IN THE SUPREME COURT OF FLORIDA

HAROLD WILLIAM KELLEY,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

Case No. 73,088

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ON APPEAL FROM THE CIRCUIT COURT
OF THE TENTH JUDICIAL CIRCUIT
IN AND FOR HIGHLANDS COUNTY

# BRIEF OF APPELLEE

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

ROBERT J. KRAUSS
Assistant Attorney General
Florida Bar #: 238538
1313 Tampa Street, Suite 804
Park Trammell Building
Tampa, Florida 33602

COUNSEL FOR APPELLEE

/sas

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## PRELIMINARY STATEMENT

The record of the instant collateral proceedings is, unfortunately, not prepared in a cohesive fashion. Rather, there are several transcripts of proceedings which occurred at different times and dates. For the benefit and assistance of the Court, your appellee will refer to the "record" in substantially the same fashion as appellant. Those references used in this brief will be as follows:

> The record of the direct appellate proceedings in this case (for use in case no. 65,134, cited as **Kelley** v. State, 486 So.2d 578 (Fla. 1986), **cert. denied**, 479 **U.S.** 871, 107 S.Ct. 244, 93 L.Ed.2d 169 (1986)), will be referred to by the symbol "R" followed by the appropriate page number.
>
> Apparently because a traditional record has not been prepared in this cause, appellant has prepared a "record appendix" which contains relevant documents, including the trial court's orders denying relief in this cause. Therefore, your appellee will refer to appellant's record appendix by the symbol "App." followed by the appropriate page number.
>
> References to the preliminary proceedings in this collateral case (which regarded appellant's motion to be declared indigent and for funds to retain experts) will be referred to by the symbol "P.T." followed by the appropriate page number.
>
> References to the 3.850 evidentiary hearing conducted in this cause will be made by the symbol "H.T." followed by the appropriate page number.
>
> References to the transcript of a hearing conducted on April 27, 1989, concerning appellant's motion to interview jurors will be made by the symbol "I.T." followed by the appropriate page number.

## STATEMENT OF THE CASE

Appellant, William Harold Kelley, was charged by indictment filed on December 16, 1981, with the first degree murder of Charles Von Maxcy (R 1012). At arraignment, Kelley pled not guilty.

On January 30, 1984, appellant's trial ended in a mistrial where the jury was unable to agree upon a verdict (R 1215). Appellant's second trial commenced on March 26, 1984, before the Honorable E. Randolph Bentley, Circuit Judge. After deliberations, the jury found the defendant guilty as charged in the indictment (R 937, 1231). Following the penalty phase of the trial, the jury recommended that the death penalty be imposed by a vote of 8 - 3 (R 1248). On April 2, 1984, Judge Bentley entered his written order containing findings of fact in support of the death sentence imposed (R 1238-1245).

On April 10, 1986, the Florida Supreme Court affirmed the judgment and sentence of death. Kelley v. State, 486 So.2d 578 (Fla. 1986). The issues raised by Kelley in his direct appeal to the Florida Supreme Court were as follows:

> I. THE TRIAL JUDGE ERRED IN REFUSING TO DISMISS THE INDICTMENT OR BAR THE PROSECUTOR BECAUSE OF THE STATE'S WILLFUL AND DELIBERATE DESTRUCTION OF THE EVIDENCE.
>
> 11. THE TRIAL JUDGE ERRED IN PERMITTING THE WITNESS NAMIA TO TESTIFY TO *AN* ALLEGED CONVERSATION WITH JOHN J. SWEET IN 1967.
>
> 111. THE TRIAL JUDGE ERRED IN REFUSING TO ANSWER A QUESTION BY THE JURY DURING ITS DELIBERATIONS AS TO WHETHER JOHN J. SWEET RECEIVED IMMUNITY IN FLORIDA FOR MURDER AND PERJURY.

IV. THE TRIAL JUDGE ERRED IN ENCOURAGING AND PERMITTING THE JURORS TO TAKE NOTES.

V. THE TRIAL COURT ERRED IN ADMITTING DEFENDANT'S POST-ARREST STATEMENTS TO FBI AGENTS IN VIOLATION OF HIS MIRANDA RIGHTS.

VI. FLORIDA STATUTE §921.141 WAS IMPROPERLY APPLIED TO DEFENDANT AND IS UNCONSTITUTIONAL ON ITS FACE.

A. The Trial Judge Improperly Found As Two Separate Aggravating Circumstances The Fact That The Murder Was Committed For Hire.

B. The Trial Court Improperly Allowed The Jury to Consider The State's Claim Of Felony Murder As An Aggravating Circumstance.

C. The Trial Court Erred In Refusing To Consider Nonstatutory Mitigating Circumstances.

D. The Trial Court Erred In Neglecting To Consider As A Mitigating Circumstance The Possibility That Sweet Or Von Etter, And Not Kelley, Committed The Actual Murder.

E. Florida Statute §921.141(5)(H) Is Inapplicable To Defendant.

F. The Treatment By Florida Courts Of §921.141(5)(H) Has Been So Arbitrary As To Render The Statute Unconstitutionally Vague.

G. The Florida Death Penalty Statute Is Unconstitutional Because It Is Unevenly Applied Based On The Race Of The Victim.

H. The Application Of A Florida Death Penalty Provision Not In Existence At The Time Of The Offense Charged Violates The Constitutional Prohibition Against Ex Post Facto Laws.

I. Death By Electrocution Pursuant to §922.10 Florida Statute (1981) Constitutes Cruel And Unusual Punishment In Violation Of The Eighth And Fourteenth Amendments To The Constitution Of The United States And In Violation Of Article I, Sections 9, 17 Of The Constitution Of The State Of Florida.

J. The Governor Of Florida Selects Those Who Are To Die In An Arbitrary And Capricious Manner.

Following a substitution of counsel, successor counsel filed a supplemental brief of appellant with the Florida Supreme Court on direct appeal. Although the issues were stated in a different manner, the content of the supplemental brief addressed the same issues raised by appellant in his initial brief.

On or about November 20, 1987, appellant filed a motion to vacate pursuant to **Florida Rule** of **Criminal Procedure 3.850.** Thereafter, the State of Florida filed a response to the 3.850 motion and on May 27, 1988, Judge Bentley entered an order denying portions of the motion for post-conviction relief and granting a hearing on other portions (App. 78-81). Prior to the evidentiary hearing, the trial court denied appellant's motions to be declared indigent and to hire experts (P.T. 56).

An evidentiary hearing concerning appellant's **Brady** claim and ineffective assistance of counsel claim was held before Judge Bentley on July 18-19, 1988. On August 11, 1988, Judge Bentley entered an order denying 3.850 relief (App. 83-91). A petition for rehearing filed by appellant was denied by Judge Bentley on September 6, 1988 (App. 92).

Subsequent to the filing of a notice of appeal in this cause, this Honorable Court relinquished jurisdiction to the trial court for entertainment of appellant's motion to interview jurors. Following a hearing, the trial court denied any claim of juror misconduct (App. 102). The appeal of these collateral matters follows.

## STATEMENT OF THE FACTS

The State of Florida will rely on the opinion of this Honorable Court (cited at **Kelley** v. State, 486 So.2d 578 (Fla. 1986)) for a statement of the facts:

> Appellant's conviction represented the resolution of a highly unusual case, raising some unusual issues. Appellant was indicted in December of 1981 for the Maxcy murder, committed in October of 1966. An explanation of this delay in prosecution requires an examination of the figures involved and the evidence adduced at appellant's trial.
>
> John Sweet, involved in an illicit love affair with Irene, the victim's wife, planned the murder so that he and she could live together on Maxcy's inheritance. Towards this end, Sweet contacted a Walter Bennett in Massachusetts and made the necessary arrangements. A price was set, and in early October of 1966 appellant Kelley and one Von Etter carried out the sinister task.
>
> Because prosecutors found the evidence insufficient to proceed against appellant and Von Etter, and because Irene Maxcy received immunity in return for her testimony in the case, only Sweet was originally tried. His first trial resulted in a mistrial, and the conviction resulting from his second trial was reversed on appeal. ***Sweet v. State,*** 235 So.2d 40 (Fla. 2d DCA), ***cert. denied,*** 239 So.2d 267 (Fla. 1970).
>
> At that point, the state felt unable to proceed against Sweet due to the lapse of time and the loss of certain witnesses' testimony. Thus, the case lay dormant for over ten years. This standstill was broken only after Sweet, in 1981, became involved in a criminal situation he found threatening and approached law enforcement authorities in order to seek some protection by receiving immunity in return for his testimony as to a wide variety of crimes.

> It was this testimony upon which appellant's indictment and prosecution in this case were centrally based. Sweet testified as to the details of the planning and execution of the murder, as well as to a purported conversation with appellant several years after the murder in which appellant allegedly said "Boy, [Maxcy] was a powerful guy. I stabbed him three or four times and he kept coming after us, so I had to shoot him in the head." The other central testimonial evidence presented in appellant's trial below was that of one Abe Namia, a private detective originally hired after the murder by Sweet's defense counsel. Namia testified as to some purported statements of Sweet's made in 1967 incriminating appellant. The statements were admitted to rebut an inference of recent fabrication established by the rigorous cross-examination of Sweet as to his extensive immunity and possible motives to fabricate.
>
> Appellant's first trial ended in a mistrial, the jury unable to agree on a verdict. His second trial began in March of 1984. In the verdict presently appealed, the jury found Kelley guilty of first-degree murder and recommended the death penalty. In April 1984, the trial judge filed his written findings of fact in support of the death penalty. He found three statutory aggravating circumstances: prior conviction of a violent felony, section 921.141(5)(b), Florida Statutes (1983); homicide committed for pecuniary gain, section 921.141(5)(f); and homicide committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification, section 921.141(5)(i). As a nonstatutory mitigating circumstance he found that appellant was the only participant in the murder to receive punishment.

As aforementioned, the jury recommended a death sentence by an 8 - 3 vote and the trial court followed that recommendation.

At the **3.850** evidenitary hearing held in this cause on July **18, 1988,** evidence was adduced which pertained to two issues, to wit: a Brady claim and an ineffective assistance of counsel claim. Your appellee will refer to the transcript of the **3.850** evidentiary hearing by the symbol H.T. followed by the appropriate page number. These references will be made in the body of the argument section as to the issues to which they pertain.

In his statement of the facts, appellant makes two contentions which are disputed by your appellee. First, appellant takes issue with this Court's finding that Kelley killed Charles Von Maxcy. Appellant maintains that he was not in Florida during the time at issue, yet this point was tried and the jury rejected appellant's contention by its finding of guilt. Additionally, the trial court and this Honorable Court has sustained that finding of guilt. Secondly, appellant contends, as he did on direct appeal, that he was denied a fair trial where evidence was destroyed prior to trial. Although appellant now maintains that there was "additional" real evidence which was destroyed and not discussed prior to the filing of the Rule **3.850** motion, your appellee denies this allegation and, as will be set forth more fully in the argument portion of this brief, all of the destroyed evidence was discussed and litigated on direct appeal and, therefore, the trial court's summary denial of this claim was wholly proper.

## SUMMARY OF THE ARGUMENT

As to Issue I: Defense counsel was provided with a list of all the lost or destroyed evidence prior to trial and the claim concerning the destruction of the evidence was raised on direct appeal before this Honorable Court. Therefore, the trial court correctly summarily denied the claim as one which was previously raised and determined on direct appeal. Also, appellant cannot relitigate this issue under the guise of a claim of ineffective assistance of counsel.

As to Issue 11: The evidence adduced at the evidentiary hearing in this cause conclusively established that appellant's **Brady** claim was properly dismissed by the trial court. Of all the items claimed to be suppressed by collateral counsel, the only items of evidence which the defense did not have, or have access to, were fingerprint reports and the transcript of Sweet's first trial. The results of the fingerprint report were well known to the defense and were utilized at trial by the defense. The points mentioned in the first Sweet transcript were either already known to defense counsel, admitted by Sweet on the witness stand, or irrelevant as not involving Sweet. Applying the legal standards of **Agurs** and **Bagley**, the defense failed to show that if evidence was suppressed by the state that evidence, if disclosed, would have created a reasonable probability that the results of the trial would have been changed. Thus, the trial court correctly rejected appellant's **Brady** claim.

As to Issue 111: Appellant's claim concerning a prosecutor allegedly showing documents to a witness during a recess was correctly summarily denied by the trial court. This is a claim which could have been raised on direct appeal where all matters necessary to raise the claim appear of record.

As to Issue IV: Appellant claimed that the prosecutor in this case, made improper closing argument at trial. The trial court denied this claim holding that this claim could have been raised, if at all, on direct appeal and, therefore, collateral relief was precluded. Appellant's attempt to circumvent the procedural bar must fail. He claims that the prosecution suppressed materials which formed the basis of his argument and, therefore, the claim could not have been raised on direct appeal. This contention is refuted by the evidence which was adduced at the evidentiary hearing. The prosecution did not suppress anything upon which appellant's prosecutorial comment claim is based.

As to Issue V: There appears to be no provision in law to declare a capital defendant indigent where he employs private counsel rather than the office of the capital collateral representative. In any event, the trial court in the instant case did not preclude a finding of indigency but rather wanted more evidence of that indigency before making that determination. No steps were taken by collateral counsel to satisfy the trial court's requirements and, therefore, he should not be heard now to complain.

As to Issue VI: Even if funds for experts witnesses are available where private counsel, rather than CCR, is involved, the trial court in the instant case did not err by denying funds for experts. The experts were requested by appellant in order help analyze lost or destroyed evidence, the subject of a claim which was previously litigated and therefore not cognizable in Rule 3.850 proceedings. Where no cognizable issue existed, it was not necessary for the trial court to award expert witness fees to delve into matters which were irrelevant for the purposes of the collateral proceedings.

As to Issue VII: Appellant failed to show how he was denied the effective assistance of counsel at the guilt phase of his capital trial. The state submits that appellant has failed to show how counsel acted deficiently in that the performance was outside the wide range of reasonable professional assistance. Even more clear, appellant failed to show how, assuming arguendo that counsel was deficient in his performance, appellant has been prejudiced. There has been no showing that but for the acts or omissions of counsel the result of the proceedings would have been different. There is no question as to the reliability of the determination of appellant's guilt.

As to Issue VIII: The evidence adduced at the "juror misconduct" evidentiary hearing conclusively establishes that no such misconduct occurred. All of the jurors, save the one complaining juror, clearly testified that they were not subjected to outside influences nor did any improprieties occur during the

deliberation of this cause. The trial court's factual findings based upon the evidence adduced at the hearing are supportable in the record.

As to Issue IX: The trial court properly denied appellant's motion to disqualify the judge. There has been no showing of extra judicial bias or prejudice which would necessitate the withdrawal of the trial court.

## ARGUMENT

### ISSUE I

WHETHER THE TRIAL COURT ERRED BY SUMMARILY DENYING APPELLANT'S CLAIM CONCERNING DESTRUCTION OF CERTAIN EVIDENCE PRIOR TO TRIAL.

As his first point on appeal, appellant contends that the trial court erroneously denied appellant's claim concerning the destruction of evidence prior to trial. In its order summarily denying portions of appellant's 3.850 motion, the trial court ruled that this claim was raised on direct appeal and, therefore, was not proper for presentation in a Rule 3.850 motion, citing Ford v. State, 407 So.2d 907 (Fla. 1981) (App. 79). The trial court's summary rejection of this claim was in accord with Florida post-conviction law and the ruling on this claim should, therefore, be affirmed by this Honorable Court.

Appellant claims that there was evidence in addition to that evidence encompassed within the destruction order discussed by this Honorable Court on direct appeal. Thus, appellant opines that the destruction of evidence claim could be raised collaterally where this "additional evidence" was never provided to the defense or, in the alternative, trial counsel failed to fully investigate the extent of lost evidence and were thus ineffective. These contentions do not form the basis for 3.850 relief and do not obviate Florida law which clearly provides that claims previously raised on direct appeal are not cognizable collaterally.

Appellant's contention that the defense was not apprised of the extent of the lost evidence prior to trial is belied by the records of the instant proceedings. The assistant state attorney who prosecuted this case, Mr. Hardy Pickard, advised the court during the **3.850** evidentiary hearing that a list of all the missing evidence was supplied to defense counsel (see, e.g., H.T. 28). Additionally, defense counsel acknowledged in their affidavits that they were aware of the evidence from the Sweet trial and "the fruits of the police investigation in the case" had been destroyed (App. **18,** 22). Thus, appellant's claim that the prosecution withheld the nature and extent of the lost evidence is totally without merit. In his **3.850** motion and in his attempt to adduce evidence at the **3.850** evidentiary hearing, appellant made reference to certain items of evidence which allegedly were not considered by the trial court or by this Honorable Court on direct appeal. Appellant thus contends that the destruction of evidence issue was not fully raised on appeal and is therefore susceptible to **3.850** consideration. Perhaps the most illustrative method of demonstrating that defense counsel knew of all the destroyed or lost evidence and that this issue was fully raised on direct appeal is to consider the supplemental brief of appellant filed during the direct appeal of this cause. We respectfully request this Honorable Court to take judicial notice of the briefs filed on direct appeal, but for the benefit of the Court your appellee will reproduce in its entirety page 17 and the first line of page **18** of appellant's supplemental brief

before this Court on direct appeal. It can plainly be seen that the evidence referred to by appellant in the 3.850 proceedings was, indeed, raised on direct appeal thereby precluding collateral review. The underlined portions of the text are supplied by your appellee and reflect those matters raised by appellant in his 3.850 motion which were allegedly not known to the defense and, hence, not raised on direct appeal:

> Furthermore, with regard to the fact that the appellant did not have blood on him after the alleged crime, any blood related evidence was unarguably material and vital to the appellant's claim of innocence. The appellant had consistently maintained that because no blood was observed on him after the crime, he could not have committed such a blood-soaked crime. Pertinent in this regard is that the destroyed evidence included the brake pedal and floor mats of the victim's car, and scrapings ~~from the car door. If no~~ blood was found in or on the car, and the appellant was alleged to have been in the car immediately after the crime was committed, this would tend to exclude the appellant from guilt. Similarly, there is the obvious evidentiary value of the bloodied carpets and hallways runners, which could have shown that the murder did, or could have had, blood on his feet or elsewhere when he was at or leaving the scene. These carpets and runners were also destroyed. Moreover, certain tests had been made in the victim's house of the sinks and areas where one could wash off blood, which showed no traces of blood. Those test results were destroyed.
>
> Also, certain blood and hair samples found at the scene were potentially exculpatory, along with fingernail scrapings, wall scrapings, projectiles and latent prints. Any one of these items could have been indicative of either the guilt or innocence of the appellant. All were destroyed.

This excerpt from the supplemental brief of appellant on direct appeal demonstrates that the destruction of evidence issue was previously entertained and determined in the Florida Supreme Court. Thus, this claim was properly summarily denied by the trial court. This would be true even if new facts were adduced in support of the previous claim. **Sullivan v. State, 441** So.2d **609** (Fla. **1983).**

Apparently because appellant is aware that defense counsel knew about all the lost or destroyed evidence and that this evidence was raised on direct appeal, he alternatively contends that if defense counsel had knowledge of the extent of the lost or destroyed evidence they were ineffective by not adequately litigating the matter. This contention does not form the basis for **3.850** relief. As the trial court correctly observed in his order denying **3.850** relief, "Claims previously raised on direct appeal cannot be raised under the guise of ineffective assistance of counsel in a collateral proceeding. See **Sireci v. State, 469** So.2d **119** (Fla. 1985), **cert. denied, 478** U.S. **1010** (1986)." (App. **86).** Thus, for the reasons expressed above, the trial court

correctly summarily denied appellant's previously-litigated destruction of evidence claim.[1]

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[1] Although your appellee steadfastly maintains that the destruction of evidence issue is barred from collateral review by virtue of its presentation and determination on direct appeal, even if the claim could have been raised on its merits it would fail. The United States Supreme Court's recent decision in **Arizona v. Youngblood, 488** U.S. __, **109** S.Ct. __, **102** L.Ed.2d **281 (1988),** would compel this conclusion. As in **Youngblood,** there is, as this Honorable Court previously determined on direct appeal, not even a hint of prosecutorial misconduct or bad faith in the instant case. As demonstrated above by the contents of appellant's supplemental brief on direct appeal, none of the missing evidence was withheld from the defense and, coupled with the fact that, as this Court previously determined, the lost or destroyed evidence was completely unlinked to any active or even foreseeable prosecution, there is no basis for success on the merits of this claim.

## ISSUE II

WHETHER THE TRIAL COURT ERRED BY DENYING, AFTER AN EVIDENTIARY HEARING, APPELLANT'S CLAIM THAT THE STATE WITHHELD MATERIAL, EXCULPATORY EVIDENCE.

As his second claim, the appellant contends that he is entitled to relief pursuant to **Brady v. Maryland**, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). **Brady** requires that the state disclose material, exculpatory information that it has in its possession. However, as set forth by the United States Supreme Court in **United States v. Agurs**, 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976), ". . . the prosecutor will not have violated his constitutional duty of disclosure unless his omission is of sufficient significance to result in the denial of the defendant's right to a fair trial." 427 U.S. at 108. The Court in Agurs further stated that: "The mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish 'materiality' in the constitutional sense." 427 U.S. at 109-110. The proper standard of materiality of undisclosed evidence is that if the omitted evidence creates a reasonable doubt of guilt that did not otherwise exist, constitutional error has been committed. This means that the omission must be evaluated in the context of the entire record. 427 U.S. at 112.

The allegations of the 3.850 motion and the evidence adduced at the 3.850 evidentiary hearing did not create a reasonable probability that had it been known of at the time, the result of

the trial would have been different where a reasonable probability is understood to mean a probability sufficient to undermine confidence in the outcome of the case. **United States v. Baqley**, 473 **U.S.** 667, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985); **Arango** v. **State**, 497 So.2d 1161 (Fla. 1986).

Moreover, disclosure requirements for the prosecution principally concern those matters not accessible to the defense in the course of reasonably diligent preparation. **Perry** v. **State**, 395 So.2d 170 (Fla. 1980); **Halliwell** v. **Strickland**, 747 F.2d 607 (11th Cir. 1984). In light of the foregoing general principles of law concerning nondisclosure by the prosecution, an examination of the specific alleged **Brady** violations in the instant case leads to the conclusion that the trial court correctly denied appellant's **Brady** claim.

**Transcript of John Sweet's first murder trial.** Initially, appellant accuses the prosecutor, Mr. Pickard, of leading "Mr. Kelley's lawyers [] to believe that the notes of the transcript were destroyed and thus unavailable (August 23, 1983 letter from Hardy Pickard to defendant's attorney, Ex. Q)". In actuality, exhibit Q, insofar as it pertains to the transcripts of Sweet's first trial, states as follows:

> "I am unaware of the status of the trial transcripts. Generally that is a matter worked out between yourself and the court reporter. You need to contact her directly. Any payment would go directly to her. I would imagine there are several reporters involved."

Thus, the prosecutor did not in any way lead the defense team to believe that it was not possible to obtain a transcript of Sweet's first trial. Thus, the trial court's finding that the state did not deliberately withhold the transcript is sustainable on the record. In any event, as aforestated, matters are not suppressed for **Brady** purposes if the defense had access to it. There has been no evidence presented that the defense was unable to obtain a copy of a public record. Thus, the first transcript of Sweet's trial was not **Brady** material.

Alternatively, the trial court held that, in any event, the matters encompassed within Sweet's first trial transcript were legally immaterial so as to preclude relief on a **Brady** claim. Appellant alleges that the first transcript could have been used to impeach John Sweet with respect to his relationship with Irene Maxcy. The trial court correctly ruled, however, that any testimony regarding Irene Maxcy's sexual misconduct would have been inadmissible for the purpose of impeaching Sweet (App. 84). A witness may not be impeached by proof of statements as to immaterial matters. **Whaley** v. **State**, 157 Fla. 593, 26 So.2d 656 (1946); **Schwab** v. **Tolley**, **345** So.2d 747 (Fla. 4th DCA 1977). In any event, the testimony at the evidentiary hearing was clear that defense counsel were aware of the allegations of sexual misconduct. Mr. Edmund, one of appellant's trial counsel, specifically testified that he was aware of the allegations concerning Irene Maxcy's sexual preferences but that he didn t think he would be able to get it into the trial (H.T. 331-332 .

Thus, where defense counsel knew of the allegations there can be no **Brady** violation.

The trial court ruled that the testimony in the transcript of Sweet's first murder trial concerning taped phone conversations between Sweet and Irene Maxcy was also immaterial for **Brady** purposes. In his **3.850** motion, appellant admitted that testimony of this nature was also produced during the second Sweet trial (and the defense team had a copy of the transcript from the second Sweet murder trial). Nevertheless, appellant argues that Sweet's testimony in his first trial that he told Irene Maxcy that he had never heard of William Kelley would have been valuable impeachment evidence. But, as the trial court correctly ruled, "Sweet's alleged statement to Irene Maxcy that he did not know a 'William Kelley' is rendered irrelevant by Sweet's later testimony that he lied to the police about knowing the defendant." (App. **84**).

**Latent fingerprint report.** The trial judge ruled that appellant never had physical possession of the latent fingerprint reports (App. **84**). However, the trial court also found that the defense was aware, since the beginning of trial, of the results of the fingerprint reports. In fact, the defense was well aware of the fact that none of the fingerprints found at the murder scene matched those of appellant and this fact was elicited during trial and commented upon by defense counsel in closing argument. William Kunstler, one of several attorneys who represented appellant during the trial proceedings of this cause,

testified that he recollected testimony concerning the fact that the fingerprints were sent to the Sheriff's Bureau in Tallahassee and that the report indicated that none of the prints matched the appellant (H.T. 128). Additionally, Mr. Kunstler acknowledged that he commented in closing argument upon the fact that none of the fingerprints lifted from the murder scene or the getaway vehicle matched those of appellant (H.T. 128-129). This fact is not surprising in that John Sweet testified at Kelley's trial that the killer was wearing gloves at the time of the murder (App. 84). Thus, where the defense knew about the fingerprint reports there can be no **Brady** violation.

**March, 1967, police report showing that a state's witness could not positively identify the photograph of appellant.** The trial court found from the testimony presented at the 3.850 evidentiary hearing that it appeared likely that appellant possessed a summary of a police report which did not contain a line about Kaye Carter's identification of appellant's photograph (App. 84). However, your appellee takes exception to this finding when a review is made of the trial transcript. The police report which allegedly was not given to the defense states that the picture of William Harold Kelley looks something like a man who was driving a 1966 Chevrolet with Andrew Etter but that the witness was sure the driver was older than the 26 years of Kelley's description. Ms. Carter described the driver as a white male around 40 years of age, six feet tall with a medium build, dark curly hair, and a husky voice. The police report also

described Ms. Carter's description of Kelley's "wife", to wit: about 34-35, plump, short black hair, medium complexion, and may have three children. Ms. Carter described both Kelley and his wife as being heavy drinkers (App. 58-59). Contrasted with this description is the identical description used by Mr. Edmund in his cross-examination of Kaye Carter at trial. The descriptions are identical leading to the inescapable conclusion that the defense was well aware of the contents of the police report now alleged to have been withheld. See R 683-685; Ex. C to State's Response to defendant's Motion for Post-Conviction Relief. Thus, not only did defense counsel have this report but it was extensively quoted from in the cross-examination of Ms. Carter. In addition, Ms. Carter was never asked to make a courtroom identification of the defendant during trial and Ms. Carter did pick out the defendant's photograph during John Sweet's murder trial. Therefore, even if this police report was not disclosed, and the state contends otherwise, this information would not be material for purposes of a Brady violation.

**Crime scene photographs.** No crime scene photographs were deliberately withheld from the defense. Although photographs of the crime scene were introduced in evidence, others were not. However, the photos that were not introduced were in no way withheld from the defense but, rather, they could have been examined by the defense at any time they desired. Even if the defense had, pre-trial, viewed the four photographs that were not introduced at trial (and the failure to do so was not because the

state withheld them), there is no reasonable probability that the outcome of the trial would have been different. As the trial court found in its order denying **3.850** relief, evidence was adduced at trial based upon the photographs that were admitted which showed the "great deal of blood" that existed at the crime scene. Appellant contended in his **3.850** motion that the photographs were important because they would have showed the extent of the blood and, therefore, the defense could assert that since no blood was found on Kelley he could not have committed the crime. However, this argument was made to the jury based upon the evidence which was adduced at trial. Even Mr. Kunstler acknowledged at the **3.850** evidentiary hearing that argument was made concerning the lack of blood on Kelley and Etter (H.T. **131).**

**John Sweet's immunity.** Appellant contends that, somehow, the immunity grants received by Kelley in Florida and Massachusetts were entwined. There was no evidence adduced at the evidentiary hearing to support this allegation. The fact that Sweet received grants of immunity in both Florida and Massachusetts was well known by the defense team. In fact, Sweet's cross-examination by Mr. Edmund concerning all the Massachusetts crime for which Sweet received immunity took many pages of the trial transcript. There is simply no basis for even the suggestion that information concerning the immunity grants was withheld from the defense.

**Alleged agreement to preclude Roma Trulock from testifying at appellant's trial.** Appellant alleges that the state

suppressed evidence of a state agreement with Sweet that Roma Trulock would not testify at appellant's trial or otherwise be involved in appellant's prosecution. The state denies this contention and, as the trial court found, there was no deal or agreement by the state not to call Mr. Trulock (App. 85). At the time the Kelley prosecution was proceeding, Mr. Trulock had long since retired from law enforcement and was no longer living in the State of Florida. Appellant's suggestion that the state withheld evidence from the jury by not calling Trulock to testify is patently ridiculous. The state is under no obligation to call any particular witness to the stand. If Trulock's testimony was *so* significant the defense could have put him on the stand. In fact, Mr. Trulock was listed as a defense witness on the discovery response. There is simply no basis for this claim.

Applying the legal standards of **Agurs** and **Bagley**, your appellee submits that the defense failed to show that if evidence was suppressed by the state that evidence, if disclosed, would have created a reasonable probability that the results of the trial would have been changed. The only items of evidence which the defense did not have, or have access to, were the fingerprint report and the transcript of Sweet's first trial. The results of the fingerprint report were well known to the defense and were utilized at trial by the defense. The points mentioned in the first Sweet transcript were either already known to defense counsel, admitted by Sweet on the witness stand, or irrelevant as not involving Sweet. The trial court correctly denied appellant's **Brady** claim.

## ISSUE III

WHETHER THE TRIAL COURT ERRED BY SUMMARILY DENYING APPELLANT'S CONTENTION THAT AT A RECESS DURING THE DEFENSE'S CROSS-EXAMINATION, THE PROSECUTOR IMPROPERLY SHOWED AND DISCUSSED WITH AN IMPORTANT WITNESS RECORDS WHICH DEFENSE COUNSEL WAS USING TO IMPEACH THAT WITNESS.

As this third claim, appellant presents an issue which is classically not reviewable in collateral proceedings. In his order summarily denying this claim, the trial court relied upon this Honorable Court's decision in Ford v. **State**, **407** So.2d **907** (Fla. **1981**), for the proposition that collateral attack is not an appropriate remedy where a defendant alleges grounds for relief which were matters known at the conclusion of the trial and could have been raised on appeal (App. **79**, 80). The trial court's ruling was correct in that Florida law is clear that issues which could have been, should have been, or were raised on direct appeal are unavailable for collateral review. See, e.g., **Blanco v. State**, **507** So.2d **1377** (Fla. **1987**).

## ISSUE IV

WHETHER THE TRIAL COURT ERRED BY SUMMARILY DENYING APPELLANT'S CLAIM WHICH ALLEGED IMPROPER CLOSING ARGUMENT BY THE PROSECUTOR.

Appellant next claims that the trial court erred by summarily denying his claim which alleged improper comments by the prosecutor. The trial court, relying upon **State v. Washington, 453** So.2d **389** (Fla. **1984)** (trial court erred in granting motion for post-conviction relief since the issue of prosecutorial comment could have been raised on appeal), and **Adams v. State, 380** So.2d **423** (Fla. **1980)** ("the asserted issues concerning prejudicial argument **. . .** could have been raised in the first appeal to this Court and these matters will not support a collateral attack"), held that this claim is clearly one which should have been raised on appeal. For the reasons expressed below, the trial court's rejection of this claim was proper.

The first basis for appellant's argument concerns the comments of the prosecutor concerning the identification of appellant by Kaye Carter. This claim has been discussed under issue 11, supra, with respect to the purported suppression of this information from the defense. As observed above, the defense team had the information concerning Ms. Carter's inability to positively identify appellant, although she did say that the photograph of Kelley looked like the man she saw at the motel. Thus, there is nothing outside of the record which was needed in order to present this purported claim on direct appeal.

Appellant next contends that the prosecutor misstated facts concerning statements made by appellant to the arresting FBI agent. Appellant contends, as he did at trial, that the inculpatory statements made by appellant were done so because of newspaper accounts of appellant's involvement in the Maxcy murder. Appellant now opines that because Mr. Pickard, the prosecutor, had information that in **1981** at least one Boston area newspaper published stories concerning Kelley's involvement in the Maxcy murder, such information compels the conclusion that Kelley learned of his involvement from the newspaper rather than from first hand knowledge. Appellant's contention is totally without merit when it is considered that no evidence was adduced, either at trial or at the **3.850** evidentiary hearing, that appellant read any newspaper articles whatsoever. Without that predicate, appellant's theory expressed in his closing argument is simply without a basis in fact.

Lastly, appellant contends that Mr. Pickard misstated the circumstances concerning the immunity received by John Sweet in both Florida and Massachusetts. As aforestated in this brief under issue 11, supra, there simply was no relationship between the Massachusetts and Florida immunities. Rather, appellant is attempting collaterally to continue his attack upon John Sweet which was commenced at trial. That attack did not succeed at trial or on appeal and it is not the basis for **3.850** relief where there was no entwining of the immunities granted in the two states.

Inasmuch as the prosecution suppressed nothing upon which appellant's prosecutorial comment claim is based, this claim should have been raised, if at all, on direct appeal, and the failure to do so precludes collateral relief.

## ISSUE V

WHETHER THE TRIAL COURT ERRED BY FAILING TO DECLARE APPELLANT INDIGENT.

Appellant next contends that the trial court erred by failing to declare him indigent.[2] For the reasons expressed below, appellant is entitled to no relief on this point.

Appellant bases his argument on the results of an affidavit filed pursuant to **Section 27.52(1), Florida Statutes (1987).** This section of our statutes provides the criteria for determining whether a criminal defendant is entitled to court-appointed counsel via representation by a public defender. In **Jackson v. State**, 452 So.2d 533 (Fla. 1984), this Honorable Court held that 3.850 proceedings are civil in nature rather than criminal. Thus, in **Jackson**, the defendant was not entitled to a competency determination concerning his ability to assist counsel in preparing collateral proceedings. Similarly in the instant case, the rules applicable to an indigency determination in a criminal cause are not applicable to 3.850 proceedings. In fact, where a defendant is not entitled as a matter of constitutional law to have court-appointed counsel in collateral proceedings, it

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[2] It is questionable, at best, whether appellant may even appeal, at this time, the failure of the trial court to find appellant indigent. **Rule** 3.850 provides that an appeal may be taken to the appropriate appellate court from the order entered on the motion as from a final judgment on application for writ of habeas corpus. Your appellee queries as to whether the failure to find a collateral defendant indigent is an issue which may be appealed.

certainly follows that determinations of indigency in criminal cases are inapplicable.[3]

Your appellee's contention that an indigency determination was not required in the instant case is bolstered by the capital collateral representative enabling legislation. If a criminal defendant in the State of Florida is indigent, counsel is provided via the office of the capital collateral representative. It is only in cases where there is a conflict that counsel is substituted and, in that event, appointed counsel is paid from dollars appropriated to the office of the capital collateral representative. **Section 27.703, Florida Statues (1987).** The office of the capital collateral representative is the exclusive means of representation for indigent capital defendants. Therefore, a trial court need not make an indigency determination unless it is to appoint the office of the capital collateral representative.

Assuming arquendo, that appellant had the right to seek funds to pay for his private counsel, a proposition which your appellee does not concede, the trial court in the instant case did not err. The trial court did not preclude a finding of indigency but, rather, wanted more evidence of that indigency before making that determination. Inasmuch as **Section 27.52** is applicable only to appointment of counsel in criminal cases, the

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[3] See **Murray v. Giarrantano** 492 **U.S.** __, 109 S.Ct. __, 106 L.Ed.2d 1 (1989); **Pennsylvania** v. **Finley,** 481 **U.S.** 551, 107 S.Ct. 1990, 95 L.Ed.2d 539 (1987).

trial court should be free to set whatever standards he deems reasonable in making the indigency determination. The trial court below did not absolutely preclude a finding of indigency but, rather, chose to satisfy himself that appellant was, indeed, indigent. No further steps were taken by collateral counsel to satisfy the trial court's requirements and, therefore, he should not be permitted to complain on appeal.[4]

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[4] It is also interesting to observe that collateral counsel disavowed his claim for funds for an attorney at the "juror misconduct" proceedings. Mr. Wilson, collateral counsel for appellant, stated, "The only inquiry that was made was a hearing in Bartow where we asked for funds for experts. We did not ever ask for any funds for an attorney." (I.T. 7).

## ISSUE VI

WHETHER THE TRIAL COURT ERRED BY DENYING APPELLANT'S REQUEST FOR FUNDINGS FOR EXPERT WITNESSES.

In a claim similar to that immediately above under issue V, supra, the defendant claims that the trial court should have provided funds with which to hire expert witnesses. Again, your appellee questions the propriety of presenting such a claim in an appeal from the denial of a **3.850** motion. In any event, for the reasons expressed below, appellant's point must fail.

Appellant contends that the CCR enabling legislation is an indication that expert witness fees may be provided to a defendant during the litigation of his **3.850** motion. Yet, in the instant case, we are not concerned with CCR where that office was not counsel of record during the Rule **3.850** proceedings.[5] Appellant was represented by private counsel, Mr. Wilson. There is no provision for the payment of expert fees, especially where there is no right to counsel in collateral proceedings under the United States Constitution. **Murray v. Giarrantano, 492 U.S. __, 109** S.Ct. __, **106** L.Ed.2d **1 (1989); Pennsylvania v. Finley, 481** U.S. **551, 107** S.Ct. **1990, 95** L.Ed.2d **539 (1987).**

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[5] CCR was inserted as co-counsel when jurisdiction of this cause was relinquished to the trial court to conduct proceedings on appellant's claim of alleged juror misconduct. Up until that time and through the conduct of the **3.850** evidentiary hearing, CCR was not representing appellant.

In any event, it is clear that the trial court properly denied funds for expert witnesses in the instant case, even if such a right exists. Appellant opines that he wanted expert witnesses to advise and testify concerning evidence which was allegedly suppressed or which was destroyed prior to trial. As aforementioned in this brief, nothing was suppressed which necessitated the assistance of expert witnesses. Clearly, the gist of appellant's complaint is that expert witnesss were needed in order to analyze what might remain of the lost or destroyed evidence. However, as set forth above in this brief, the destruction of evidence claim was not properly before the trial court in the Rule 3.850 proceedings and the trial court so ruled. Thus, where no cognizable issue existed, it certainly was not necessary for the trial court to award expert witness fees to delve into matters which were irrelevant for the purposes of the collateral proceedings.

## ISSUE VII

WHETHER THE TRIAL COURT ERRED BY DENYING, AFTER CONDUCTING AN EVIDENTIARY HEARING, APPELLANT'S CLAIM THAT HE WAS DEPRIVED OF THE EFFECTIVE ASSISTANCE OF COUNSEL.

Appellant next contends that he was deprived of the effective assistance of counsel at the guilt phase of his capital trial. As our courts have consistently pointed out since **1984**, claims of ineffective assistance of counsel are controlled by the standards set forth in **Strickland v. Washington**, **466** U.S. **668**, **104** S.Ct. **2052**, **89** L.Ed.2d **674** **(1984)**. This Honorable Court in **Blanco v. Wainwright**, **507** So.2d **1377**, **1381** (Fla. 1987), explained **Strickland** thusly:

> A claimant who asserts ineffective assistance of counsel faces a heavy burden. First, he must identify the specific omissions and show that counsel's performance falls outside the wide range of reasonable professional assistance. In evaluating this prong, courts are required to (a) make every effort to eliminate the distorting effects of hindsight by evaluating the performance from counsel's perspective at the time, and (b) indulge a strong presumption that counsel has rendered adequate assistance and made all significant decisions in the excercise of reasonable professional judgment with the burden on the claimant to show otherwise. Second, the claimant must show that the inadequate performance actually had an adverse effect so severe that there is a reasonable probability that the results of the proceedings would have been different but for the inadequate performance.

Appellant has failed to carry this heavy burden in this case. Not only has he failed to show that trial counsel's conduct fell

outside that wide range of reasonable professional assistance, but he has also failed to show that the results of the trial would have been different.

The state submits that when reviewing allegations of ineffective assistance of counsel, the general presumption is that defense counsel is presumed to have performed competently and effectively within the meaning of the Sixth Amendment. **Strickland** v. **Washington**, supra. Furthermore, the defense is required to prove prejudice. **Strickland** v. **Washington**, supra. Absent a denial of counsel or counsel who entirely failed to subject the state's case to adversarial testing, there must be both a pleading of specific deficiency and a resulting prejudice. See **United States** v. **Cronic**, 466 **U.S.** 648 (1984). Also, as the trial court observed in its order, **Strickland** v. **Washington** requires the court to make every effort to eliminate the "distorting effects of hindsight" and to judge the conduct of counsel from their perspectives at the time of the trial. The trial court also correctly applied the principle that the acts or omissions of counsel which were found to be based on reasonable professional judgment of trial strategy are not considered to be facets of an ineffectiveness claim, citing **Strickland** v. **Washington**, supra; **Downs v. State, 453** So.2d 1102 (Fla. 1984); and **Songer** v. **State**, 419 So.2d 1044 (Fla. 1982) (App. 86). An examination of the entire transcript of the instant case reveals that appellant's counsel acted as advocates. Therefore, the trial court correctly denied appellant's claim of ineffective assistance of counsel.

As a preliminary matter, appellant questions the evidentiary ruling made by the trial court below concerning the failure to admit into evidence an affidavit which was unsigned by attorney Jack Edmund. The affidavit had been prepared by attorneys Barry Wilson and Allen Dershowitz based upon conversations between Mr. Edmund and Marc Nezer, a private investigator for the collateral defense team. Mr. Edmund testified at the **3.850** evidentiary hearing **(H.T. 318-405).** At the hearing, Mr. Edmund testified that he changed his mind about signing the affidavit when, upon reviewing same, he noticed that the matters contained therein did not reflect his recollection of events (H.T. **393-394).** Nevertheless, appellant now contends that the affidavit should have been admitted into evidence because it contained the substance of conversations between Mr. Edmund and Mr. Nezer. Both Mr. Edmund and Mr. Nezer testified at the evidentiary hearing and, in any event, a witness' testimony cannot be bolstered by affidavits. The trial court correctly ruled that an unsigned affidavit was not to be admitted into evidence (App. **89).** Appellant's position that an unsigned affidavit should reflect facts and be more credible than in-court testimony subject to cross-examination is untenable. The trial court's evidentiary ruling was correct.

In his **3.850** motion, appellant made various claims asserting ineffective assistance of counsel. For the reasons expressed below, the trial court correctly denied the ineffectiveness claim.

**Failure to investigate the nature and quantity of the destroyed evidence.** Contrary to appellant's assertions in his motion and at the evidentiary hearing, this area was explored in detail by defense counsel pre-trial via motions to dismiss and again on direct appeal to this Honorable Court. As aforementioned in this brief under Issue I, supra, defense counsel was aware of all the evidence and litigated this issue fully in the Florida Supreme Court. What appellant tries to do now is to argue with the findings of the trial court pre-trial and with the findings and ruling of this Honorable Court on direct appeal. This he cannot do. As this Court has previously held, where an issue has been previously litigated it cannot be relitigated under the guise of ineffective assistance of counsel. **Sireci v. State, 469 So.2d 119 (Fla. 1985), cert. denied, 478 U.S. 1010 (1986).**

**Failure to object to testimony of state experts who presented scientific analysis of destroyed evidence. As** the trial court observed, no testimony was offered at the evidentiary hearing in support of this claim (App. **87).** Moreover, appellant would be entitled to no relief on this claim. He alleges that defense counsel should have objected to the testimony of three witnesses, J.C. Murdock, Heinrich Schmidt (the medical examiner) and James Halligan. J.C. Murdock was not an expert witness. He was one of the officers who helped process the crime scene. He simply gave his observations as to what he observed. The matters testified to by Murdock are those matters which are commonly and

ordinarily related to the jury by crime scene personnel. Therefore, his testimony was not objectionable and the failure to raise an objection does not render counsel ineffective. A review of Dr. Schmidt's testimony likewise shows that there was nothing to which he testified that would be objectionable. Dr. Schmidt's testimony was within the realm of that testimony ordinarily offered by a medical examiner. See, e.g., **Delap v. State**, 440 So.2d 1242 (Fla. 1983); **Endress v. State**, 462 So.2d 872 (Fla. 2d DCA 1985). Nothing was objectionable in Dr. Schmidt's testimony. The trial court found that counsel stipulated to the testimony of James Halligan as a matter of trial strategy (App. 87). The trial court did not err in its ruling. Cf. **Lara v. State**, 475 So.2d 1340 (Fla. 3d DCA 1985).

**Failure to develop defense theories adequately.**

**(a) Failure to adduce evidence that the handwriting on the motel registration record was not appellant's.** As the trial court found, the state never contended that Kelley himself signed the motel registration form (App. 87). Appellant registered with a woman who was purportedly his wife or girlfriend. The handwriting could very well have been hers. The identity of the person who "signed in" is irrelevant. The important fact is that appellant was staying there with co-defendant Andrew Vaughn Etter.

**(b) Counsel stipulated to the state's evidence linking the Mr. and Mrs. William Kelley registered at the Daytona Inn to the motor vehicle owned by Jennie Adams.** Defense counsel cannot

be ineffective when he stipulates to certain evidence when the state could simply put on live witnesses to establish the same fact. A live witness, in fact, did testify and linked appellant to the car, Lt. John Kulik.

**(c) Failure to point out distinctions between the man at the Daytona Inn (as described by Kaye Carter) and the defendant.** In his **3.850** motion, appellant points out alleged discrepancies between how Kaye Carter described appellant in 1967 and how other people who allegedly knew him at the time described him. Appellant then alleges that defense counsel were ineffective for failing to point out these discrepancies. In fact, the discrepancies did come out at trial. Defense counsel had Ms. Carter relate the description she gave to the investigators in 1967, and later had John Sweet describe how Mr. Kelley looked at that time. Defense counsel did not delve into the fact that Ms. Carter did not identify Kelley in the courtroom for good reason. He knew that Ms. Carter had identified Kelley's photo during Sweet's second trial and any attack on her current inability to identify Kelley would only permit the state to be able to ask her about previous identification. Since the state never asked Ms. Carter to point out the defendant in the courtroom it was sound strategy for defense counsel to stay away from that line of questioning.

**(d) Failure to investigate and utilize the inconsistency in the time periods on the evening of the murder.** As the trial court found, no testimony or other proof was offered

on this point at the evidentiary hearing (App. 87). Nor were defense counsel questioned concerning these alleged inconsistencies at the evidentiary hearing. Thus, appellant has failed to prove his claim. In any event, as observed by the trial court, Mr. Edmund did comment on the time factor in his closing argument in an attempt to point out inconsistencies to the jury (App. 87).

**(e) Failure to interview and call witnesses to testify regarding appellant's physical characteristics in 1966.** Appellant contends that he did not fit the physical description of the person Sweet identified as having come to Florida to commit the murder. As the court observed, even a review of the affidavit submitted by the collateral defense team shows how difficult height and weight estimates can be even where those making the estimates allegedly knew the defendant at the time of the murder (App. 87). Margaret McEvoy estimated Kelley was 6' 5" - 6' 6" and weighed 200 - 230 lbs. in 1966 (not too different from Sweet's recollected estimation of 6' 5", 280 - 290 lbs.). Lawrence Casey estimated Kelley at 6' 3" - 6' 4" and 160 - 170 lbs. Francis Walsh's estimate was 6' 6" and 170 - 180 lbs. William Stewart recollection was 6' 6" and 165 lbs. With everyone giving different estimates it cannot be concluded that it was a "serious omission" under **Strickland** for defense counsel not to call these people as witnesses. In his brief, appellant relies upon the decision rendered in **Williams v. State**, 447 So.2d 442 (Fla. 5th DCA 1984), for the proposition that **Williams**

mirrors the instant case. Reliance upon **Williams** is misplaced where the instant case did not involve a credibility clash between John Sweet's version of the facts and William Kelley's version of the facts, This is because William Kelley did not testify and his "version of the facts" was never before the jury for their consideration.

**(f) Failure to obtain and present evidence (newspaper articles) which would explain the defendant's knowledge of the Maxcy killing when he was arrested.** Appellant alleged that because newspaper articles which ran in the Boston area in 1981 detailed the fact that appellant was wanted in the Maxcy case, those articles might have explained how appellant became aware of the information he gave to FBI agent Ross Davis at the time of his arrest. There are two reasons why counsel cannot be faulted, and hence ineffective, for failure to introduce evidence of those newspaper articles. First, a review of the articles shows that no defense attorney would allow a jury to see the things written in those articles. They described appellant as a criminal and delved extensively into his prior crimes by connecting him to narcotics trafficking, armed car robberies and contract killings. Of course, appellant was on trial for a contract killing in the instant case. Secondly, the articles, standing alone, are irrelevant. Relevancy could only be established if there was testimony by Mr. Kelley that he, in fact, read the articles. Mr. Kelley never testified.

**(g) Failure to obtain affidavits and present testimony from three attorneys that appellant contacted them to determine if there was a warrant for appellant's arrest.** A review of the record of the instant proceeding shows that one of these witnesses, Barry Haight, Esquire, was listed as a potential defense witness. However, presentation of this type of testimony, as the trial judge found, could have been quite damaging to the defense in that the jury might have found appellant's conduct inconsistent with that of a law-abiding citizen (App. **88**). In any event, the fact that appellant may have contacted several attorneys in **1982** or **1983** and asked them to attempt to determine if he was wanted for a Florida murder is inconsequential. Even assuming appellant was aware he was wanted, that fact changes nothing. The testimony of FBI agent Davis would have been the same.

**Presentation of evidence to the jury *of* appellant's prior crimes, bad acts, and other prejudicial information. A** review of the entire trial record and the testimony of John Sweet makes it abundantly clear why trial counsel introduced this evidence. It was necessary for defense counsel to try and show why John Sweet may have a motive to lie about Kelley. By showing that Kelley and Sweet had been involved in other criminal activity together and had had problems, it could be argued that Sweet was simply "getting back" at Kelley. Sweet also testified he was afraid of Kelley. Defense counsel could well have concluded that evidence of Kelley and Sweet being involved together in dangerous crimes

in the past may impeach Sweet's claims of fear. In essence, this was a matter of trial strategy. Perhaps the best reasoning for offering this type of evidence was offered by trial counsel Jack Edmund at the evidentiary hearing held in this cause:

> [MR. PICKARD] Q. Were there certain things that you attempted to do or go into with Mr. Sweet that were not gone into in the first trial?
>
> [MR. EDMUND] A. Yeah. I don't know whether we determined or I determined. But it got determined and I intended doing it. So I was the ultimate person to determine it--that I wanted to disclose to the jury every bad facet I could of Sweet.
>
> I wanted to disclose to the jury a reason for Sweet wanting Billy Kelley off the street. I wanted to disclose to the jury the ability that Sweet would have to perjure himself becuase of his other bad traits of character.
>
> And I decided to go just as far as the judge would allow me to go on specific items of bad character, illegal activities, confrontations with Billy or with others, child prostitution, the whole thing.
>
> I wanted to attempt to paint Sweet as black and bad a character as I could in hopes that the jury would not give any credit to his tesitmony.
>
> Q. All right. Did that entail bringing out some things about Mr. Kelley?
>
> A. Well, sure. I wanted to bring out anything I could that was of an adverse nature between Kelley and Sweet to justify the contention I was taking and frankly think is correct, that Sweet found the fall guy.
>
> He was in trouble. I'm sure the law up there gave him Kelley's name. And I felt from the very beginning that Sweet took it from that point on.

> Q. There has been some allegations about you bringing out in voir dire and I guess later in the exmaination of Mr. Sweet things such as Mr. Kelley's involvement in other illegal activities, narcotics, fights, knives.
>
> A. I couldn't exactly put a plaster saint in the same company with Sweet and expect the jury to give any consideration to their being animosity. If it was a trial tactic that was wrong, it's trial tactic that was wrong.
>
> Q. Did you consider it to be a trial tactic?
>
> A. Of course.
>
> (H.T. 324-325)

As the trial court found, trial counsel did an excellent job of impeaching John Sweet's character at trial. The presentation of the evidence now complained-of was a reasonable trial tactic in an attempt to impeach Sweet.

**Failure to object to a potentially coercive jury deadlock instruction.** Appellant complains, as he did on direct appeal, that the **Allen** charge given in the instant case is defective. Although appellant attempts to discuss the merits of this claim, he raises the claim in the guise of ineffective assistance of counsel. This Honorable Court rejected this issue on direct appeal and, therefore, it cannot be re-raised in the guise of ineffective assistance of counsel. **Sireci**, supra.

**Failure to adequately impeach John Sweet's credibility.** Under this sub-claim, appellant appears to be arguing that if

trial counsel had 100 ways to impeach a witness and only uses 95 he is ineffective. The law does not condone the use of hindsight to support this type of proposition. For the benefit of this Honorable Court, a review of John Sweet's trial testimony will conclusively establish that Sweet was impeached about as well as a witness could be:

> Sweet admitted he lied at his two (2) prior trials. "I lied many times." (R 600).
>
> Sweet admitted he lied about not knowing Kelley, lied about not knowing Von Etter, and lied about not knowing about Von Maxcy's death. "I lied on every questions that was asked". (R 601).
>
> Sweet admits receiving immunity for hijacking and loan sharking in Massachusetts. (R 606)
>
> Sweet admits being given immunity in Florida (R 608).
>
> Sweet was asked, "You received immunity from prosecution for every offense that you talked to the law enforcement people about, didn't you?" Sweet's answer: "I did, yes" (R 614).
>
> Sweet admits to receiving immunity for First Degree Murder in Florida (R 614).
>
> Sweet admits receiving immunity for committing perjury at his two (2) trials in Florida (R 615).
>
> Sweet admits receiving immunity for loan sharking in Massachusetts (R 615).
>
> Sweet admits receiving immunity for prostitution in Massachusetts (R 617).
>
> Sweet received immunity for narcotics violations (R 625).
>
> Sweet received immunity for larceny (R 626).
>
> Sweet received immunity for arson (R 627).

Sweet received immunity for bribery of a police officer (R **628).**

Sweet received immunity for bookmaking **(R 628).**

Sweet received immunity for false reports to police (R **629).**

Sweet received immunity for counterfeiting (R **632).**

The following questions and answers occurred on page **627:**

*Q.* During your first trial you denied knowing Bill Kelley, didn't you?

A. I did.

*Q.* When you were talking to the investigators prior to your first trial, you denied knowing Bill Kelley, didn't you?

A. I did.

Q. During your second trial you denied knowing Bill Kelley, didn't you?

A. I did.

The following question and answer occurred on page **638:**

Q. When Bill Kelley beat you up and you went to the hospital, you even lied to the hospital about how it happened, didn't you?

A. Yes.

The following questions and answers occurred on page **639:**

*Q.* Could you estimate for this jury how many lies you have told under oath, sir, over the period of the last seventeen and a half or eighteen years?

A. Well, since I have known Bill Kelley, any involvement there, I have lied about knowing the man.

Q. I am talking about the number of lies, would they be in the hundreds of lies that you have told under oath, Mr. Sweet?

A. Well, it would be both trials. I'm sure it was.

Q. It was question after question after question in your first trial that you lied about, wasn't there sir?

A. Yes sir.

Q. And you were under oath?

A. Yes.

Q. And you raised your hand to swear to God to tell the truth, the whole truth, just like you did today?

A. Yes.

Q. And you lied?

A. Yes sir.

Q. You lied to save your life?

A. Yes sir.

The following questions and answers occurred on page **640:**

Q. Didn't they (police)walk up to you dozens of times before the trial and twice during the trial and take some photographs and walk up to you with **8** or 10 photographs and drop them down in front of you and said do you know any of these fellows and you said Walter Bennett was the only one you knew?

A. Yes, I did.

Q. And didn't they point out Bill Kelley's photograph to you and you didn't remember his face, Mr. Sweet?

A. I recognized it when they told me it was Bill Kelley.

Q. And you denied knowing it?

A. I don't believe *so,* not at that time.

Q. You admitted knowing Bill Kelley?

A. I didn't admit it. I saw the picture.

Sweet was questioned about his being in the Witness Protection Program and benefits therefrom (R 648-652).

Sweet filed $250,000 suit against Irene Maxcy (R 653).

Sweet never gave Kelley and Von Etter a photograph of Maxcy so that they could identify him (R 655).

Sweet was impeached with contradictions between his current testimony and his testimony in Kelley's first trial as to whether Irene Maxcy went to Boston with Sweet when he paid $15,000 to Walter Bennett (R 659).

Sweet was impeached with contradictions between his current testimony and his testimony in Kelley's first trial as to how much money Sweet got from Irene Maxcy after the murder (R 660).

Sweet admitted he did not like Kelley (R 666).

Sweet and Abe Namia's testimony are made to look inconsistent when Sweet states he did not tell Namia about Kelley's involvement (R 672).

The above recitation is offered to show that defense counsel did an excellent job in impeaching John Sweet. The fact that present

counsel can *go* through the transcripts and find several other things that could be used for impeachment does not make trial counsel ineffective. The bottom line is whether these other areas would have made Sweet look less credible than he already had been made to look, and thereby create a reasonable probability that the outcome of the trial would have been different. In no way can it be concluded that the additional areas referred to by appellant in his brief would have made any difference.

Appellant also contends that counsel was ineffective for failing to object when the trial court did not accomodate the jury's question about Sweet's immunity. The jury question issue was determined and decided adversely to the defendant on direct appeal. Thus, where the underlying issue has no merit, counsel cannot be held ineffective. This claim, not unlike others raised collaterally, cannot be re-raised in the guise of ineffective assistance of counsel. **Sireci**, supra.

**Failure to move for a change of venue.** As to this sub-claim, the trial court ruled as follows:

> Both defense attorneys testified that the venue matter was discussed and rejected for strategic reasons. In addition, a review of the voir dire shows that there was no problem in seating a jury in Highlands County. This may have been due to the fact that Highlands County has experienced an explosive population growth, mostly due to a recent influx of retirees. Consequently, a large number of jurors did not live in the county at the time of the murder in 1966. Mr. Edmund also testified that the decision to waive alternates was a matter of trial

> tactics. No jurors became incapacitated. The court also notes that the defense used much less than a number of peremptory challenges allowed. (App. **89)**

The trial court's ruling was correct, especially where case law is clear that a tactical decision such as that made in the instant case cannot be challenged as ineffectiveness. See **Buford** v. **State, 492** So.2d **355** (Fla. **1986); Songer** v. **State, 419** So.2d **1044** (Fla. **1982).**

Based upon the foregoing discussion, it is clear that appellant has not met the burden required under **Strickland** of showing that trial counsel was guilty of serious and substantial deficiencies and that there is a reasonable probability that had trial counsel done the things now mentioned the outcome of the cas would have been different. Your appellee submits, therefore, that the trial court correctly denied appellant's ineffective assistance of counsel claim.

## ISSUE VIII

WHETHER THE TRIAL COURT ERRED BY DENYING APPELLANT'S CLAIM OF PREJUDICIAL JUROR MISCONDUCT.

On the evening that the 3.850 evidentiary hearing adjourned in the instant case, Robert Hatten Grey, Chief Assistant Public Defender for the Highlands County branch of the Tenth Judicial Circuit, and Frank Oberhausen, Jr., a private practioner, were in the Sir Walter's Lounge in Sebring, Florida (I.T. 144-145). The two lawyers were discussing the Kelley 3.850 proceeding inasmuch as they had generated interest in the legal community (I.T. 118, 145-146). The attorneys testified that Glen Thomas Barret, Jr., approached them while they were at the bar (I.T. 116, 118, 146). Mr. Barret stated that he overheard the attorneys discussing the Kelley case and advised that he had been a juror and had some problems (I.T. 153). Basically, Mr. Barret told the attorneys about 3 things that bothered him about the trial, to wit: (a) a female juror (later identified as Susan [Hargrove] Ricketts), advised Mr. Barret that during trial she and her mother read the paper and acquired some information therein (I.T. 122-124); (b) a juror or jurors may have been playing tic-tac-toe (I.T. 125); and (c) one female juror changed her vote in order to attend a social engagement that she had (I.T. 125). These allegations were the subject of a hearing held in this cause upon relinquishment of jurisdiction by this Honorable Court.

At that evidentiary hearing, Mr. Barret testified that there were 3 things that bothered him about the trial. The first of these was that the youngest female juror stated that she read the paper when she and Mr. Barret had lunch together (I.T. 34). Mr. Barret stated that the juror (later identified as Susan [Hargrove] Ricketts) said something about a lot of money being found on appellant's person when he was picked up in Tampa (I.T. 35). However, Mr. Barret testified that he "really didn't know if that was brought up in the trial or she told me that in the paper" (I.T. 35). The second thing that bothered Mr. Barret was that this same juror was not taking notes but instead was drawing something. This allegation was tempered somewhat by Mr. Barret when he testified that he had previously stated that the juror could have been playing tic-tac-toe or something and that he really didn't know. Rather, the notion that jurors were playing tic-tac-toe was blown out of proportion (I.T. 36-37). Lastly, Mr. Barret said that the third thing that bothered him was that the same juror changed her vote so that she could be at the Lake Placid Skating Rink at 7:00 (I.T. 39). At the time of this alleged conduct, the vote was 11 to 1 in favor of conviction (I.T. 38). When the possibility was expressed to the juror that deliberations might have to occur over the weekend another vote was called for which was resulted in the 12 to 0 required for conviction (I.T. 39). Mr. Barret testified that this was the same juror who he allegedly had lunch with at the Cat House where he was told about the newspaper accounts of the proceedings (I.T. 39).

The remaining 11 jurors were interviewed before the court. All of the jurors denied ever reading, watching, or listening to any media account of the case or about the defendant or about the trial (I.T. 59-104). All of the jurors denied ever having had lunch with Mr. Barret at the Cat House (I.T. Id.) In particular, your appellee refers this Honorable Court to the testimony of Susan Ricketts, the juror who allegedly was at the center of the impropriety (I.T. 59-61, 80-84). Even upon being reexamined at the hearing, juror Ricketts denied any wrongdoing or impropriety during her service as a juror (I.T. 81-84).

The evidence adduced at the evidentiary hearing concerning juror misconduct conclusively established that no juror misconduct or impropriety occurred in the case. The state's suggestion that Mr. Barret's claims were "a bunch of bar talk" (I.T. 213) might have some validity. There was simply no evidence from any of the other jurors in this cause that the matters to which Mr. Barret testified actually occurred. The trial court observed the witnesses and applied the usual standards of credibility (I.T. 219). The court found that Mr. Barret's in-court testimony did not rise to a level that would justify setting aside the verdict (I.T. 219). Even that in-court testimony was not accepted by the trial court after hearing the testimony of the other jurors (I.T. 220). Based upon the testimony that was adduced at the hearing and the clear, unequivocal denials by all members of the jury, save Mr. Barret, that any improprieties occurred, the trial court's denial of the

juror misconduct claim is more than supportable on the record. Appellant's claim eight should be rejected by this Honorable Court.

## ISSUE IX

WHETHER THE TRIAL COURT ERRED IN FAILING TO DISQUALIFY HIMSELF FROM THE "JUROR MISCONDUCT" PROCEEDINGS.

As his final claim on appeal, appellant contends that the trial court erred by failing to disqualify himself from presiding over the "juror misconduct" proceedings. For the reasons expressed below, the trial judge correctly denied the motion to disqualify.

Your appellee submits that any comments of Judge Bentley did not reflect extra judicial bias, prejudice or sympathy, but rather were statements generated by Judge Bentley's knowledge of the trial proceedings that he conducted. A bare reading of the **3.850** evidentiary hearing transcript reveals that counsel for appellant was very forceful and provocative in his presentation before the court. The trial court was forced many times to warn counsel of proper courtroom procedure and etiquette. These types of matters did not compel the necessity to disqualify a judge. If *so,* any attorney willing to risk possible disciplinary action could provoke a judge during a proceeding or to have that judge disqualified. The instant case is controlled by the decision of this Honorable Court in Jones v. **State, 446** So.2d **1059** (Fla. **1984).** In **Jones,** the trial court had complimented defense counsel on the quality of the work done at trial, yet that judge was the same judge who was to hear the defendant's **3.850** motion which alleged ineffective assistance of counsel. This Court held

that merely because the judge had previously heard the evidence and was to be final arbitor of the 3.850 motion, those facts were not legally sufficient to require disqualification. See also, **State ex rel Schmidt v. Justice**, 237 So.2d 827 (Fla. 2d DCA 1970); **Moser v. Coleman**, 460 So.2d 385 (Fla. 5th DCA 1984); **Dempsey v. State**, 415 So.2d 1351 (Fla. 1st DCA 1982), cases cited by Judge Bentley in his order denying the motion to disqualify (App. 101). The trial court did not err in denying the motion to disqualify.

## CONCLUSION

Based upon the foregoing reasons, arguments and citations of authority, the orders of the trial court denying **3.850** relief should be affirmed.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

**ROBERT J. KRAUSS**
Assistant Attorney General
Florida Bar #: **238538**
**1313** Tampa Street, Suite **804**
Park Trammell Building
Tampa, Florida **33602**
**(813) 272-2670**

COUNSEL FOR APPELLEE

## CERTIFICATE OF SERVICE

**I** HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Barry P. Wilson, **59** Temple Place, Boston, Massachusetts **02111**, and to Billy Nolas, Office of the Capital Collateral Representative, 1533 South Monroe Street, Tallahassee, Florida **32301**, this 30th day of October, **1989**.

OF COUNSEL FOR APPELLEE