State went on to argue that "even when states fail to provide effective postconviction counsel, state prisoners are seldom left without a remedy. That is because a state's failure to provide effective counsel in postconviction proceedings can, in certain circumstances, provide cause to raise ineffectiveness of trial counsel claims on federal habeas review." BIO p. 13. The State's argument is disingenuous.

The State would, as they inevitably do in most cases, respond to any so-called *Martinez* claim with an outcry of "procedural bar." Moreover, *Martinez*, at best, is still an insufficient substitute for the full review for which the state courts have the primary responsibility. *Martinez* only applies to claims involving the ineffectiveness of trial counsel and does not encompass the right to raise other claims forfeited by counsel. Additionally, it does not overcome time bars or the bar on successive petitions, as the State will inevitably raise in the future and has raised in the past, let alone any retroactivity problems with *Martinez*.

Martinez by its own limitations, fails to consider actual innocence and does not require an overarching review that takes into account actual innocence. There can be no more of an important "federal question" then whether an individual has access to the courts and the great writ without de facto suspension by the State and state provided counsel. That a prisoner "may" be able to, in a narrow class of cases, show cause and prejudice, is insufficient to overcome the right of habeas corpus and the Constitution's bar on suspension.

I(3) – Respondents incorrectly argue that Mr. Sweet's case presents "a poor vehicle to consider the first question presented." BIO p. 14.

Respondents argument that Mr. Sweet did not frame his first claim in federal terms during his State proceedings and thus is barred from presenting it in this writ of certiorari is incorrect. BIO p. 15. Claim 1 of Mr. Sweet's Eighth Successive Motion to Vacate Judgments of Conviction and Sentence is titled "Mr. Sweet was a victim of ineffective assistance of trial and post-conviction counsel given that he was represented by a lawyer with a severe drinking problem and post-conviction counsel

never used this evidence during any post-conviction proceeding in violation of due process and his right to counsel under the Fifth, Sixth and Fourteenth Amendments to the U.S. Constitution and corresponding provisions of the Florida Constitution."

Further, Argument I in Mr. Sweet's Initial Brief to the Florida Supreme Court states that "Mr. Sweet was a victim of prejudicial ineffective assistance of trial and post-conviction counsel." Initial Brief ("IB") p. 20. Specifically, Mr. Sweet cites to *Strickland v. Washington*, 466 U.S. 668 (1984) and *Williams v. Taylor*, 529 U.S. 362 (2000) in support of his underlying claims on ineffective assistance of trial counsel. IB p. 21-22. In that brief, Mr. Sweet also argues that "post-conviction counsel rendered prejudicial ineffective assistance of counsel by failing to file Mr. Sweet's false testimony claim in violation of his rights under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and corresponding provisions of the Florida Constitution." IB p. 27. This subclaim specifically cites to *Giglio v. United States*, 405 U.S. 150 (1972) in support for the merits to Mr. Sweet's underlying claim. IB p. 33. Thus, Mr. Sweet has based the claims found within question 1 of his petition for writ of certiorari in federal law and the United States Constitution.

Respondents also claim that Mr. Sweet's underlying claim for ineffective assistance of trial counsel is making "similar ineffectiveness arguments" to claims already considered and rejected by the State courts during his first petition for postconviction review. BIO p. 12. It is true that Mr. Sweet's first petition for postconviction relief contained claims alleging the fact that his trial counsel was ineffective during both the guilt and penalty phase of his capital trial. *See Sweet v. State*, 810 So. 2d 854 (Fla. 2002). These claims were filed in a motion to vacate

judgments of conviction and sentence on August 1, 1995, which was subsequently amended on June 30, 1997. However, the postconviction attorneys representing Mr. Sweet prior to and during the evidentiary hearing on these claims are the same ones who failed to use vital information during the hearing regarding his trial attorney's alcoholism and overall trial competency. *See* Claim I(A)(1), Petition for Writ of Certiorari. Thus, while the trial court and the Florida Supreme Court rejected claims of trial attorney ineffectiveness nearly twenty years ago, neither court had the benefit of new and damaging information regarding trial counsel. Due to errors and omissions from prior postconviction counsel, the courts lacked all the necessary information needed to rule on this claim. To this day, no state court has re-weighed the merits of these claims with the new information since presented.

III(2) – Respondents argued that this "Court has never held that free-standing actual innocence claims are cognizable." BIO p. 28-29.

Here the State argued that there is no split of authority between state laws and that "[t]his Court has never held that free-standing actual innocence claims are cognizable." BIO p. 29. *Herrera v. Collins*, 506 U.S. 390, 416 (1993) states, "We may assume, for the sake of argument in deciding this case, that in a capital case a truly persuasive demonstration of 'actual innocence' made after trial would render the execution of a defendant unconstitutional, and warrant federal habeas relief if there were no state avenue open to process such a claim." The State acknowledges this statement but ignores the practicalities of how this is supposed to work. If the truly persuasive demonstration is to take place, it will have to take place in state court for purposes of exhaustion before it could be presented to federal courts. If state courts,

like in Florida, do not allow for that showing because those courts do not recognize the right to such a claim, an actually innocent individual will never be able to demonstrate such and obtain relief in federal court.

Florida's failure to consider actual innocence claims is not overcome by Florida's willingness to consider newly discovered evidence. Mr. Sweet's case shows that actual innocence evidence emerges over time and continues to build on the previous evidence. While there is a possibility of immediate revelation of innocence in some circumstances, such as DNA, it remains highly likely that the case for innocence will be built over many years. Innocence shown over time is no less "a truly persuasive demonstration of 'actual innocence'" and no less worthy of relief. The state courts should be required to reckon with these important issues as the courts with the greatest responsibility for the Constitution.

While "most states do not acknowledge a freestanding claim of actual innocence" (BIO at 29; citations omitted), it is a far different question of whether they should. This Court should grant the petition for writ of certiorari.

CONCLUSION

For the reasons outlined in Mr. Sweet's petition for writ of certiorari and those arguments present above, Mr. Sweet's petition for writ of certiorari should be granted.

Respectfully submitted,

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