IN THE SUPREME COURT OF FLORIDA

CASE NO. **73,088**

WILLIAM H. KELLEY,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

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

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This proceeding involves the appeal of the circuit court's denial of Mr. Kelley's motion for post-conviction relief. The motion was brought pursuant to Fla. R. Crim. P. **3.850.** As the facts discussed in this brief demonstrate, this is a unique and complex case, involving an offense taking place over fifteen years before Mr. Kelley's prosecution, a deal between the State and a "witness" (Sweet) whom the State had originally (unsuccessfully) prosecuted twice for this very offense, two trials involving Mr. Kelley (the first resulting in a deadlocked jury), a jury's stated on-the-record concerns regarding the case at the second trial, Rule **3.850** evidentiary proceedings, and serious questions concerning prosecutorial overreaching and misconduct, discovery violations, ineffective assistance of trial counsel, and juror misconduct, among other issues, As an aid to the court, counsel have prepared an appendix which includes pertinent record excerpts. The appendix shall be cited in this brief as "App. ___ "

The transcript of the March, **1984,** second trial (resulting in Mr. Kelley's conviction) shall be cited as "T. ___," with the appropriate page number noted thereafter. The Exhibits to the Memorandum of Law submitted in support of Mr. Kelley's Rule **3.850** motion shall be cited as **"Ex.** ." Many of these exhibits were introduced at the Rule **3.850** evidentiary hearing before the lower court. The transcript of the preliminary hearing conducted before the lower court with regard to Mr. Kelley's motion to be declared indigent and for funds to retain an expert prosecuting attorney and forensic expert shall be cited as "P.T. ___." The transcript of the evidentiary hearing before the Rule **3.850** trial court, conducted on July **18-19, 1988,** shall be cited as "H.T. ___" with the appropriate page number noted thereafter. **The** transcript of the hearing conducted on April 27, **1989,** with regard to Mr. Kelley's motion to interview jurors shall be cited as "I.T. ___." All other references in this brief shall be self-explanatory, or will be otherwise explained.

REQUEST FOR ORAL ARGUMENT

Mr. Kelley has been sentenced to death. The resolution of the issues involved in this action will therefore determine whether he lives or dies. This Court has not hesitated to allow oral argument in other capital cases in a similar procedural posture. A full opportunity to air the issues through oral argument would be more than appropriate in this case, given the seriousness of the claims involved and the stakes at issue, and Mr. Kelley through counsel accordingly urges that the Court permit oral argument.

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STATEMENT OF THE CASE

A. INTRODUCTION

This is a unique and complex case. The offense at issue occurred in 1966. A man by the name of John Sweet was then prosecuted for this murder, twice. The first trial ended in a mistrial. The second resulted in a murder conviction which was reversed on appeal. Sweet v. State, 235 So. 2d 40 (Fla. 2nd DCA 1970). The State did not proceed further against Sweet. Fifteen years later Sweet found himself again in trouble with the authorities. He then cut a deal: in exchange for testimony and cooperation against Mr. Kelley, his (Sweet's) problems would be alleviated. "It was this [Sweet's] testimony upon which [Mr. Kelley's] indictment and prosecution in this case were centrally based." Kelley v. State, 486 So. 2d 578, 580 (Fla. 1986). Sweet's deal was made in 1981 and continued throughout these proceedings.

Mr. Kelley thus was tried in 1984 for this 1966 offense. Mr. Kelley's first trial ended in a mistrial because the jury could not reach a verdict. Mr. Kelley's second trial took place in March of 1984. The jury deliberated at length and then "announced that it had reached an impasse." Kelley, 486 So. 2d at 583. The jury was given an "Allen charge," only to "subsequently inquir[e] of the court whether 'John J. Sweet received immunity . . . for first degree murder and perjury . . . and if he had anything to gain by this testimony.'" Kelley, 486 So. 2d at 583. (This question was not answered by the trial court. See text, infra.) The jury deliberated further, then convicted. Mr. Kelley was sentenced to death in April of 1984.

B. STATEMENT OF THE FACTS

For purposes of this brief, Mr. Kelley will rely upon the facts as stated in this Court's opinion on direct appeal, 486 So. 2d 578, with the following exceptions, exceptions borne out by the Rule 3.850 record:

1. The Court stated that Mr. Kelley killed Charles Von Maxcy. Kelley, 486

So. 2d at 579. Mr. Kelley vehemently maintains that although there was evidence that an individual claiming to be "William Kelley" was registered at the Daytona Inn at the time in question, Mr. Kelley was not that individual and was nowhere in Florida during the time at issue.

2. The Court noted on direct appeal that the only real evidence destroyed by the State in this case was a bullet, a bloody bedsheet, and a shred of the victim's shirt. Id. at 580. In his Rule 3.850 motion, Mr. Kelley presented to the trial court two extensive lists of evidence. The first list involved evidence from John Sweet's trial which was destroyed pursuant to a 1976 court order allowing the destruction of evidence (App. 1-3, 4). Also destroyed were numerous tape recordings of telephone conversations between John Sweet and Irene Maxcy (see App. 27-38, excerpts from trial transcripts of John Sweet's first and second trials regarding the tape-recorded conversations). The second list represents the actual crime scene evidence, which was in the custody of the Florida Department of Law Enforcement (App. 5-17). This evidence was not presented at John Sweet's trial and was not covered by the 1976 destruction order.

The facts relevant to the issues presented herein shall be more fully discussed in the body of this brief, as they relate to the individual claims presented.

C. PROCEDURAL HISTORY

Mr. Kelley was charged by a single-count murder indictment on December 16, 1981, and was arrested on this charge on June 16, 1983. As noted, Mr. Kelley's first trial ended when the jury was unable to agree upon a verdict. Jury selection in the second trial commenced on March 26, 1984. As this Court noted on direct appeal, the prosecution was "centrally based" on Sweet's testimony. Kelley, 486 So. 2d at 580.

During deliberations, the jury's foreperson announced that the jury was "at an impasse." The court gave an "Allen charge" (T. 923-925). The jury then sent a note requesting that the judge inform them whether Sweet received immunity for first

degree murder and perjury "before he gave information on the Maxcy trial, and if he had anything to gain by his testimony." Kelley, 486 So. 2d at 583 (T. 925, 1230). The judge refused to answer the question (T. 927-933, 936). The jury then returned a verdict of guilt (T. 937-1231) and voted 8-3 for death, a sentence thereafter imposed by the judge in April of 1984. Mr. Kelley's conviction and sentence were affirmed on direct appeal, with Justice Overton noting his concern "that our system of justice has allowed Sweet, who instigated, planned, and directed this murder, to receive total immunity from prosecution . . ." Kelley, 486 So. 2d at 586.

Mr. Kelley filed a motion to vacate, see Fla. R. Crim. P. 3.850, on November 20, 1987. The State responded and Mr. Kelley replied. The trial court denied certain portions of the motion and granted an evidentiary hearing on two issues: (1) the prosecution's suppression of evidence favorable to the defense; and (2) trial counsels' ineffectiveness.

A preliminary hearing was held on May 27, 1988, with regard to Mr. Kelley's Motion To Be Declared Indigent, Motion For Funds To Hire an Expert Prosecuting Attorney and Motion For Funds To Hire A Forensic Expert. At the hearing, the defense also made an ore tenus motion for the court to appoint two criminal defense lawyers to analyze and testify as to the quality and competency of trial counsels' representation, and its effect on the verdict. The circuit court denied each motion (P.T. 56). As to the Motion To Be Declared Indigent, and the accompanying Affidavit of Indigency (App. 75), the court stated that Mr. Kelley's showing was insufficient (P.T. 59). The court suggested that counsel file further documentation, including affidavits of the attorneys now representing, or who had previously represented Mr. Kelley, regarding the source of the fees, if any, paid (Id. 59-60).'

'Since Mr. Kelley is clearly indigent, the Office of the Capital Collateral Representative (CCR), through Mr. Billy H. Nolas, later would appear as co-counsel on Mr. Kelley's behalf. Nevertheless, the trial court persisted in its refusals to declare Mr. Kelley indigent. The costs of many of the transcripts necessary for this appeal and for the litigation of this Rule 3.850 action were thus borne by Mr. Barry Wilson. Although the indigency issue is of little moment when compared to the (continued...)

After a hearing, the lower court denied the Rule **3.850** motion (App. **83-90).** **A** Petition for Rehearing was also denied (App. **92).** Mr. Kelley timely appealed to this Court. Subsequently, this Court granted the trial court jurisdiction to entertain Mr. Kelley's Motion To Interview Jurors, which was then filed in the trial court, accompanied by a Motion To Disqualify Judge. The lower court denied the motion to disqualify (App. 101) and, after a hearing, denied the claims of juror misconduct (App. 102).

SUMMARY OF ARGUMENT

I. Neither the trial court nor the Florida Supreme Court were fully apprised of the extent and nature of evidence destroyed, lost or simply never provided to the defense by the State at the time of Mr. Kelley's trial. Particularly, the order for the disposal of evidence referred to the evidence from the Sweet trial, held by the Clerk of the Highlands County Circuit Court (App. A-1). Not included in the Order was the actual crime scene evidence, held by the Florida Department of Law Enforcement, and tape recordings of telephone conversations between John Sweet and his accomplice, Irene Maxcy. The crime scene evidence was composed of numerous material and potentially exculpatory items. The tapes, too, contained exculpatory statements. The State misconduct detailed in Claim I warrants a new trial.

II. The prosecutor deprived the defense of material, exculpatory evidence which was in his possession or control. First was the transcript of Sweet's first trial. This transcript contained invaluable impeachment evidence concerning Sweet, and revealed the exculpatory nature of the Sweet-Irene Maxcy tape-recorded conversations. Second was a fingerprint report showing that prints lifted from the crime scene and Maxcy's car did not match Mr. Kelley's fingerprints (App. 56-57).

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[1](...continued)
claims for relief involved in this action and the stakes at issue, Appellant requests that the Court order Highlands County to pay costs, as is required, and to reimburse Mr. Wilson for the funds he has personally provided for transcription, etc. Cf. Glock v. State, 14 F.L.W. (Fla., Jan. 12, **1989).**

Third was law enforcement's original report regarding Kaye Carter, who had met a man at the Daytona Inn during the time in question, but who could not positively identify Mr. Kelley as that man, although she was sure the man she met was older than Mr. Kelley (App. ***58-59***). Fourth were photographs showing bloody footprints at the crime scene (App. ***39-42***). These footprints controverted the Sate's trial account that there was no blood found in the alleged getaway car, and that the alleged assailants were seen after the crime with no blood on their persons. Fifth were documents indicating that Sweet's trial testimony was exchanged not only for immunity from the State of Florida, but also for immunity from the Commonwealth of Massachusetts (App. ***50-53***; 55), a matter of critical importance to the jury's assessment of Sweet's credibility, as the jurors' **own** on-the-record questions amply show. Finally, it appears that to secure Sweet's testimony in Mr. Kelley's trial, the prosecution promised Sweet that Roma Trulock, the primary law enforcement investigator in the Maxcy case, would not testify or otherwise be involved in Mr. Kelley's prosecution (H.T. 224-25). The logical conclusion is that Sweet was afraid Mr. Trulock would show that Sweet's testimony, which was rewarded with immunity, was a lie. The suppressed evidence had obvious and critical exculpatory and impeachment value, as detailed in Claim II, and the State's non-disclosure is plainly sufficient to warrant Rule ***3.850*** relief.

111. There was a recess during Abe Namia's, a critical State witness', cross-examination by the defense. Upon returning to the courtroom, the prosecutor's remark to the judge demonstrated that the prosecutor had shown Mr. Namia the very reports being used by the defense in cross-examination. The defense had requested that this not be done. It was clearly improper. Mr. Namia was an important witness, as his testimony could have impeached Sweet. The State's misconduct warrants the relief sought herein, especially in light of the other instances of misconduct described in this brief.

IV. In closing argument, the prosecutor made material misrepresentations based

on information that the State knew but that was never made known to the defense. First, the prosecutor stated that Kaye Carter could not be expected to come into court seventeen years after the incident and identify the defendant (T. **866-67).** However, the prosecutor knew, while trial and appellate counsel did not, that Kaye Carter had attempted and failed to positively identify Mr. Kelley in **1967** (App. **58-59).** Second, the prosecutor argued that Mr. Kelley's statements to the arresting officer in **1983** had to have been based on Mr. Kelley's personal knowledge regarding the crime, rather than on newspaper articles. He bolstered the argument by contending that any newspaper articles regarding the crime would have been printed in **1966** and **1967** (T. **877).** In fact, in **1981,** the same prosecutor spoke to a newspaper reporter from Mr. Kelley's hometown who told him that he was then covering the Maxcy killing because William Kelley, a Brockton, Massachusetts resident was one of the suspects (K.T. **179-88).** The reporter, James Harrington, even sent the prosecutor copies of the articles he wrote and accompanying photographs (H.T. **183).** Trial and appellate counsel were unaware of any such communication **(H.T. 70-72, 77).** Third, the prosecutor told the jury that Sweet did not have to testify against Mr. Kelley to receive immunity in Massachusetts. The documents now in the defense's possession demonstrate that this was inaccurate (App. **50-53; 55; 61-62),** and that the State knew of the inaccuracy. Trial and appellate counsel never had the necessary documentation to refute this claim (H.T. **85-86, 88-89, 160; 291-95; 356-57).**

V. Mr. Kelley filed a proper affidavit of indigency which covered the statutorily designated factors. The circuit court erred in refusing to declare Mr. Kelley indigent.

VI. The circuit court erred also in denying Mr. Kelley's related motion for funds for forensic, prosecutorial, and defense experts. Mr. Kelley made the proper showing of indigency, and with expert assistance he could have further substantiated his claims of prosecutorial misconduct and ineffective assistance of counsel. The

forensic expert(s) would have provided technical assistance regarding the missing evidence which counsel (not experts) could not develop or present without expert assistance.

VII. Mr. Kelley's trial attorneys' lack of effectiveness was so plain that appellate counsel sought to present the claim on direct appeal. They failed to investigate, develop, or present readily available evidence that would have supported their own defense theories while presenting the jury with incomprehensible comments which gutted their own theory and which can be supported by no reasonable tactic. The specific ineffective omissions and commissions of counsel, and the resulting substantial prejudice to Mr. Kelley, are described in Claim VII. Counsels' ineffectiveness here is more than sufficient to undermine confidence in the jury's verdict.

VIII. Mr. Kelley sustained his burden of showing that juror misconduct occurred in that there was testimony that the jury was exposed to extraneous information, that one juror changed her vote to guilty to avoid sequestration, and that some jurors may have been playing tic-tac-toe during the presentation of evidence. The misconduct was inherently prejudicial, in violation of Mr. Kelley's fundamental state and federal constitutional rights. Although the proceedings before the lower court on this issue were insufficient to fully assess the claim, the evidence clearly is sufficient to raise a presumption of prejudice which the State did not rebut. The jury acted improperly, and Mr. Kelley's conviction should be vacated for all of the reasons discussed in Claim VIII.

IX. Mr. Kelley's Motion To Disqualify Judge was legally sufficient and, therefore, the judge erred in failing to disqualify himself from proceedings on the issue of juror misconduct.

ARGUMENT

CLAIM I

THE STATE'S DESTRUCTION OF CRITICAL, MATERIAL EVIDENCE PRIOR TO MR. KELLEY'S FIRST DEGREE MURDER TRIAL DEPRIVED HIM OF HIS RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE ONE, SECTION NINE OF THE FLORIDA CONSTITUTION.

In 1976, the prosecutor for Highlands County filed with the circuit court a "Petition for the Disposal of Evidence." The Petition dealt with the evidence presented at John Sweet's trial (see Ex. A; App. 1-3). On April 30, 1976, the circuit court granted the Petition. (See Petition For Disposal of Evidence and Order, Ex. A-1; App. 4), thus allowing destruction of certain exhibits from Sweet's trial which had been in the custody of the circuit court clerk.

There exists additional relevant evidence not accounted for by the destruction order. The evidence is comprised of the fruits of the Florida Department of Law Enforcement's investigation of the actual crime scene (Florida Sheriff's Bureau Evidence List, attached to Rule 3.850 Memo as Ex. B; App. 5-17) and tape recordings of telephone conversations between John Sweet and Irene Maxcy, the decedent's wife.[2] This evidence was never made known to Mr. Kelley's jurors or the trial court for one or both of the following reasons: (1) the prosecutor never provided this list, or the evidence itself, to the defense; and/or (2) neither Jack T. Edmund nor William M. Kunstler, Mr. Kelley's trial counsel, fully investigated the extent of the lost evidence, and thus never fully apprised the court of the resulting prejudice to their client (see Affidavit of Jack T. Edmund and Affidavit of William M. Kunstler, Exs. C and D; App. 18-26).

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[2] On direct appeal, this Court noted that at the time of the homicide John Sweet was "involved in an illicit love affair with Irene, the victim's wife," and that the two "planned the murder so that [they] could live together on Maxcy's inheritance." Kelley, 486 So. 2d at 579.

A. THE DESTRUCTION OF EVIDENCE ISSUE WAS NOT FULLY RAISED ON DIRECT APPEAL BECAUSE TRIAL COUNSEL FAILED TO INVESTIGATE THE EXTENT OF, AND THE STATE NEVER APPRISED THE DEFENSE OF, THE MISSING CRIME SCENE EVIDENCE

The lower court opined that the affidavits of former counsel demonstrated that counsel was aware of additional evidence which was lost or destroyed (App. 79). On that basis, the court ordered that the matter could not be raised in the Rule **3.850** motion. However, in that same order, the lower court acknowledged that issues relating to ineffective assistance of counsel were properly before the court (App. 80), and that the destruction/missing evidence issue would be considered at the hearing to the extent that it pertained to ineffective assistance of counsel (H.T. 18-20).[3] The lower court also acknowledged that whether the prosecutor suppressed evidence which was favorable to the accused was an issue properly raised in the Rule **3.850** Motion (App. **79-80).**

Throughout the hearing on a pretrial motion to bar prosecution, Mr. Pickard (the prosecutor) repeatedly represented to the court that "the only evidence that was destroyed was the State's exhibits that were introduced into evidence" (T. **47).** "The transcript of Mr. Sweet's trial reflects specifically what the items of evidence are. What we're talking about is ninety percent of it is documentary evidence (sic); copies of checks, copies of car rental agreements, copies of motel registrations.[4] There is very little actual physical evidence" **(T. 68-69)** (emphasis added). Exhibit **B** of Mr. Kelley's Rule **3.850** motion belies Mr. Pickard's representation. That Exhibit lists thirty-nine items of physical evidence about which the defense was uninformed (App. **5-17).** In view of this discrepancy concerning what was destroyed, missing and never brought forward, this Court's warning must be reconsidered:

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[3]**Mr.** Kelley sought to present an ineffective assistance of counsel claim on direct appeal. This Court declined to reach the issue, ruling that it should be presented in **a** Rule 3.850 action. Kelley, 486 **So.** 2d at **585.**

[4]**Presumably,** Mr. Pickard was referring to the State's exhibits listed in Ex. A of Mr. Kelley's Rule **3.850** memorandum. **See** App. 1-3.

> We wish to emphasize, however, that if even the slightest hint of prosecutorial misconduct was present in the case the result might well be different.

Kelley, 486 So. 2d at 582 (emphasis added). There is much more than a "slight hint" here, as the record now developed shows.

On direct appeal, this Court considered only "a bullet, a bloody bedsheet purportedly used to subdue the victim during repeated stabbings, and a shred of the victim's shirt," and two handwritten statements of John Sweet. Id. at 580. In fact, approximately sixty items were destroyed or unaccounted for. Most of these items were evidence taken from the actual crime scene, which was not presented at Sweet's trial because he was not alleged to have been present when Mr. Maxcy was killed (see H.T. 314-16, 345-47). At the pretrial and 3.850 hearings, Mr. Pickard continually referred to the destroyed evidence of the Sweet trial rather than dealing with the fruits of the investigation of the crime scene. The ineffectiveness of trial counsel allowed him to get away with it. As the circuit court noted, trial counsels' affidavits demonstrated counsels' unawareness that some evidence from the Sweet trial and from the FDLE investigation had been destroyed (Ex. C, par. 2a; Ex. D, par. 6a; App. 18, 22-23). However, neither attorney pursued the matter any further. Specifically, trial counsel never actually investigated whether and to what extent the crime scene evidence was still available (see testimony of Joseph Mitchell, Special FDLE Agent, H.T. 308, 316-17; testimony of former trial counsel Jack Edmund, H.T. 335, 342-44; testimony of former trial counsel William Kunstler, H.T. 21-22, 164-65). The bad faith of the prosecutor is further borne out by Joseph Mitchell's testimony regarding the fruits of the crime scene. Mr. Mitchell was asked:

> Q. Well what I want to know is through your investigation, did you have a discussion with Mr. Pickard about where these items were.
>
> A. I think we did some investigation to try to determine where they were.

(H.T. 315).

Clearly, Mr. Pickard knew more than he let on. The court was deliberately misled. The prosecutor had an obligation to determine what happened to this evidence. Mr. Pickard's actions were untruthful and violated his obligations as a prosecutor. Here, more than the "slightest hint" of prosecutorial misconduct is apparent.

Furthermore, tape recordings of numerous telephone conversations between John Sweet and Irene Maxcy, both of whom allegedly planned the murder, were destroyed. The real value and quantity of these tape-recorded conversations was only made apparent in John Sweet's first trial transcript (App. **27-36),** which trial counsel never received from the prosecution. Testimony at John Sweet's second trial only touched on these conversations, never alerting the defense to the wealth of exculpatory material therein (App. **37-38).**

This Court was never fully apprised of the quantity and nature of the destroyed or missing evidence. The omission is clearly due to some combination of the ineffective assistance of counsel and the failure of the prosecutor to fully apprise the trial court and the defense as to the extent of evidence originally in its posssession. Finally, in view of the quantity and nature of the destroyed or missing evidence (discussed below), it is impossible to comprehend the circuit court's reasoning that "[a]lthough there are some differences between the evidence listed in the instant Motion and that argued before the Court in the Motion To Dismiss, those differences are immaterial" (App. **86).**

B. EVIDENCE FROM SWEET TRIAL (APP. **1-3**)

The sketch of the location **of** Mr. Maxcy's wounds and a cut out section of his shirt were destroyed. Allegedly, there were five diagonal slits of approximately 1-1/2", 1", 1-1/2", 7/8" and 1" respectively in the back of the shirt. A bed sheet with slits in it was allegedly used to cover the decedent Maxcy. This, too, was destroyed. Therefore, trial counsel was unable to determine that the slits found in the shirt did not match in size and quantity the slits found in the sheet and

whether either/or both of these items matched the victim's actual wounds. Such a comparison was crucial because there was a discrepancy in testimony concerning the number of slashes in the sheet and the number in the shirt (H.T. 25-28). Further, the defense was unable to assess the angle and location of the slits and wounds and thus compare Maxcy's height with that of the assailant. This evidence was exculpatory. It negated the State's version of the attack and Sweet's testimony concerning the killing.

Cancelled check nos. 24, A19985, 539 and 13526 were **also** destroyed, as were seven registration cards and receipts, five service application telephone cards, four Hertz rental agreements, a telephone toll record card and telephone billings. These items would have revealed handwriting samples, signatures and other potentially valuable exculpatory infomation. Additionally, the missing Ledger Sheet -- Account No. SPS 2699 -- might have presented important financial information.

Because it, too, was destroyed, the defense had no opportunity to test the .38 lead bullet and/or slug found at the scene, or to trace its origin. Such an investigation certainly could have inculpated one other than Mr. Kelley, particularly because the Massachusetts State Police were in possession of other bullets and slugs that would have merited comparison. See State v. Counce, 392 So. 2d 1029 (Fla. 4th DCA 1981) (impairment of defendant's right of access to relevant and material evidence where instruments of arson -- beer bottle containing liquid that tested and smelled like gasoline and charred piece of paper -- were destroyed). Another Massachusetts suspect, Stephen Busias, could well have been linked to the bullets or **slugs.** In fact, the FDLE showed Sweet photographs of twelve potential suspects, including Busias, sent from the Massachusetts State Police (**See** Officer Roma Trulock's testimony at Sweet's first trial, Ex. E). The defense also was unable to analyze data concerning the bullet or knife wounds taken from Maxcy's body, because the autopsy laboratory samples were destroyed. The laboratory samples

may have contained scrapings and other potentially exculpatory material.

One of the most detrimental losses to the defense was the destruction of Sweet's July 30, 1967 and August 31, *1967* handwritten statements given to Roma Trulock, an officer with the Florida Sheriff's Department (Excerpt from Sweet's second trial, Ex. **ZZ**, p. *804)*. The statements, which Sweet chose to give without his lawyer present (Excerpt from Sweet's first trial, Ex. **ZZ-1**, p. 883), could have contained valuable exculpatory evidence and obviously could have been used to impeach John Sweet at Mr. Kelley's trial. Moreover, prior to Mr. Kelley's trial, Sweet told the prosecutor that if Roma Trulock was to be involved in the case, then Sweet would not be involved. (This issue is dealt with in more detail below). Sweet was obviously afraid of what Trulock would reveal.

In the context of Sweet's questionable credibility, the impeachment value of Sweet's statements is especially important. As this Court observed on direct appeal, without Sweet's testimony, Mr. Kelley's indictment and prosecution would have been impossible. Kelley, *486 So.* 2d at *579-80.* The statements were material -- they had use in impeaching the prosecution's key witness and they, like the Sweet-Irene Maxcy tape-recorded conversations, may well have contained exculpatory information.

C. FDLE CRIME SCENE EVIDENCE (APP. 5-17).

The forty-eight destroyed cards bearing latent prints might have provided the parties with any number of leads as to other suspects. In particular, Roma Trulock testified that Stevie Busias was a suspect as early as *1967* (T.795, *805-06).* The victim's body hair samples might have been mixed with the hair of the victim's assailant(s), providing further identification of suspects while suggesting that the defendant was not present at the scene. The same can be said of the hair found on the bedroom wall, the victim's fingernail scrapings, scrapings from the wall of the victim's bedroom and the hole in the bedroom wall. After all, the prosecution alleged that a violent struggle preceded Maxcy's death (T.494). Was another's blood

mixed with the victim's in the glass bottle? If so, what blood type was it? The hallway carpet runners and the bedroom floor carpet section could have yielded footprints or other evidence exculpatory as to the defendant, inculpatory as to other persons.

The carpet specimens did contain dried type O blood (Ex. B, p. 176; App. 14). Allegedly, there was a great deal of blood in the victim's bedroom and hallway (T. 493-94). The defense had the right to independently test the specimens and the blood. Allegedly, the defendant was seen at the motel soon after the offense was committed, and allegedly there was no blood on his person. Thus, blood-related evidence was material and vital to Mr. Kelley's claim of innocence. Indeed, the defense has consistently maintained that because no blood was observed on the person alleged to be Mr. Kelley, after the crime, he could not have committed such a blood-soaked crime. Similarly, there is the obvious evidentiary value of the bloodied carpets and hallways runners, which could have shown that the actual perpetrator did have (or could have had) blood on his feet or elsewhere when he was at or leaving the scene. The defense could have tested the carpets for footprints. Moreover, several 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 (T.496), thus demonstrating that the assailants did not wash blood from their persons before fleeing. Those test results were never provided to the defense.

Sweet claimed the killers left the crime scene in the victim's car (T. 593-94). Therefore, all evidence allegedly taken from the car, scrapings from the outside left car door, brake pedal, floor mat, car keys, metal door sill, left door window channel, tire and steering wheel should have yielded fingerprints, footprints, blood specimens or other specimens, possibly exculpating the defendant. However, J.C. Murdock testified that no blood whatsoever was found in Maxcy's car (T.496-97), despite the absence of evidence that the killer(s) had washed off blood before leaving Maxcy's house (T. 496). The defense was unable to verify the reports

concerning Maxcy's car because the reports, as well as the parts taken from the car, were never given to trial counsel. This evidence would have impeached Sweet and shown to be myth his testimony as to what supposedly happened.

Furthermore, the trial testimony was that one set of car keys was found in the car (March 31, **1967,** Maxcy death investigation report, Ex. I), and another in Maxcy's house **(T.490).** The two sets of keys raises an issue as to why the assailant(s), when leaving the scene, did not take both sets of keys. The obvious answer is that they were familiar with the Maxcy automobile and the appropriate keys thus knowing, even in haste, which keys would fit the automobile. This information is exculpatory as to Mr. Kelley. Conversely, it is damaging to Sweet, who knew the Maxcys personally and might well have been at the scene and himself perpetrated the crime.

Allegedly, a violent struggle took place and the victim was attacked repeatedly before he died. Therefore, blood or fingerprints found on the victim's shirt, shoes, pants, underwear, socks, handkerchief, wristwatch and hair comb might have shown that Sweet, Stevie Busias or others, and not Mr. Kelley, attacked the victim. Moreover, for a true picture of the detriment suffered by Mr. Kelley, one must consider the more sophisticated tests that were available to the defense in **1984** that were unavailable to law enforcement in **1966.**

Furthermore, four knives were found in or near the victim's home. The defense was unable to test these knives for prints or scrapings. Mr. Kelley was foreclosed from contesting the state's version of how the slits or cuts were made in the sheet and the victim's shirt, and which knife, if any of those found, was responsible. Notably, there was a startling discrepancy between the number and size of the slits found in the sheet compared to the slits found in the shirt (**See** Ex. B, p. **176;** App 14). It is now clear that the slits in the back of the victim's shirt (five diagonal slits, approximately 1-1/2", 1", 1-1/2", 7/8" and 1") do not match, in size or quantity, the slits in the sheet, which were approximately 5/8" and four in

number (Ex. B, p. 176; App. 14). Thus, the State's explanation concerning the details of the stabbing and the absence of blood was actually not sustained by the evidence.

Again, the defense was unable to compare the projectiles found at the scene with evidence in the possession of the Massachusetts State Police. The same can be said of the metal fragments removed from the rear internal area of Maxcy's head.

Two Exhibits, Nos. 32 and 34, are missing from the FDLE's list of exhibits. This potentially valuable information thus never reached the defense.

Abe Namia testified that John Sweet told him that prior to Maxcy's murder a potential assailant met Sweet for the purpose of slashing a tire from Maxcy's automobile (T.771). After slashing the tire, the individual remained until Maxcy returned, and assisted Maxcy in changing the tire, thus apprising himself of Maxcy's identity (T.771). John Sweet, testifying at his own trial in November, 1968, denied any knowledge of Maxcy's tire having been slashed. (Excerpt from Sweet's second trial transcript, Ex. PPP).

The critical point is that the State was in possession of the tire and the Florida Sheriff's Bureau Crime Laboratory examined the tire slashes (Ex. B, p. 174, 177; App. 12). Because the tire was never provided to trial counsel, the defense was unable to compare the slashes with knives found in Maxcy's home. Such information might have been useful in impeaching or even further inculpating Sweet, who had access to the Maxcy residence.

Another puzzling and potentially valuable piece of lost evidence is the sheet of paper bearing a handwritten inscription beginning "Confirming our..." and ending "...by both parties," bearing the signatures "C.V. Maxcy" and "J.J. Sweet" (Ex. B, p. 178; App. 16). The defense was unable to determine the contents of this document, which might have provided important information concerning a communication between John Sweet and Charles Von Maxcy. Further, the defense was unable to test the document for fingerprints and handwriting comparisons.

1. The court erred in denving the defense motion for a recess of the Rule 3.850 hearing to take depositions regarding the existence of the crime scene evidence.

Through the testimony of Joseph Mitchell at the 3.850 hearing, it became apparent that some or all of the crime scene evidence may not have been included in the destruction order and may still be in existence (H.T. 309-17). Accordingly, defense counsel made a motion for a recess to depose Mr. Mitchell, other FDLE officers, lab technicians, etc., to determine if some or all of the crime scene evidence was still available (H.T. 429-32). Counsel, at this time, renewed the Motion To Be Declared Indigent (H.T. 432), as funds would be needed for such depositions (Id.). Both motions were denied. (H.T. 432-33).

Mr. Kelley contends that 1) it was not apparent until Joseph Mitchell testified that some or all of the crime scene evidence might still be in existence; and 2) the court should have allowed the motions for a recess and for funds. If the motions had been granted, the defense might have been able to uncover some or all of the evidence in question. Moreover, the evidence would likely have been material and exculpatory. The lower court erred. This Court should remand the case in order to afford a full hearing to Mr. Kelley and in order that it may have all of the evidence for review.

D. TAPE RECORDINGS OF TELEPHONE CONVERSATIONS BETWEEN IRENE MAXCY AND JOHN SWEET

At John Sweet's first trial there was substantial testimony that Irene Maxcy, at the instruction of her lawyer and the sheriff's bureau, tape recorded her telephone conversations with Sweet (See excerpt from Sweet's first trial transcript, Ex. F-1, p. 138-140, 814; App. 27-30). At his first trial, Sweet testified that Irene Maxcy assured him that the telephone was not bugged (Ex. F-1, p. 828-29; App. 32-33), that he never suspected that it was bugged (Ex. F-1, p. 846; App. 35), and only found out the truth when Irene testified at his trial (Ex. F-1, p. 845-46; App. 34-35). In the course of their conversations, Irene implored Sweet to work a deal with the police by inculpating someone in the Maxcy murder (Ex. F-1, p. 829,

1129; App. 33, 36). She then suggested names, one of which was "William Kelley" (Id.). Sweet replied that he did not know a "William Kelley" (id.).

At Sweet's second trial, there was only a passing mention of the tapes. Roma Trulock testified that he knew of at least one tape recorded telephone conversation between Irene and Sweet (Ex. F-2, p. 789; App. 37). Sweet then changed his story, claiming that Irene had told him of the bugging even before his first trial (Ex. F-2, p. 1039; App. 38). The defense never received these tape recordings and was, therefore, deprived of valuable information with which to impeach Sweet, particularly as to whether Sweet had ever heard of a William Kelley prior to Irene mentioning his name in 1967. The amount of potential evidence on the tapes is mindboggling, in view of the fact that Irene and Sweet spoke on the telephone three or four times a day (Ex. F-1, p. 139; App. 28). Sweet estimated that one hundred to one hundred fifty calls were made (Ex. F-1, p. 846; App. 35). In the context of the entire record, the omitted tapes would have created a reasonable doubt not otherwise existing. See State v. Sobel, 363 So. 2d 324, 327 (Fla. 1978)(citing United States v. Agurs, 427 U.S. 109, 112-13 (1976)); Farrell v. State, 317 So. 2d 142, 143-44 (Fla. 1st DCA 1975).

Furthermore, Irene was constantly speaking with the investigators of the case who repeatedly urged her to obtain a statement from Sweet (Ex. F-1, p. 139; App. 28). Certainly, she heard William Kelley's name mentioned by the investigators, who suspected him in 1966 (T. 84). Additionally, the defense never received a copy of John Sweet's first trial transcript, so it was unaware of the exculpatory nature of the tape recordings, as revealed by that transcript (H.T. 49-51, 136-37). Mr. Kunstler testified that he believes the defense made an inquiry as to whether there were tape recordings and were told there were none (H.T. 136-37). The withholding of this critical evidence, whether requested or not, is inexcusable. See, e.g., Fla. R. Crim. P. 3.220.

E. DISCUSSION

Due process of law contemplates the presentation of evidence fully and fairly in a criminal trial. Henderson v. State, 20 So. 2d 649, 651 (Fla. 1945). The present situation is further compounded by the fact that the prosecutor, Hardy Pickard, only referred to the evidence of the Sweet trial while no one discussed the missing crime scene evidence that had been collected by the FDLE. See Aranno v. State, 467 So. 2d 692, 693 (Fla. 1985), subsequent history, 497 So. 2d 1161 (Fla. 1986)(applying United States v. Bagley, 473 U.S. 667 (1985)) (State may not withhold favorable evidence in hands of police). Of course, the evidence discussed herein was all subject to discovery, and the prosecution's failure to provide it cannot be deemed harmless beyond a reasonable doubt, see Roman v. State, 528 So. 2d 1169, 1171 (Fla. 1988), citing State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986), a showing which the State has not even attempted to make. This evidence was crucial at Mr. Kelley's trial: it constituted real evidence gathered at the actual crime scene. Again, the circuit court's reasoning that this evidence does not differ materially from the documentary evidence from Sweet's trial cannot withstand the requisite scrutiny.[5]

[5]This Court on direct appeal reiterated the balancing test applicable to the present case. See Kelley, 486 So. 2d at 581. When the State, pre-trial, destroys evidence, the Court must balance any negligent or culpable prosecutorial conduct against any resulting prejudice to the defendant. Id. The degree of prejudice warranting reversal of a conviction varies inversely with the degree of fundamental unfairness in the trial process. Id.

This Court then found no negligence by the State, reasoning that the State had insufficient evidence to proceed against the defendant until Sweet's 1981 offer to testify. However, the Court expressed concern over the destroyed evidence and was "extremely hesitant to condone the State's behavior..." Id. at 581. Further, the Court emphasized "that even if the slightest hint of prosecutorial misconduct was present in the case the result might well be different." Id. at 582. On direct appeal this Court did not know about the crime scene evidence which was in the FDLE's custody, or the other evidence discussed above. Moreover, it cannot be disputed that the State made little, if any, effort to determine whether the evidence was still available, and trial counsel made even less effort in this regard.

Glen Darty, the State Attorney in 1966 at least through the time of the destruction of the evidence in 1976, testified that as far back as 1966, "I had reached a conclusion that he [Kelley] was actually involved in the death of Von Maxcy" (T.84) and he had not changed his mind "that he was involved to this day" (T. 85). Feeling as he did about the Mr. Kelley's involvement, the destruction of evidence in this case is simply inexcusable. Since murder in Florida has no statute of limitations, a prosecutor as experienced as Mr. Darty must have foreseen that future events in a highly-publicized murder case with an extremely well-known victim might well bring the case back to life, particularly with an active suspect in his thoughts.

Where a "verdict is already of questionable validity, additional evidence of relatively minor importance might be sufficient to create a reasonable doubt." United States v. Agurs, 427 U.S. 97, 109, 112-13 (1976); see also Aranno v. State, 497 So. 2d 1161 (Fla. 1986); United States v. Bagley, 473 U.S. 667 (1985). Certainly, where 1) a defendant's first trial results in a hung jury; 2) during the defendant's second trial the jury complains to the Judge that, after voting three times, it remains deadlocked; and 3) the jury then questions the Court concerning the bias of the State's key witness, the addition, at trial, of a substantial amount of potentially exculpatory evidence is highly material. Put in the language of Banlep, if the defense had had access to the lost evidence, there is a "reasonable probability that . . . the result of the proceeding would have been different." Id. The quality and quantity of evidence lost seriously "undermine[s] confidence in the outcome" of Mr. Kelley's trial, Bagley, supra, and the State in this case has been and is absolutely unable to show harmlessness beyond a reasonable doubt. Roman, supra; DiGuilio, supra.

The prosecution has the burden of proving the absence of prejudice and materiality concerning destroyed evidence. Kelly, 486 So. 2d at 581; Krantz v. State, 405 So. 2d 211, 213 (Fla. 1981); cf. Roman, supra. Much of the destroyed or

missing evidence supported Mr. Kelley's defense. For example, Mr. Kelley maintained that he was not the same William Kelley who was registered at the Daytona Inn in 1966. Certainly, the hotel registration cards and receipts, telephone application cards and automobile rental agreements (Ex. A; App. 1-2) could have yielded handwriting samples and signatures that would have supported the defense. See Arango, 497 So. 2d at 1162 (evidence supporting defense theory is material).

In State v. Wright, 557 P.2d 1 (Wash. 1976), the government destroyed the homicide victim's clothing and a sheet used to wrap the victim. Id. at 5-6. The Court held that the evidence was "intimately related" to the homicide, id. at 5, because the sheet could have aided in determining whether the victim was attacked while covered with the sheet and in determining the ownership of the sheet, id. at 6, and the victim's clothing might have yielded blood specimens valuable in identifying the assailant. Id. The present case, where this same evidence was destroyed, requires the same conclusions. Further, in Wright, as in the present case, other suspects existed. Id. at 4, 6. Neither administrative convenience nor inadequate facilities justify the failures to preserve evidence which occurred here, as there is a reasonable possibility that the evidence would have been material and favorable to the defendant. Id. at 7. Here, Mr. Kelley has made the requisite showings and has shown the absence of good faith on the part of the prosecution.

CLAIM II

MR. KELLEY WAS DENIED DUE PROCESS AND THE PROTECTIONS GUARANTEED UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE FEDERAL CONSTITUTION AND ARTICLE ONE, SECTION NINE OF THE FLORIDA CONSTITUTION, WHEN THE PROSECUTION SUPPRESSED EVIDENCE FAVORABLE TO THE DEFENSE.

Mr. Kelley was deprived of a fair trial by the State's suppression of evidence favorable to the defense. Given the weakness of the State's case against Mr. Kelley, the State's failures to disclose "undermine confidence" in the guilt and/or sentencing verdicts. Bagley, supra. In this case the State simply cannot show that its non-disclosure of evidence favorable to the defense is harmless beyond a

reasonable doubt. Roman, supra, 528 So. 2d at 1171; DiGuilio, supra, 491 So. 2d 1129.

Bradv v. Maryland, 373 U.S. 83, 87 (1963). held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material to either guilt or punishment." This Court has not hesitated to apply the holding of Bradv. See, e.g., Roman, supra; Arango, supra; Anderson v. State, 241 So. 2d 390 (Fla. 1970); State v. Crawford, 257 So. 2d 898 (Fla. 1972).

In the instant case, the prosecution failed to disclose at least six favorable items of evidence. These were: (1) the transcript of the first murder trial of John Sweet, the State's chief witness; (2) a fingerprint report showing that Mr. Kelley's fingerprints did not match those found at the scene of the crime; (3) a police report which contained information that a State's witness, seventeen years ago (at the time approximate to the offense) did not match the defendant's photograph or description with the person she thought was William Kelley; (4) photographs and copies of the photographs of the crime scene showing footprints and smudge marks on the carpet near the victim's body; (5) documents that would have shown that John Sweet received immunity for offenses in Massachusetts based, in part, because of information he provided on the Maxcy case; and (6) the prosecution, at Sweet's request, did not present Roma Trulock as a trial witness even though Mr. Trulock was the primary investigating officer of the Maxcy murder. Furthermore, Mr. Kelley contends that all six of these non-disclosures were intentional on the part of the prosecutor and/or his staff.

A. THE TRANSCRIPT OF THE FIRST MURDER TRIAL OF JOHN SWEET

In 1983, the defense made repeated specific pre-trial requests for the transcript of John Sweet's first murder trial (Defense Motion and Letters, Ex. P-1 to P-3 and Ex. Q). John Sweet, the State's chief witness, was previously tried for the murder of Charles Von Maxcy. His first trial resulted in a hung jury, and Sweet

was tried a second time, and then convicted (as noted, his conviction was overturned on appeal). The defense requested, but never received, the transcript of Sweet's first trial (H.T. 44). Mr. Kelley's lawyers were led 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). They were led to believe that no other copy existed, and particularly, that the State did not have a copy (Id.)

In fact, in the State's Response to the Rule 3.850 motion, the trial prosecutor himself, Mr. Pickard, admitted that he had a copy of the entire transcript or at least portions of it. The entire transcript was obtained finally in February, 1987, from the State, pursuant to a request under the Florida Public Records Act (Affidavit of Barry P. Wilson, Ex. R, par. 5). Furthermore, on June 3, 1981, Massachusetts State Police Trooper Robert St. Jean sent Joseph Mitchell of the F.D.L.E. a copy of St. Jean's February 22, 1981 interview with John Sweet (June 3, 1981 letter from St. Jean to Mitchell, Ex. S; H.T. 278). At the interview, Sweet provided St. Jean with transcripts from both of his trials (May 22, 1981 Memorandum to Ronald A. Pina, District Attorney from St. Jean, p. 5, Ex. S-1; H.T. 280, 284). On March 12, 1981, prosecutor Pickard, Joe Mitchell and others met with John Sweet at the District Attorney's Office in New Bedford, Massachusetts (F.D.L.E. Investigative Report, p. 2, Ex. S-2; H.T. 274). Obviously, Mr. Pickard would have received a copy of Sweet's trial transcripts at this March 12, 1981 meeting, if he did not already have them in his possession. Thus, he certainly had a copy of the first trial transcript when it was requested by the defense in 1983.

Certain relevant mataters reflected by the first trial transcript were discussed in Claim I, supra. This transcript contained other valuable impeachment evidence concerning John Sweet. At that trial, for example, Sweet testified that Irene Maxcy 1) had a sexual affair with a young boy (Excerpt from first trial transcript of John J. Sweet, p. 1075-78, Ex. JJ); 2) arranged for, in Sweet's presence, and then engaged in sex with a friend of Sweet's (Id. at 1079-82); and 3)

engaged in sex with a dog, purchased for her by Sweet (Id. at 1083-87). The jury would have thought carefully about the credibility of a man who made such allegations about a woman with whom he claimed to be in love in order to aid himself. Certainly, Sweet's credibility was central in this case -- the jury's questions make this undeniable, as does this Court's opinion on direct appeal. Kelly, 486 So. 2d at 580. Moreover, Sweet's version of the Maxcy killing was far different at his first trial than what he testified at Mr. Kelly's trial. Indeed, Sweet's version differed in each of his own trials.

The trial court ruled that the testimony regarding Irene Maxcy's sexual misconduct would have been inadmissible for purposes of impeaching John Sweet (App. 84). Furthermore, the court ruled that defense counsel were aware of the allegations (id.). The only statement concerning the alleged awareness, by the defense, was that Mr. Edmund and Mr. Kunstler had heard something about it (H.T. 47, 332). However, having documentation of sworn testimony is quite different than hearing something about it. The transcript, itself, could have been utilized to impeach Sweet. The defense asked for the transcript. The State had it (or knew how to get it). The State did not provide it.

Contrary to the lower court's ruling, Sweet's testimony regarding the sexual misconduct of Irene Maxcy was quite relevant and material for the purpose of fully impeaching Sweet as to motive and bias and was directly relevant and material as to Sweet's state of mind at the time of the offense. See Giglio v. United States, 405 U.S. 150 (1972) (when guilt or innocence rests on witness' credibility, impeachment evidence regarding witness is unquestionably material and falls within Brady rule). Mr. Kelley's defense has always been that Sweet's desire for Irene Maxcy was so extreme that Sweet killed Charles Maxcy in order to have Irene Maxcy for himself. This was the core of the defense at trial.

When considering whether the transcript of Sweet's first trial would be relevant to impeach John Sweet, special consideration and latitude must be given to

the fact that Sweet was the chief witness for the State. See Marr v. State, 470 So. 2d 703 (Fla.1st DCA 1985); cf. Roman v. State, 528 So. 2d at 1171. Since Mr. Kelley was on trial for his life, he had an even more compelling right to cross-examine Sweet on any matter plausibly relevant to the defense. Cf. Chaney v. Brown, 730 F.2d 1334 (10th Cir. 1984); cf. Beck v. Alabama, 447 U.S. 625 (1980)(under eighth amendment's heightened scrutiny requirements, errors which would not warrant reversal in noncapital settings nevertheless require retrial). Here, reversal would be required even if Mr. Kelly's conviction did not involve his life; with his life at stake, heightened scrutiny is required. After all, cross-examination "is particularly important in a capital case . . . where a defendant's right to cross-examine witnesses is carefully guarded, and limiting cross-examination on any matter plausibly relevant to the defense may constitute reversible error." Williams v. State, 386 So. 2d 25, 27 (Fla.2d DCA 1980); Coxwell v. State, 361 So. 2d 148 (Fla. 1978). John Sweet was the chief witness for the State in this capital case; the State withheld evidence which would have shown a jury with obvious reservations about Sweet's credibility that his version of the events was not reliable. Indeed, the withheld evidence here involved Sweet's own prior statements.[6]

Sweet testified in his first trial that Irene Maxcy had sexual relations with a dog, a young boy, and a man known to her for only a half hour previously. With this in mind, the fact that John Sweet still wanted to have her for himself clearly shows the unusual obsession he had for Irene Maxcy, possibly pathological. Such an obsession is directly relevant to "witness" Sweet's state of mind. The defense would have been able to use this evidence to show that Sweet's desire was so outrageously strong that Sweet had the intent to stab Charles Maxcy by his own hand.

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[6]The lower court's ruling on this issue, is even more puzzling in light of the fact that in Sweet's own appeal, Sweet v. State, 235 So. 2d 40 (Fla.2d DCA 1970), it was deemed reversible error to forbid cross-examination of the two chief government witnesses regarding their sexual activity together because the evidence tended to show a possible material bias or interest on the part of the witnesses. See also State v. Statewright, 300 So. 2d 674 (Fla. 1974).

Sweet's first trial testimony regarding Irene also shows that he would discredit anyone to save himself (See H.T. *44-45; 48-49).*

Additionally, the transcript contained important references to tape recorded telephone conversations between Irene Maxcy and John Sweet. The circuit court believed that the second Sweet trial transcript "contained essentially the same information" regarding the taped telephone conversations as the first trial transcript (App. *84).* As previously detailed, a comparison of the testimony in the first and second trial shows significant differences. In his first trial, Sweet testified that Irene Maxcy assured him that the telephone was not bugged and that he believed her (Ex. F-1, p. *828-29, 846,* App. *32-33, 35).* Also, Sweet stated that he and Irene spoke on the telephone three or four times each day (id. at *139;* App. *28)* and that the total amount of calls was between one hundred and one hundred fifty (Id. at *846;* App. *35).* Irene, who was being urged repeatedly by investigators to obtain a statement from Sweet (id. at *139;* App. 28), begged Sweet to work a deal with the police by framing someone in the Maxcy murder (id. at *829;* App. *33).* Irene suggested names, one of which was "William Kelley" (id. at *829; 1129;* App. *33, 36).* Sweet replied that he did not know a William Kelley (id.). These matters did not come out at the second Sweet trial.

The only reference at Sweet's second trial to the Sweet-Maxcy taped conversations was Roma Trulock's testimony that he knew of one tape-recorded conversation (Ex. F-2, p. *789;* App. *37).* Also, Sweet, there, claimed that Irene had told him of the bugging before his first trial (id. at *1039;* App. *38).* From the second transcript, the defense only learned that there was one taped telephone conversation. The defense attorneys never knew that there were approximately one hundred to one hundred fifty taped calls. They did not know that Sweet claimed he was innocent of the bugging and that when Irene suggested he name a "William Kelley," Sweet said he knew no none by that name. The circuit court reasoned that Sweet's claim of not knowing a William Kelley "is rendered irrelevant by Sweet's

later testimony that he lied to the police about knowing the defendant." (App. 84). But surely this is a matter for the jury, not the court to determine. And just as surely Sweet's first representation to Irene, his co-conspirator, made closest in time to the event, that he did not know a William Kelley, would have been the most credible to the jury. After all, the circuit judge opined that "[e]ven though the Court was convinced that Sweet was telling the truth by the end of the trial, there were serious doubts that the jury were (sic) so convinced." (App. 88). The jury would have had a much stronger doubt if the defense had impeached Sweet with the information which was only available from the first trial transcript. The issue was one for the jury to determine. It never did because the State suppressed the evidence.

Mr. Kelley has assumed that the tape recordings, themselves, were destroyed. However, it is possible that the tapes were not destroyed, thus raising one more piece of exculpatory evidence withheld by the State (see H.T. 136-37).

In Giglio v. United States, 405 U.S. 150 (1972), the Supreme Court held that impeachment evidence is Brady material. See also Roman, supra. When the 'reliability of a given witness may well be determinative of guilt or innocence', nondisclosure of evidence affecting credibility falls within this general rule [Brady doctrine]". Gielio, at 154, quoting Napue v. Illinois, 360 U.S. 264, 269 (1959). In Giglio, the Court made special note that "[h]ere the government's case depended almost entirely on Taliento's testimony; without it there could have been no indictment and no evidence to carry the case to the jury. Taliento's credibility as a witness was therefore an important issue in the case . . ." id. at 154-55.

This Court made this same determination in regard to John Sweet. See Kelley, 486 So. 2d at 580. Because the government's case stood or fell on Sweet's credibility, Mr. Kelley had a right to fully impeach him. He was unable to properly do so because the prosecutor suppressed the trial transcript. The importance of the first trial transcript cannot be lessened by the fact that Sweet now states he lied

during his own trial. This would, in effect, beg the question as to Sweet's credibility by assuming he was telling the truth in Mr. Kelley's trial. That question is solely for the jury to determine.

Our case is on point with Roman v. State, 528 So. 2d 1169 (Fla. 1988). There, this Court ruled that a witness' undisclosed prior inconsistent statement required vacating the conviction and death sentence, even though the defense had impeached the witness with another prior inconsistent statement. Id. at 1171. The Court reasoned that although the defense impeached the witness, the State rehabilitated the witness on redirect examination. Id. Furthermore, "[g]iven this trial's circumstantial nature, we cannot say beyond a reasonable doubt that the state's failure to disclose [the witness'] prior statement did not contribute to the conviction." Id. In the present case, the defense impeached Sweet with prior inconsistent statements, but the State rehabilitated Sweet by eliciting, inter alia, testimony that he had lied about the killing in the past (T. 600). The remaining evidence in Mr. Kelly's case was circumstantial, as it was in Roman and, by itself, was insufficient to support a prosecution, let alone a conviction. See Kelley, 486 So. 2d 579-80.

Moreover, Sweet had a motive to lie during his testimony at Mr. Kelley's trials as well as during his conversations with Roma Trulock, to which Trulock testified at Sweet's second trial. He had no motive to lie during a telephone conversation with Irene Maxcy where he represented that he never had heard of a William Kelley. Only Sweet's first trial transcript documents his representation to Irene Maxcy.

It is axiomatic that the suppression of evidence by the government should result in a new trial for the accused. "It has been held that where suppression of evidence by the State is 'deliberate' -- a considered decision to suppress or where the great value to the defense must have been known to the State -- a new trial should be granted." Resnick v. State, 287 So. 2d 24, 33 (Fla. 1973); accord Miller v. Pate, 386 U.S. 1 (1967); Napue v. Illinois, 360 U.S. 264 (1959); United States v.

Keogh, 391 F.2d 138 (2d Cir. 1968). The suppression of the first trial transcript was deliberate under this test given above. Since Mr. Kelley's attorney made repeated requests for the transcript, the prosecutor's failure to turn it over must have been the result of a considered decision to suppress. Also, the requests put the prosecutor on notice that the transcript was of great value to the defense. Thus, the non-disclosure of Sweet's first trial transcript, in and of itself, requires a new trial.

B. THE FINGERPRINT REPORT

The results of the fingerprint testing originally conducted showed that the prints lifted from the scene of the crime, Maxcy's car and all material developed as part of the investigation, did not match up with Mr. Kelley's fingerprints. (September 1, 1967 Florida Sheriff's Bureau Latent Fingerprint Report, Ex. T, App. 56-57). Although defense counsel has no duty to specifically request information which they had no reason to know existed, Jackson v. Wainwright, 390 F.2d 288, 297 (5th Cir. 1968), Barbee v. Warden, Maryland Penitentiary, 331 F.2d 842 (4th Cir. 1964), the fact here is that defense counsel did specifically request it. One motion filed by the defense demanded all discoverable evidence under Fla. R. Crim. P. 3.220 (Demand for Discovery, Ex. U; H.T. 81). Section (a)(1)(x) of the rule mandates disclosure of "reports or statements of experts made in connection with the particular case, including the results of . . .scientific tests, experiments or comparisons" (emphasis added). Defense counsel could not get any more specific under the circumstances since they did not know that these particular fingerprint tests were conducted. Nor did they need to since Mr. Pickard was an experienced prosecutor and was well aware of the demands upon him under Fla. R. Crim. P. 3.220.

Instead, the prosecutor chose to suppress this fingerprint report (Ex. HH, par. 3B; Ex. II, par. 3B; H.T. 81, 127). Mr. Kelley's present counsel received the report in 1987, pursuant to the Public Records Act request (Ex. R, par. 5B). Fingerprint reports are classically recognized probative and material evidence.

Barbee v. Warden, Maryland Penitentiary, supra, 331 F.2d 842; Imbler v. Craven, 298 F. Supp. 795 (C.D. Cal. 1969). The fingerprints lifted from the crime scene and Maxcy's car do not match the prints of Mr. Kelley. Under State v. Gillespie, 227 So. 2d 550 (Fla.2d DCA 1969), the results of the fingerprint tests were "favorable" evidence that should have been disclosed upon request. Favorable evidence "is really that evidence which a reasonably skilled prosecutor should know could be fairly and probably used to the advantage by the accused on issues of guilt and punishment." Id. at 556. Given the weakness of Sweet's credibility (which properly could have been impeached had the prosecutor turned over the first trial transcript) the prosecutor did know that these tests **would** have been used to the advantage of Mr. Kelley on the issues of guilt and punishment. This was a deliberate non-disclosure and, in itself, denied Mr. Kelley a fair trial.

The circuit court reasoned that although the defense never had actual possession of the fingerprint report, it did know that no fingerprints matched Mr. Kelley's, and argued this to the jury (App. **84).** However, the actual report would have supplied conclusive documentary evidence. Conversely, mere argument of counsel, without the documentary support, falls far short of the persuasive, authoritative proof which the State suppressed. As Mr. Kunstler testified, the defense had no knowledge that an actual fingerprint comparison was made and found to be negative (H.T. **81-82, 128-130).**

The trial court further reasoned that Sweet testified that the killer wore gloves at the time of the murder. Again, Sweet's credibility and lack thereof were central in this case, so each item of evidence contradicting that testimony would have been crucial. Prints **were** lifted from the crime scene, so the "gloves" theory was questionable, at best,

C. MARCH **18,** 1967 POLICE REPORT SHOWING THAT KAYE CARTER COULD NOT POSSIBLY IDENTIFY A PHOTOGRAPH OF WILLIAM KELLEY.

There existed information, contained in a police report, that seventeen years previously one witness, Kaye Carter (Kaye Simmons at the time), could not positively identify Mr. Kelley when shown a photograph of him (Florida Sheriff's Bureau Memorandum, March 18, 1967, Ex. V; App. 58-59). The only information given to defense counsel on this point was the fact that Kaye Carter gave a general description of the man that stayed at her hotel which was different from the characteristics of the defendant. The defense was never put on notice, until the sheriff's report was received in 1987 pursuant to the Public Records Act, that seventeen years before the trial, at a time quite proximate to the offense, Ms. Carter was shown an accurate photograph of Mr. Kelley which she could not positively identify (H.T. 78). In addition, defense counsel was never notified that Ms. Carter stated that she was sure that the person she saw in 1966 was older (H.T. 78, 145-49). Ms. Carter's observation is particularly significant in that William Stuart, previously a Boston Police Officer, described Stephen Busias, and not William Kelley, as having the characteristics described by the State's witnesses (H.T. 199-212). Ms. Carter described the man she saw as being about 40 years old, 6' tall, and of medium build (H.T. 78-79, 145-49). Former officer Stuart described William Kelley, whom he knew in 1966, as being in his early twenties, 6'6" tall, and approximately 210-220 lbs (H.T. 203, 206); officer Stuart characterized Mr. Kelley in 1966-67 as a "string bean" (Ex. MM-5). This is far removed from the description given by Ms. Carter. Officer Stuart also testified that Mr. Kelly was someone he knew as a "thief," but not as a "contract killer" (id. at 204).

The fact that defense counsel requested disclosure of all "evidence tending to negate Mr. Kelley's guilt" cannot be deemed too vague to put the prosecutor on notice as to the contents of ths police report. The prosecutor knew this was an important issue in the case, as evidenced by his closing argument. In closing, Mr, Pickard harped on the fact that Ms. Carter could not possibly be expected to identify Mr. Kelley seventeen years later at trial (T. 866-67). He mentioned this

more than once (id.). The issue was clearly significant.[7] At the Rule 3.850 hearing, the prosecutor argued that because Ms. Carter identified a photograph of Mr. Kelley at John Sweet's second trial in 1969, the unsuccessful 1967 photo identification is immaterial (see H.T. 448). However, the unsuccessful 1967 identification, occuring only five months after the offense is obviously much more reliable than an identification three years later (see H.T. 150-54, 157). There can be little doubt that this non-disclosure was deliberate. Regardless,

> [T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution.

Brady, 373 U.S. at 87.

D. THE CRIME SCENE PHOTOGRAPHS

The prosecutor failed to turn over photographs of the crime scene or copies thereof which were in his possession (H.T. 34, 130-32). Copies of the photographs (Exs. G-1 through G-4; App. 39-42) were obtained for the first time from the State in February, 1987, pursuant to the aforementioned Public Records Act (Ex. R, par. 5A). The copies show footprints or smudge marks on the carpet near Maxcy's body. Several tests were made of sinks and other areas in the victim's house where one could wash off blood, and the tests showed no traces of blood in those areas (T.496). Thus, Mr. Kelley could have shown that the assailant(s) must have left the Maxcy house covered with blood. This fact contradicts testimony that Mr. Kelley was seen after the crime with no blood on his person. Further, this impeaches the testimony of Sweet as to the killers' leaving the scene in the Maxcy car -- no blood

[7] Courts have recognized that where a prosecutor emphasizes issues to the jury in closing argument, it tends to show that the matters were material. See Miller v. Pate, 386 U.S. 1 (1966); United States v. Sanfilippo, 564 F.2d 176 (5th Cir. 1977). Thus, when the prosecutor stressed the fact that Carter could not be expected to identify Mr. Kelley seventeen years later, when he alone knew that in 1967 she could not identify him from a photograph, it cannot be seriously said that the prosecutor was not on notice that the non-disclosed information would be favorable and material to Mr. Kelley.

was found in the car (H.T. *33-34*).

The way in which the lower court dealt with the crime scene photographs is interesting, but very wrong. It indicated that one photograph showed "what appears to be bloody footprints or smudge marks at the crime scene" (App. **85**). Strangely, the court then said that this evidence is "immaterial because three color photographs which were introduced depicted 'a great deal of blood' as pointed out by Mr. Kunstler during cross-examination" (Id.) What is obvious is that all of the evidence taken from Maxcy's car would have been useful in raising this issue to the jury. If Sweet's story that the murderers used Maxcy's car to leave the scene of the crime was to be believed, then why does there appear to be no blood in the vehicle? Even the court acknowledged the bloody footprints or smudge marks. Those footprints would have been left in the car. The photos at issue showed footprints. They should have been disclosed; they were relevant.

The lower court then stated that the defense's argument was **"contradicted** by the testimony of J.C. Murdock who stated that no bloody footprints were found" (App. **85**). Nevertheless, the trial is the search for the truth where such contradictions are to be fully explored. The very fact of the contradiction makes the photographs and the "bloody footprints" very relevant and material. It is ironic that the lower court in the same paragraph stated that the photographs were immaterial and then, by its own reasoning, establishes the materiality. Mr. Kelley was denied a fair trial by the suppression of the photographs and physical evidence of the crime scene.

E. JOHN SWEET'S IMMUNITY

The lower court ruled that Sweet's Massachusetts immunity was not contingent upon his testimony in Mr. Kelley's Florida trial. Mr. Kelley maintains that there were facts withheld from the defense that would have enabled the defense to make a substantial showing and argument to the jury that the Florida and Massachusetts immunity grants were entwined. The prosecutor argued otherwise to the jury (T.

863). The jury was entitled to hear all the facts and make its own determination.

Sweet's testimony was negotiated at a March 12, 1981, meeting between officials from the Bartow State Attorney's Office, the FDLE; the Bristol County, Massachusetts District Attorney's Office, and John Sweet (Ex. **S-2**; App. 50-53). A careful reading of the FDLE Report (Ex. **S-2**) shows that both the Massachusetts State Police and the Bristol County District Attorney's Office had an interest in Sweet's giving testimony in Florida. A representative from each traveled to Florida "to discuss actions to be taken in conjunction with the information being provided by John Sweet, and the request by the Massachusetts authorities . . ." (Ex. **S-2**, p. **2**; App. 51)(emphasis added). It appears that Sweet refused to cooperate with Massachusetts unless they secured his immunity in Florida, and/or that Massachusetts refused to aid Sweet unless he testified in Florida.

At the meeting, held at the District Attorney's Office in New Bedford, Massachusetts, Sweet provided extensive statements inculpating Mr. Kelley in the Maxcy homicide (id.). He additionally agreed to testify against Mr. Kelley both in Massachusetts, and in Florida if the State of Florida prosecuted Mr. Kelley (id.). In return, the following day, John Sweet received immunity for his criminal involvement in Massachusetts from the Massachusetts Supreme Judicial Court, as requested by the Bristol County District Attorney's Office (Order of Immunity, March 13, 1981, Ex. LL; App. 61-62). Two and one half months later, Robert St. Jean of the Massachusetts State Police Bureau of Investigative Services sought assistance from the Federal Witness Protection Program for Sweet (June **2**, 1981 letter from Robert St. Jean to Joseph Mitchell, Ex. S-3; App. 55). The jurors should have been apprised of these events and made their **own** determination as to whether Sweet's cooperation in the Maxcy case was inextricably entwined to his grant of immunity in Massachusetts (**see** H.T. 85-6, 88-9, 160, 291-95, 356-57). They had concerns precisely in this regard. See Kelly, 486 **So**. 2d at 583. Florida authorities formally granted Sweet immunity on December 15, 1981 at the request of Sweet's

attorney (T. **608;** Ex. **QQQ;** Contract of Immunity, Ex. **QQQ-1;** App. 70-72); the jurors should have learned that there was a prior deal, involving Sweet's Massachusetts crimes as well, in order to fairly assess the testimony of the one witness on whose word the State's case was built.

F. THE PROSECUTION, BY AGREEMENT WITH JOHN SWEET, PRECLUDED ROMA TRULOCK FROM TESTIFYING AT MR. KELLEY'S TRIAL

Roma Trulock, then an FDLE agent, was the primary investigator in this case (H.T. **222-23).** The lower court believed that there was no agreement by the State not to call him at Mr. Kelley's trial. The evidence clearly supports the contrary. As Mr. Trulock himself testified at the 3.850 hearing:

Q. But what you do recall though was there was an incident when you were present with Mr. Pickard?

A. Right.

Q. And in addition, was there a lawyer from Massachusetts who stated that he represented Mr. Sweet present?

A. Yes.

Q. And this meeting dealt with the idea that Sweet could potentially testify in an upcoming trial and that the subject of immunity was discussed. Is that true, sir?

A. Yes.

Q. And in addition, do you recall whether or not Mr. Sweet's lawyer -- and do you remember his name?

A. No, I do not.

Q. Do you recall his making a statement to the effect that if you-- by you meaning yourself, Mr. Trulock--was involved in this case, then Sweet would not be involved?

A. Yes, sir.

Q. There is no doubt in your mind about that?

A. No, sir.

Q. And subsequent to this meeting, did you receive a phone call?

A. Yes, sir.

Q. **Who** called **you?**

A. Special agent Joe Lee--1 mean Joe Mitchell, Mr. Mitchell.

Q. And as a result of that phone call. were you informed as to the role that you would play in this case?

A. I was told my testimony wouldn't be needed.

Q. And did you have any other involvement in this case after that point?

A. No, sir.

(H.T. 224-25)(emphasis added). Marc Nezer, the defense investigator during post-conviction proceedings, testified that Mr. Trulock told him that he believed that Sweet would not testify at Mr. Kelley's trial if Trulock testified because Sweet would then be exposed as perjuring himself (H.T. 261).

The evidence thus demonstrates that the prosecution promised Sweet that Roma Trulock, the primary investigator in the Maxcy murder, would not testify at Mr. Kelley's trial, or otherwise be involved in Mr. Kelley's prosecution. This can only be construed as a bad faith act on the prosecution's part because it withheld from the jury important and likely exculpatory information. After all, Mr. Trulock extensively investigated the murder and obtained two statements from John Sweet (Ex. **ZZ**, p. *804)*. Furthermore. Sweet agreed to give these statements without his lawyer being present (First Sweet trial transcript, *Ex.* **ZZ-1**, p. *883)*. Obviously, Sweet was afraid of what Mr. Trulock might reveal both to the defense and to the jury.

Moreover, where the state intentionally or negligently causes the unavailability of a material witness, it may well be guilty of a violation of the accused's right to compulsory process. Ashley v. State, *433 So.* 2d 1263, 1269 (Fla. 1st DCA 1983). Mr. Kelley's trial counsel neglected to procure Mr. Trulock's assistance or testimony (H.T. 223), an omission which Mr. Kelley contends is an instance of their ineffective representation. However, even if they had attempted to interview or subpoena Mr. Trulock, it is likely their efforts would have been thwarted by the prosecution's agreement with Sweet,

G. DISCUSSION

The prosecution is dutybound to disclose any and all evidence which is favorable to the defense. Anderson v. State, *241 So.* 2d *390, 395* (Fla. *1970);* State v. Crawford, *257 So.* 2d *898,* 900 (Fla. *1972).* Furthermore, it is well established that impeachment is Brady evidence. Bagley, *473* U.S. at *676;* Ashley v. State, *479 So.* 2d *837, 839* (Fla. 1st DCA *1985).* All of the evidence discussed above would have been utilized by the defense at trial. The State's non-disclosures thus violated Brady, as well as Fla. R. Crim. P. *3.220.* The State cannot demonstrate that these discovery violations do not warrant relief under Bagley, and cannot show that the violations were harmless beyond a reasonable doubt. Roman; DiGuilio. Additionally, the record now demonstrates that the prosecution acted in bad faith by, among other things, promising Sweet that it would exclude any input or testimony of Trulock, an important witness. The jury should have known about this promise -- Sweet should have been cross-examined about it.[8]

Mr. Kelley was denied his right to a fair trial when the prosecutor deliberately suppressed the evidence mentioned above. Each suppression, in and of itself, is prejudicial enough to warrant relief. The total prejudicial effect of all the non-disclosures, Chanev v. Brown, supra, unquestionably makes more evident the constitutional violations. Rule *3.850* relief is proper. See Roman. supra.

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[8]Moreover, the materiality question also requires consideration of the

> adverse effect that the prosecutor's failure to respond might have had on the preparation or presentation of the defendant's case. The reviewing court should assess the possibility that such effect might have occurred in light of the totality of the circumstances and with an awareness of the difficultv of reconstructing in a post trial proceeding. the course that the defense and the trial would have then had had the defense not been misled bv the prosecutor's incomplete response.

Bagley, *473* U.S. at *683;* see also Chanev v. Brown, supra, *730* F.2d *1334.*

CLAIM III

MR. KELLEY WAS DENIED HIS FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS WHEN, 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.

Abe Namia, an investigator employed by Sweet's attorney prior to Sweet's trial, testified for the State (T. 766). The purpose of his testimony was to corroborate Sweet's claim that the defendant was involved in the offense. During cross-examination, Namia told defense counsel that Namia's reports contained information which John Sweet gave to Namia (T. 774; 795). In actuality, there was no record of any interview between Namia and Sweet (T-809). At this point the judge called a recess. Defense counsel Kunstler requested that the prosecutor not talk with Mr. Namia during this recess in the midst of cross-examination. The judge denied the request (T. 798: "You are implying something of the State Attorney?"). After the recess the prosecutor stated that Namia recognized the reports (T. 799). The reports had been shown to him by the prosecutor during the recess.

The prosecutor has a duty to be fair, honorable and just." Boatwright v. State, 452 So. 2d 666, 667 (Fla.4th DCA 1984). His or her "trial tactics and trial strategy...must reflect a scrupulous adherence to the highest of professional conduct." Martin v. State, 411 So. 2d 987, 990 (Fla.4th DCA 1982). "In interviews with witnesses...[the prosecutor]' must exercise the utmost care and caution to extract and not to inject information, and by all means to resist the temptation to influence or bias the testimony of the witnesses.'" Lee v. State, 324 So. 2d 694, 698 (Fla. 1st DCA 1976)(citing Mathews, 44 So. 2d at 669)).

By showing Namia the reports at issue, after the Judge noted that this was improper, the prosecutor "injected information" and "influenced the testimony of the witness", Lee, supra, by preparing Namia for the defense's use of the reports to impeach him. The prosecutor, upon returning from the recess, stated that Namia did not know whether the reports were complete or whether there were additional reports,

but that Namia represented that "they do not reflect his interview with John Sweet" (T. 799). Thus, Namia had time to compose an explanation to the discrepancy between his testimony and the reports themselves.

Namia's credibility was important in that his testimony was admitted to rebut an inference of recent fabrication or improper motives in the testimony of the prosecution's key witness, Sweet. Kelley, 486 So. 2d at 582. Therefore, absent the prosecutor's misconduct, Namia might have appeared not credible, thus further implying that Sweet was lying. This shadow on Sweet's credibility might have produced a different result in the trial. Cf. State v. Williams, 478 So. 2d 412, 413 (Fla. 3d DCA 1985)(affirming trial court's granting of new trial where prosecutor's misconduct deprived defendant of testimony that might have produced a different result). In any event, it is axiomatic that a party may not prepare a witness during the opposition's cross-examination. This occurred in this case and tainted Mr. Kelley's trial, warranting the relief sought.

CLAIM IV

MR. KEUEY WAS DENIED DUE PROCESS OF LAW, AND HIS RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS, AND ARTICLE ONE, SECTION NINE OF THE FLORIDA CONSTITUTION BY THE PROSECUTOR'S IMPROPER CLOSING ARGUMENT.

William Kelley was denied the most rudimentary fair trial rights when the prosecutor intentionally urged the jury to make conclusions of fact that he, the prosecutor, knew to be untrue. This misconduct worked a fraud upon the jury and the court. The trial court declined to hear this issue, reasoning that it should have been raised on appeal. However, at the time of the appeal, the defense did not have information showing that the matters urged to the jury by the prosecutor were untrue. Rather, the relevant documents were not provided until 1987, pursuant to the defense's Public Records Act request.

Mr. Pickard, the prosecutor, misstated facts in his closing argument regarding three critical issues. The first issue concerned the inability of the State's witness, Kaye Carter, to identify the defendant. The prosecutor emphasized that

Mrs. Carter could not be expected to ". . . come into court seventeen and a half years later after the person has changed his appearance and identify him. It's extremely difficult to do that" (T.866). The prosecutor then re-emphasized this point:

> [m]aybe if they [Mrs. Carter and another witness] knew at the time, if somebody back in '66 had come up to them and said, make sure you know what this guy looks like because in 1984 you are going to have to go to court and identify him, maybe they would have made a greater effort to remember him.

(T. 867).

These remarks deceived the jury into believing that Mrs. Carter could not identify Mr. Kelley because of the seventeen year time-lapse. However, the prosecutor was aware of a March 18, 1967, investigation report by Officer Trulock which expressly noted that during the original investigation, Mrs. Carter was shown a photograph of William Kelley but could not positively identify Mr. Kelley as the person she saw at the Daytona Inn and stated that although the photograph "looks something like" the man at the Inn, "she is sure" that the person at the Inn was older (Ex. V; App. 58-59). The report also stated the person she saw was approximately 6" shorter than the defendant (Id.; H.T. 78-79, 145-149, 203, 206). This report was suppressed by the prosecutor although defense counsel requested all exculpatory evidence (H.T. 78, 145-49). Thus, in argument, the prosecutor affirmatively urged the jury to find that the seventeen year hiatus caused Mrs. Carter to forget what Mr. Kelley's face looked like. The prosecutor, alone, knew this to be false. He knew Mrs. Carter could not effectuate an identification of Mr. Kelley when shown his photograph seventeen years previously, in March, 1967. Because the exculpatory evidence was suppressed by the prosecutor, defense counsel was prevented from cross-examining the witness on this point and later was prevented from objecting to the State's deceptive half-truth during closing argument.

The second intentional misstatement made by the prosecution concerned Mr. Kelley's knowledge of the Von Maxcy murder, based on statements he made to the

arresting FBI agent. The prosecutor argued to the jury that the defendant's knowledge was derived from personal knowledge rather than from another source, such as the news media:

> Apparently, Mr. Kunstler wants you to believe that Mr. Kelley was giving out this information based on things he read in a newspaper. But remember, this was not **1966** and **1967,** this was **1983** in Tampa, Florida. Anything that came out in Boston would have come out seventeen or eighteen years ago.

(T. **877).**

These statements could also be deemed as reasonable inferences to argue to the jury. However, again, the prosecutor knew that what he stated to the jury was completely untrue. Mr. Pickard, the prosecutor, had personal knowledge that in December, **1981** at least one greater Boston newspaper had published stories concerning Mr. Kelley's alleged involvement in the Maxcy murder. He spoke to a Massachusetts reporter, James Harrington, of the Brockton Enterprise who told of the articles he wrote concerning Mr. Kelley. (December **16** telephone message to Hardy Pickard, Ex. DD; App. **60;** testimony of James Harrington, H.T. **179-88).** James Harrington, in addition, sent copies of his articles and photographs to Mr. Pickard (H.T. **183).** Thus, again, the prosecutor argued based on facts he knew were false. Trial/appellate counsel were unaware of the prosecutor's misstatement of fact because they were not in possession of the telephone message slip which showed that Mr. Pickard had indeed been alerted that the news media, in **1981,** were covering the alleged connection of William Kelley to the Maxcy murder (H.T. **70-72, 77),** and covering it in Massachusetts. Thus, counsel could not object to the prosecutor's closing, nor could they have raised the matter on appeal. This misstatement, in conjunction with the other misstatements, amounted to prosecutorial misconduct that unfairly prejudiced Mr. Kelley and denied him a fair trial.

Thirdly, the prosecutor told the jury that John Sweet did not have to testify against Mr. Kelley in order to receive immunity in Massachusetts (T.**863).** However, the jury was never apprised of the full amount of leniency John Sweet received for

his testimony. He was rewarded for his testimony by grants of immunity for numerous crimes in two States -- Florida and Massachusetts. Surely, the jury would have considered whether the extent of the reward biased Sweet's testimony.

As noted by the circuit court, Mr. Edmund cross-examined Sweet extensively regarding the crimes for which Sweet received immunity in Massachusetts (App. 61-62). However, any impact that cross-examination might have had on the jury was obliterated when Mr. Pickard argued:

> He already had his immunity from Massachusetts on loan sharking, whatever that long list of things were. He didn't have to give them Kelley to get immunity. That came up later after he went to Massachusetts and thirty investigators or however many he said were questioning him about all sorts of crimes in Massachusetts.

(T. 863). In fact, Sweet did not "give them Kelley" later. Rather, he was questioned in Massachusetts by both Massachusetts and Florida law enforcement officers (see Ex. S-2, p. 2; App. 51). At that early questioning, he agreed to testify against Mr. Kelley (Ex. S-2, p. 3; App. 52). Furthermore, Florida and Massachusetts law enforcement authorities met together on at least two occasions, first in Florida, then in Massachusetts (Ex. S-2; App. 50-53). The prosecutor's remarks clearly confused the jurors, as evidenced by their question to the court regarding whether Sweet had anything to gain by his testimony in the Maxcy case (T. 925). The prosecutor knew them to be inaccurate. See Claim II, supra. In its closing argument, the defense attempted to argue that the immunity grants were related, but it did not have the documents or information to support the argument (see H.T. 85-86; 88-89, 160; 291-95; 356-57). The State suppressed this evidence.

The A.B.A. Standards for Criminal Justice 3-5.8 (2d ed. 1980) provide that "[i]t is unprofessional conduct for the prosecutor intentionally to misstate the evidence or mislead the jury as to inferences it may draw." Prosecutorial misconduct of this type, however, can reach a degree where it ceases to be merely unprofessional and instead denies the accused a fair trial. When this happens, a new trial must be awarded. Berger v. United States, 295 U.S. 78 (1935); United

States v. Brown, 451 F.2d 1231 (5th Cir. 1971). This happened here.

In Berger, the Supreme Court explained that improper suggestions, insinuations, and also assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none. Id. These methods are forbidden to a prosecutor when they are calculated to mislead the jury. United States v. Rodriguez, 765 F.2d 1546 (11th Cir. 1985); see also Miller v. Pate, supra. In the present case, the prosector's remarks in closing argument could not be considered to result from prosecutorial overzealousness, but rather from a desire to mislead the jury. Overzealousness implies the prosecutor acted in good faith, whereas here, the prosecutor had affirmative knowledge that what he told the jury was in fact untrue.

Where a prosecuting attorney has knowingly indulged in such improper argument to the jury, the resulting conviction must be reversed if there is any chance of prejudice to the accused. McCall v. State, 163 So. 38 (Fla. 1935). Here, the prosecutor's improper argument seriously prejudiced Mr. Kelley and cannot be considered as mere harmless error. In Whitfield v. State, 479 So. 2d 208 (Fla.4th DCA 1985), the Court dealt with the harmless error rule when deciding a case involving an improper closing argument by a prosecutor. The Court explained that once error has been shown, the State must prove that the error was harmless beyond a reasonable doubt. Id. at 217. As noted in the preceding sections of this brief, this showing cannot be made by the State in this case.

This Court has in fact held that post-conviction relief is warranted where the State suppresses evidence and uses the suppression to its advantage in closing argument. Arango, 497 So. 2d at 1162. Mr. Pickard, too, failed to inform the defense of 1) Kaye Carter's non-identification of Mr. Kelley seventeen years ago; 2) Mr. Pickard's telephone conversation with the Brockton Enterprise newspaper reporter and the articles about Mr. Kelley sent by the reporter to Mr. Pickard; and 3) the nexus between John Sweet's immunity in Massachusetts and his cooperation in the Maxcy case, specifically relating to the joint meetings held in Massachusetts. He

then used the defense's ignorance of these facts to the State's advantage in closing argument. In a similar situation involving a prosecutor's efforts to convince a jury to make factual findings that the prosecutor personally knew were false, the Sixth Circuit held harmless error to be inapplicable:

> In the circumstances, we find this line of argument to be foul play. As he was making the argument, the prosecutor well knew that evidence did exist to corroborate [the defendant's] story..the prosecutor told the jury that it should convict because of the absence of evidence he knew existed. We have no choice but to assume that the jury was persuaded by the prosecutor's remarks and convicted for that reason.

United States v. Toney, 599 F.2d 787, 790-91 (6th Cir. 1979).[9]

Finally, when considering the prejudicial effects of prosecutorial misconduct, a reviewing court must consider the strength of the government's case. Here the government's case was extremely weak. The crucial witness for the state was himself convicted of Maxcy's murder at trial, and although this conviction was overturned on appeal, this witness refused to testify unless immunity was given to him. In addition, Mr. Kelley's first trial resulted in a deadlocked jury, while in the second trial the jury deliberated at length and could not reach a verdict after voting three times. As in the first trial, the jury in the second trial returned questions about whether the key witness, Sweet, received immunity. Again, it is clear that the jury was confused by Mr. Pickard's (mis)statement that Sweet did not have to "give them Kelley to get immunity," and that the Massachusetts authorities questioned Sweet only about crimes in Massachusetts (see T. 863). The jurors'

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[9] In fact, the harmless error standard has been surpassed for less egregious misstatements. Where a prosecutor personally commended a government agent for doing a "good job" and praised him for the danger he risked, when there was no evidence of danger, the court held this to go beyond harmless error in United States v. Brown, 451 F.2d 1231 (5th Cir. 1971): "However, it is contended by the United States that this was harmless error and it should be overlooked. This court has passed too many times on this kind of comment by prosecutors to permit it to continue by allowing it to be brushed under the rug under the harmless error doctrine." Id. at 1236. If comments on the heroism of a government agent, which are absolutely irrelevant to the issue of a defendant's milt, are beyond harmless error, then in our present case the prosecutor's intentional misstatement of probative facts must certainly rise above harmless error.

questions to the court show that the impact of the cross-examination of Sweet regarding the Massachusetts immunity was undermined by the prosecutor's misconduct during closing argument.

Although the jury finally reached a verdict of guilt, the government's case against Mr. Kelley cannot be considered overwhelming by any stretch of the imagination. This may be why the prosecutor, who knew the jurors' expressed concerns at the first trial, was reduced to misleading the jury in his closing argument at the second trial. Considering the weakness of the State's case, the prosecutor's improper arguments substantially prejudiced Mr. Kelley. A new trial should be ordered, comporting with Mr. Kelley's rights to due process.

CLAIM V

THE CIRCUIT COURT SHOULD HAVE DECLARED MR. KELLEY INDIGENT AS HE PROVIDED ALL STATUTORILY REQUIRED INFORMATION AND FLORIDA ALLOWS FOR FUNDING OF EXPERT WITNESSES WHERE A DEFENDANT IS INDIGENT.

The circuit court denied Mr. Kelley's Motion To Be Declared Indigent, reasoning that counsel would have to submit affidavits explaining the source of funds, if any, paid to Mr. Kelley's various former attorneys (P.T. 58-59). The determination of Mr. Kelley's present indigency (Mr. Kelley has been incarcerated on death row since 1983 and is clearly indigent) is based on an affidavit filed pursuant to sec. 27.52(1) Fla. Stat. (1987). Mr. Kelley's affidavit made the showing of indigency required by the rules (App. 75) and demonstrated that he did not meet any of the sec. 27.52(2)(b) requirements for non-indigency status. Mr. Kelley stated in the affidavit that he owned no valuable property whatsoever. He is, in fact, without funds. His indigency has been further determined by the Office of the CCR (pursuant to Fla. Stat. sec. 27.001, et. seq.) which through Mr. Nolas then entered an appearance as Mr. Wilson's co-counsel.

The circuit court based its findings of non-indigency on the right of the court to make a reasonable inquiry as to defendant's indigency (P.T. 59). The lower court suggested that it believed Mr. Kelley's prior lawyers' services could not all have

been pro bono or paid for by family or friends (P.T. 58-59). Therefore, the court wanted an affidavit from present and past counsel stating the nature, amount and source of fees. This exceeded the lower court's authority. The court also suggested that the defense seek an expert in commercial lending or bankruptcy to help in presenting to the court information concerning Mr. Kelley's purported assets (P.T. 26).

The circuit court's requirements (some tongue-in-cheek) were not reasonable. The court's inquiry under sec. 27.52 is limited to whether Mr. Kelley is indigent. Mr. Kelley made that showing.

Indeed, the attorneys representing Mr. Kelley at the Rule 3.850 proceedings assured the court that Mr. Kelley had not paid them (P.T. 13-16, 19-20). It is not unusual for out-of-state counsel to appear pro bono in Florida capital cases. (Of course, CCR counsel receive no compensation from the client.) The fact that family or friends have retained counsel for a defendant and that the defendant is, therefore, not represented by a public defender or court-appointed counsel does not bar a defendant's recovery for expert witness fees, discovery costs, or transcription fees under secs. 939.07, 914.06, 914.11 Fla. Stat. (1987), or Fla. R. Crim. P. 3.220 (K). See Saintilv. Snyder, 417 So. 2d 784, 785 (Fla.3d DCA 1982); Thomas v. State, 525 So. 2d 1011 (Fla.3d DCA 1988).

The circuit court's ruling presents difficulties for an indigent defendant. Cf. Glock v. State, 14 F.L.W. __ (Fla. Jan. 12, 1989). Obviously, the circuit court's suggestion that Mr. Kelley seek a commercial lending or bankruptcy expert to help him determine what information the court needs to determine he is indigent is not pratical because, as he already indicated, he does not have funds to hire an expert. The court, in effect, indicated that Mr. Kelley should hire an expert to prove he is indigent for the purposes of hiring an expert. Mr. Kelley has done everything in his power and has complied with the affidavit requirement of sec. 27.52. The circuit court erred. This case should be remanded with instructions

that the County bear the costs of the experts which Mr. Kelley's counsel sought to, but could not because of petitioner's indigency, retain, that the hearing be re-opened in order for the circuit court to consider such expert evidence, and that Mr. Wilson be reimbursed for the costs of transcription.

CLAIM VI

THE CIRCUIT COURT SHOULD HAVE PROVIDED FUNDING FOR THE EXPERT WITNESSES REQUESTED BY THE DEFENSE, AS MR. KELLEY REQUIRED THEIR SERVICES FOR THE FULL AND FAIR LITIGATION OF HIS RULE AND THE COURT'S REFUSAL TO DISBURSE THE NECESSARY FUNDS VIOLATED DUE PROCESS AND EQUAL PROTECTION OF LAW.

Mr. Kelley requested compensation from Highlands County for necessary expert witnesses under Sec. 914.06 Fla. Stat. (1985):

> In a criminal case, when the state or an indigent defendant requires the services of an expert witness whose opinion is relevant to the issue of the case, the court shall award reasonable compensation to the expert witness that shall be taxed and paid by the county as costs in the same manner as other costs.

The circuit court denied the request (**see** Claim V. supra). The circuit court erred, and consequently denied Mr. Kelley his right to a full and fair adjudication of the facts involved in his claims for relief.

The Florida Legislature's creation of the CCR office is further indication that expert witness fees may be provided to a defendant during the litigation of a Rule 3.850 motion and, in fact, county funding has been provided often in cases litigated by the CCR office. (Similarly, funding is provided by federal disctrict courts in federal habeas corpus actions). Through the CCR's enabling statute, the Legislature made the determination that it is in the interest of justice to provide full representation on a **3.850** motion for an indigent defendant sentenced to death. In the present case, where Mr. Kelley could not afford to retain the expert witnesses necessary to the fair presentation of his ***3.850*** motion, the provision of funding for the requested expert witnesses was necessary to fulfill the legislative intent. The circuit court opined that present Florida law provided no entitlement to the payment of experts by the County in post-conviction proceedings (P.T. ***57***). However, the

Court stated that there was a strong implication that by guaranteeing the right to counsel in indigent cases, the law would also guarantee funding for the tools needed by appointed counsel, including experts (Id). Therefore, the court ruled "with some reservation" that there was no right to payment of experts by the county in a post-conviction proceeding (=.)

In the instant case the prosecution accused the defense of requesting experts for a "fishing trip" and suggested that the providing of expert witness funds to Mr. Kelley would open floodgates to all convicted prisoners to have a prosecutional expert review the prosecutor's files. Mr. Kelley, however, was on no fishing expedition. Numerous specific pieces of evidence are in question as having been unconstitutionally suppressed or destroyed. This evidence includes potentially exculpatory physical evidence and identifications, impeachment evidence of a key state witness, Mr. Kelley's alleged co-conspirator, and the trial transcript of this alleged co-conspirator. Mr. Kelley's request for experts to advise and testify concerned very specific evidence which is at issue. The request for forensic experts is also specific as it refers to experts skilled to analyze the hair, parts of the car, blood at the scene and objects found at the scene, inter alia, an analysis which attorneys (who obviously are not forensic experts) simply cannot perform. The State had the assistance of various forensic experts throughout the trial and post-conviction proceedings (e.g., FDLE, sheriff's offices, etc.). Mr. Kelley was not even allowed one expert to assist the defense.

Funds for expert witnesses under sec. 914.06 are routinely provided where a defendant requires the experts' services. Mr. Kelley does require the services of the experts requested. The experts will analyze evidence which was not known to the defense at the time of the trial. The determination of the exculpatory nature and materiality of the evidence is crucial to the fair adjudication of this Rule 3.850 motion. Unlike the situation in Martin v. State, 455 So. 2d 370 (Fla. 1984), where the Florida Supreme Court found trial court did not err in declining to grant to the

defense an eighth psychiatrist, the expert testimony and assistance requested in the present case was far from cumulative. No expert testimony as to the materiality of the evidence the prosecution suppressed or destroyed has been heard yet in this case. See Rose v State, 506 So. 2d 467, 471 (Fla. 1st DCA 1987)(trial court erred in failing to appoint any expert to testify to possible neurological illness which would have negated intent).

The United States Supreme Court held in Ake v. Oklahoma that a criminal defendant is entitled to a psychiatric expert to assist the defense and for testimony at trial where the defendant's sanity is at issue. 470 U.S. 68, 105 S. Ct. 1087, 1096 (1985). The Court emphasized that "mere access to the courthouse doors does not by itself assure a proper functioning of the adversary process," id. at 1093, and that a criminal defendant must be provided the "basic tools of an adequate defense or appeal." Id. at 1093 (quotinp. Britt v. North Carolina, 92 S. Ct. at 431, 433 (1971)). This Court also pointed out in Spalding v. Dugger that such "tools" as counsel are required in a Florida collateral proceeding, where the death penalty has been imposed. 526 So. 2d 71, 72 (Fla. 1988).

In determining whether an expert should have been appointed in Ake, the Supreme Court balanced the defendant's interest, the state's interest, and the value of awarding the expert. In any criminal proceeding, the defendant's interest in his own life and liberty and the state's interest in a just outcome weigh in the defendant's favor.

The value of the requested expert assistance must be viewed in light of the possible risk of error in the proceeding without the expert's advice, assistance, and testimony. In the present case, without the experts requested, Mr. Kelley was denied advice, assistance, and possible testimony as to the materiality of physical evidence which the defense had never before examined. The materiality and exculpatory nature of this physical evidence was and is a crucial issue in Mr. Kelley's 3.850 motion. Also, criminal defense experts would provide objective

opinions as to whether trial counsel were ineffective. The risk of error was, therefore, very high without expert advice, assistance, and testimony. The eighth amendment, due process of law, and equal protection all require that Mr. Kelley be afforded a full and fair opportunity to defend his case. The risk of error must be considered with the utmost seriousness in a capital case where the punishment, once administered, can never be re-examined or changed. This case should be remanded with instructions that the circuit court allow the appointment of the requested experts to assist the defense and consider any evidence which Mr. Kelley may submit as a result of the requested expert evaluations.

CLAIM VII

MR. KELLEY WAS INEFFECTIVELY REPRESENTED BY HIS TRIAL COUNSEL IN THIS CAPITAL CASE, IN VIOLATION OF HIS RIGHTS TO EFFECTIVE ASSISTANCE OF COUNSEL AND DUE PROCESS OF TAW AS GUARANTEED BY THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE ONE, SECTIONS NINE AND SIXTEEN OF THE FLORIDA CONSTITUTION.

In Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984), the Supreme Court defined "counsel's function" as one founded on the duty of "mak[ing] the adversarial testing process work in the particular case", 104 S. Ct. at 2066, and announced the benchmark for judging claims of ineffectiveness: whether counsel's conduct undermined the "proper functioning of the adversarial process" so that outcome of the proceedings "cannot be relied on" by the reviewing court. Id. at 2064. In order to establish his ineffective assistance of counsel claim, Mr. Kelley must show deficient performance and prejudice., Strickland v. Washington, supra.[10] Mr. Kelley has shown both.

William Kelley was represented by two attorneys whose professional effort, whether viewed individually or collectively, fell so far below the level of

[10]It should be noted than in order for a petitioner to make the requisite showing of prejudice, the Supreme Court expressly rejected an "outcome determinative" test, making clear that a defendant's claim of ineffective assistance of counsel can succeed "even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome." Id. at 2067.

reasonable professional assistance as to undermine the reliability of the jury verdict.

A. THE JUDGE SHOULD HAVE GRANTED MR. KELLEY'S OFFER TO ADMIT INTO EVIDENCE JACK EDMUND'S UNSIGNED AFFIDAVIT

At the *3.850* hearing, the defense offered into evidence an affidavit prepared by attorneys Barry P. Wilson and Alan Dershowitz (H.T. *423-25*). (This affidavit was attached to the Rule *3.850* Memorandum as Ex. R-1; App. *43-49*). Mr. Edmund initially agreed to sign this affidavit (H.T. *384-87*) but then refused (H.T. *387, 390*). Initially, Mr. Edmund claimed he decided not to sign the affidavit only after his law partner pointed out that signing the affidavit could jeopardize his future as a lawyer (H.T. *333, 387, 390*). Later in his testimony, Mr. Edmund stated that he made the decision not to sign prior to conferring with his partner (H.T. *392, 395-98*). He did sign a modified affidavit (H.T. *421*).

Regardless of when Mr. Edmund decided not to sign the first affidavit, the defense's private investigator, Marc Nezer, testified that Mr. Edmund admitted that both he and Mr. Kunstler were totally incompetent in trying Mr. Kelley's case (H.T. *414-19*). Mr. Nezer also testified that the content of the affidavit factually represented what Mr. Edmund actually had told Mr. Nezer and Mr. Edmund appeared willing to sign the affidavit until his law partner advised him not to (H.T. *414-21*). The trial judge ruled that Mr. Nezer and Mr. Edmund met only briefly to discuss what eventually became part of the affidavit (App. *89*). However, Mr. Edmund testified that he and Mr. Nezer spoke at some length (H.T. *333*). In sum, Mr. Kelley maintains that this first affidavit, although not drafted or signed by Mr. Edmund, accurately represented matters which Mr. Edmund conveyed to Mr. Nezer. As such, the affidavit is relevant and material to Mr. Kelley's ineffective assistance of counsel claim, and should have been admitted into evidence.

In his order denying relief, the Rule *3.850* judge noted that each former attorney testified that they made mistakes. However, in the same order, the lower

court stated that an attorney's own admission of ineffectiveness is of little persuasion in proving such a claim (App. 90).[11] During the hearing, both trial counsel made numerous admissions of ineffectiveness, citing very specific instances to support the claim. While such admissions, alone, may be insufficient to prove the proposition, Mr. Kelley maintains that taken in the context of the entire case, the attorneys' testimony, in combination with the evidence offered, demonstrates that trial counsel were ineffective, to Mr. Kelley's detriment. Furthermore, our situation differs significantly from that in Francis v. State, where trial counsel merely stated "'Perhaps, in retrospect, I was negligent in some areas'" 529 So. 2d 670, 672 (Fla. 1988). In the present case, trial counsel admitted to much more than perhaps, in retrospect, being negligent.

Other noteworthy and telling matters came to light at the 3.850 hearing. Harvey Brower, a disbarred attorney, did much of the investigation and preliminary legal work prior to Mr. Kelley's first trial (H.T. 14-15, 17, 38-41). Apparently, Mr. Brower supplied a list of names and addresses of potential witnesses to the defense, and the defense learned that the addresses listed were incorrect--they did not represent actual addresses (H.T. 96-100). In fact, Barry Haight saw his name on the defense witness list, but the address listed for him was non-existent (H.T. 193-94). Trial counsel never pursued the matter any further (H.T. 97-100). Additionally, Mr. Kunstler never learned, and local counsel never told him, that the Florida Rules of Criminal Procedure provided for the taking of depositions of the state's witnesses (H.T. 164-69), even though that might well have been a fruitful

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[11] Interestingly, circuit courts generally do not take this position when an attorney provides "tactics" during Rule 3.850 proceedings involving effective assistance of counsel claims. An attorney's admission of error is no less credible than an attorney's testimony that he or she had "tactics" or made few errors. Indeed, an attorney is defending himself or herself when ineffective assistance of counsel claims are made, and admissions of error in such contexts should carry considerable weight. It is a sad irony of capital post-conviction litigation that many courts apply against the defendant the normal presumptive truth that attaches to declarations against interest when those declarations are made by attorneys who honestly admit mistakes in capital post-conviction actions.

discovery tactic in the case." Counsel also failed to object to the prosecution's misconduct regarding witness Namin, or to seek a hearing on the issue, to Mr. Kelley's substantial disadvantage. See Claim III, supra. The specific omissions discussed herein demonstrate further instances of prejudicial ineffectiveness.

B. THE DESTROYED, MISPLACED AND UNACCOUNTED FOR EVIDENCE

The destruction, misplacement and unaccountability of evidence has been addressed extensively above (Claims I and 11). Therefore, at this juncture, Mr. Kelley will merely add to the previous discussion relevant citations to the testimony at the ***3.850*** hearing. Counsel's handling of the destruction of evidence was certainly ineffective, as the discussions presented in earlier portions of this brief and immediately below reflect.

Counsel did not apprise the court that the destroyed bullet could have implicated Stevie Busias, another suspect (H.T. ***31-32).*** Counsel failed to raise the relevancy and materiality of the missing forty-eight destroyed cards of latent prints, scrapings and hair samples, victims clothing, knives found in the Maxcy home, and portions of the vehicle allegedly used to leave the crime scene, including a slashed tire (H.T. ***32-34, 41-42).*** There was no strategic reason for these omissions.

C. TRIAL COUNSEL DEPRIVED MR. KELLEY OF HIS RIGHTS TO DUE PROCESS OF LAW ***AND*** CONFRONTATION BY FAILING TO OBJECT WHEN THE STATE OFFERED EXPERT TESTIMONY AND SCIENTIFIC ANALYSIS TESTIMONY CONCERNING THE DESTROYED EVIDENCE

"It would be fundamentally unfair, as well as a violation of Rule ***3.220,*** to allow the State to negligently dispose of critical evidence and then offer an expert witness whose testimony cannot be refuted by the defendant." State v. Ritter, ***448***

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[12]The attorneys' lack of understanding is also reflected by the manner in which the motion for a new trial was filed in this case. Immediately after sentencing, Mr. Edmund filed a notice of appeal (H.T. ***400).*** After that, he filed a motion for a new trial, even though his premature filing of a notice of appeal removed the case from the trial court's jurisdiction (H.T. ***400-01).*** Mr. Edmund had no explanation for his actions, except "that wasn't very smart" and "that wasn't trial strategy" (H.T. ***401).***

So. 2d 512, 514 (Fla. 5th DCA 1984); State v. Hills, 467 So. 2d 845, 848-49 (Fla. 4th DCA 1985).[13] The same unfairness pervades when the missing evidence requires scientific analysis. Lancaster v. State, 457 So. 2d 506, 507 (Fla. 4th DCA 1984), rev. den. 467 So. 2d 1000 (Fla. 1985). There can be no question of the need for full and fair disclosure relating to scientific proof and the testimony of experts. This is the form of evidence wherein it is practically impossible for the opposing party to test or rebut it at trial without advance opportunity to examine it closely." Florida Statutes Annotated, Rule 3.220, Fla. R. Crim. P., Author's Comment.

In Lancaster, the defendant was charged with the arson of a truck. After police and fire investigators conducted a physical examination of the truck, they released it to the owner who proceeded to renovate it. Id. at 506. At trial, the sergeant who authorized the truck's release testified that he did not know whether the truck, in its original post-fire condition, was of evidentiary value to the defendant. Id. Two of the examining investigators testified against the defendant, who was subsequently convicted. Id. The court found a due process violation and remanded for a retrial at which the fire investigators would be precluded from testifying. Id. at 507.

Similarly, in Johnson v. State, the defendant was unable to examine the fatal bullet because it was lost after examination by the police ballistics expert. 249 So. 2d 470 (Fla. 3d DCA 1971), writ of cert. disch., 280 So. 2d 673 (1973). Accordingly, the court found a deprivation of the defendant's rights of discovery and sixth amendment rights to effectively confront and cross-examine witnesses against him. Id. at 472.

The stricter balancing test cited in Kelley, supra, need not be met when the

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[13] Mr. Kelley notes that the discussion presented herein is also relevant to the claims of State misconduct presented in this action (Claims I and 11). In the interests of avoiding redundancy, this discussion was not detailed in the earlier portions of this brief.

State actually introduces testimony relating to the destroyed evidence. Hills, *467 So.* 2d at *849;* Lancaster, *457 So.* 2d at *507.* Rather, if the destruction of evidence was "unnecessary", then introduction of testimony concerning that evidence violates due process. Hills, supra; Lancaster, supra.

At the defendant's trial, the State offered expert testimony and testimony concerning scientific analysis of the missing evidence which the defendant was unable to dispute because he completely lacked access to that evidence. J.C. Murdock from the Highlands County Sheriff's Office testified concerning fingerprints, photographs, a bullet (cf. Johnson, supra), a sheet found at the scene, fingerprints lifted from Maxcy's car, and photographs of the car (T. *477-88).* These items were sent to the Sheriffs' Bureau at Tallahassee for processing. To the best of Murdock's knowledge, the fingerprints were never identified (T. *479, 488).* However, if the defendant had had access to the fingerprints he might have shown that 1) they did not match his own; and 2) they matched those of other suspects such as "Stevie the Greek" Busias or John Sweet. Counsel should have objected to Mr. Murdock's testimony.

Murdock testified that the sheet appeared to have knife slashes in it. Heinrich Schmidt, the medical examiner, described the stab wounds and their position (T. 510, *513, 516).* If the defendant had been able to examine the sheet, he might have found on it a blood type other than the victim's or his own, thus indicating that another assailant (Stevie the Greek; Sweet) was responsible. Mr. Murdock testified that the sheet was found in the hallway (T. *483).* The defendant was unable to adequately take issue with whether the slits in the sheet matched the size of the knife wounds, and whether the sheet was thrown over the victim prior to the stabbing and whether he was stabbed through the sheet, as alleged by the prosecutor in closing argument (T. *869, 967).* Cf. Wright, supra (reasonable possibility that sheet would have been material and exculpatory). The prosecutor claimed that the assailant's use of the sheet explained why no blood was seen on suspected assailants

after the killing (T. **869).** The defense was unable to refute this theory because of the unavailability of the sheet, and counsel were, therefore, remiss in not objecting to the testimony, As previously described, the State's theory was weak, because the slits in the sheet were different in size and number from the slits in the back of the victim's shirt.

There was a stipulation (H.T. **23-27)** as to the testimony of James Halligan, a former laboratory examiner for the FDLE, that Mr. Halligan would testify that a .38 bullet with a fragment of bone and blood on the projectile was found at the scene, and that Mr. Halligan determined that the sheet contained type *O* human blood and contained four slits, each three by eight inches long (T. **707-08).** This does not comport with the written laboratory analysis (See. App. 14**).** The defendant was unable to investigate this item and possibly trace its ownership or possession to one other than himself. Thus, Mr. Kelley's handicap is even greater than the defendant's in Johnson, supra, where only one missing item, the bullet, was at issue and yet, there, the court reversed the conviction.

In sum, the defendant was precluded from examining evidence concerning which the State offered testimony at trial. He was thus precluded from offering potentially exculpatory information relating to the evidence. He was further prevented from confronting the State's witnesses in their testimony, which the State used to support its case against him.

Trial counsel ignored the defendant's constitutional rights to due process and the right to confront and cross-examine witnesses against him, as well as his discovery rights (H.T. **25-26, 378-80).** Had they raised objections and stood by these constitutional issues, they might have succeeded in barring the testimony of these experts, further weakening the prosecution's case, and thus creating a reasonable doubt. Instead, strangely, they took the opposite course and facilitated the state by stipulating to numerous evidentiary matters **(see** T. **703-708). No** reasonable tactic supported the defense attorneys actions here.

Finally, the State cannot maintain that its disposal of the evidence was necessary. See Hills, supra; Lancaster, supra. It successfully stored part of the evidence for nine and one-half years and the prosecution harbored strong suspicions concerning Sweet's. Stevie Busias' and the defendant's involvement. Surely, the State anticipated the potential for new evidence to surface, or that a trial might take place regarding this case. By disposing of the evidence of Maxcy's killing, the State deprived the defendant of the opportunity to use that evidence in his defense, in violation of his federal and Florida constitutional right to due process, confrontation and discovery. Counsel's errors in failing to object may well be mitigated by the State misconduct discussed above. Nevertheless, counsel should have presented objections to the trial court. They ineffectively failed to do so, to Mr. Kelley's detriment.

D. FAILURE TO DEVELOP DEFENSE THEORIES

Counsel presented two theories of defense. The first theory was that Mr. Kelley was not the man who allegedly had been registered at the Daytona Inn from October 2nd through 4th, 1966. The second line of defense, not inconsistent with the first, was that John Sweet had not hired anyone, but had performed the killing himself (T. 816, 845-46). Having elected these defense strategies, defense counsel then sabotaged both theories.

Elemental to the Strickland v. Washington analysis is the recognition that counsel's role at trial is "to ensure that the adversarial testing process works to produce a just result". Id., 104 S. Ct. at 2064. In failing to adequately present the defense that this Mr. Kelley was not the man at the Daytona Inn, however, the acts and omissions of trial counsel caused the adversarial testing process to collapse.

The prosecution presented its allegation that Mr. Kelley had been one of Maxcy's killers by introducing evidence that a "William Kelley" from Dorchester, Massachusetts, allegedly was registered at the Daytona Inn from October 2 through

October 4, 1966; that the plate number of the motor vehicle signed in by the alleged William Kelley, motel guest, matched the Massachusetts registration of a vehicle owned by one Jenny Adams, purported to be the girlfriend of the defendant, William Kelley; that Kaye Carter, the daughter of the Daytona Inn owner, remembered the "William Kelley" who had been registered with his wife "Charlotte"; that the then wife of the alleged co-killer, Andrew Von Etter, who was registered at the same motel at the same time, remembered a Mr. and Mrs. William Kelley also staying there, and remembered that her husband had presented William Kelley as a friend and had spent the day of October 3, 1966 with him. The prosecution elicited the testimony of Kaye Carter and Annette Von Etter, without ever establishing from either of these women that the William Kelley whom they had met at the Daytona Inn was the same William Kelley who was on trial.

Defense counsel failed to meet the case presented by the prosecution. Defense counsel, among other things, failed to adduce evidence that the handwriting on the motel's registration record was not the defendant William Kelley's handwriting (H.T. 101-103), a fact that defense counsel were quite well aware of. In fact, Mr. Kelley's present counsel obtained the opinion of John J. Swanson, a handwriting expert, who determined that the handwriting on the registration record was not Mr. Kelley's (H.T. 102-03). (Report of John J. Swanson, Ex. AAA). The trial court reasoned that no prejudice existed because the State did not contend that Mr. Kelley signed the motel register (App. 87). Of course, evidence that Mr. Kelley's handwriting did not match the motel register would have been one more doubt that could have been added to other substantial doubts in the jurors' minds. There is clear prejudice here. Counsel further failed to introduce evidence that the description of "Charlotte Kelley" could not have fitted -- by age or physical characteristics -- Jennie Adams. To the contrary, and amazingly enough, defense 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 (H.T. 91-

93; 376-77), and failed to offer any resistance to the prosecution's eliciting testimony from Kaye Carter and Annette Von Etter about a William Kelley without ever identifying the defendant as being the same person.

Worse yet, defense counsel, in the cross-examination of Kaye Carter, failed to make any distinctions between the man at the Daytona Inn and the man on trial. His questions to the witnesses reinforced the notion already given the jury that there was only one William Kelley. In his testimony, William Stuart stated that Stevie the Greek Busias associated with Andrew Von Etter (allegedly the defendant's accomplice), Jennie Adams (Kelley's alleged companion), and the Bennett brothers (one of whom was allegedly John Sweet's link to the hired killers) (H.T. 205-12). Furthermore, Mr. Stuart gave a description of Stevie Busias that corresponds to the description of the assailant given by Kaye Carter at trial: forty years old, 6' to 6'2" tall, medium build, dark, curly hair and a deep husky voice. (Compare T. 685, with H.T. 208-210). Mr. Edmund, who was aware of Stevie "the Greek" Busias' existence, never questioned Kaye Carter (then Kaye Simmons) concerning Stevie the Greek when she described what the individual who was allegedly William Kelley looked like (Ex. C, par. 2.m; Ex. D, par. 6.m). Again, Mrs. Carter never identified the defendant, William Kelley.

Moreover, Mrs. Carter stated emphatically that the William Kelley she met at the Daytona Inn arrived there on October 3, 1966, the evening of the murder, shortly before 8:30 p.m. (T.862, 863). Jacqueline Davis, who lived across the road from the Maxcy's at the time, testified that on the day of the murder she saw two individuals in Maxcy's automobile back out of the driveway and head north (T. 544-46). The time was dusk, and the car lights were on (T. 546).

If defense counsel had done their homework, they would have learned that on October 3, 1966, the sun set at 7:07 p.m. (Ex. TTT-1; App. 73). Twilight began at 7:07 p.m., continuing until 8:27 p.m., during which time darkness gradually set in (id.). The skies were mainly clear, with good visibility (id.). Accordingly, Mrs.

Davis could not have seen the two individuals leaving the Maxcy home in Maxcy's car with the lights on until well after 7:07 p.m. Then, according to Sweet, the two individuals drove to a parking lot in Sebring to exchange cars, and then on to Daytona Beach (T. 593-94). Sebring is approximately one hundred and forty miles from Daytona Beach (American Automobile Association Report, Ex. TTT-2; App. 74). It is thus impossible that the person Ms. Carter knew as "William Kelley" who was registered at the Daytona Inn could have travelled from Maxcy's home in Sebring and arrived at the Daytona Inn in Daytona Beach before 8:30, as reported by Mrs. Carter, particularly considering the highways existing in 1966. Counsel, in closing, merely hinted at this inconsistency, and even in so doing, incorrectly and to Mr. Kelley's disadvantage estimated dusk to be between 6:30 and 6:45 (T. 853, 857). This incorrect estimate failed to prove that the individuals Mrs. Davis saw could not have reached Daytona Beach until after 8:30 p.m. Such proof would have made a crucial difference in negating Sweet's story and exculpating the defendant for the actual killing, even if the jury believed (contrary to logic) he was the individual registered at the Daytona Inn.

While the decision to call witnesses is ordinarily a matter of personal judgment, that judgment is "irresponsibly exercised" so as to constitute "inadequate representation" where counsel fails to interview and call witnesses who support the defense's theory. Roth v. State, 479 So. 2d 848 (Fla. 3d DCA 1985); see also Bridnes v. State, 466 So. 2d 348 (Fla. 4th DCA 1985)(counsel found ineffective for failing to pursue defense of voluntary intoxication despite availability of witnesses); Mathews v. State, 44 So. 2d 664, 669 (Fla. 1950)(counsel has duty to interview and examine potential witnesses in preparing defense). In the present case, the defense failed to develop facts and interview witnesses to suppport its theory that the William Kelley who stood trial was not the man registered at the hotel. Counsel's theory of defense was correct; counsel failed to effectively investigate, develop, and present it. This omission was obviously founded on no

tactic or strategy, but rather on the failure to adequately prepare, and was therefore patently ineffective. Cf. State v. Michael, 530 So. 2d 929 (Fla. 1988); Harris v. Dugger, 874 F.2d 756 (11th Cir. 1989); Smith v. Wainwright, 799 F.2d 1442 (11th Cir. 1986).

Counsel failed to investigate pertinent information concerning the defendant's physical characteristics in 1966, the year of the killing (H.T. 63). A routine investigation would have produced numerous witnesses who knew the Mr. Kelley during that time. Affidavits obtained from such witnesses reveal that in 1966 the defendant weighed somewhere between 200-230 lbs. (Ex. MM-1 through MM-5). Granted, these weight estimates vary within thirty pounds (See Circuit Court Order, App. 87). However, none of the affiants estimated Mr. Kelley, (who was 6'6" tall) to have weighed more than 230 pounds. Indeed, in his affidavit, William Stuart, who was a Boston Police Officer in 1966 and was then familiar with the defendant, characterized him as a "string bean" (Ex. MM-5). At the hearing Mr. Stuart testified that, at the time, Mr. Kelley was 6'6" and approximately 210-220 lbs (H.T. 203, 206-207). John Sweet testified that the suspected killer was extremely heavy, between 280 and 290 lbs. (T.590), and the original descriptions in 1967 were of a man 6' tall and 40 years old (App. 58). By no stretch of the imagination did the William Kelley who was prosecuted for this offense fit the original descriptions.

Surely, the discrepancies in physical characteristics would have created a reasonable doubt in the jurors' minds as to whether the defendant was the "William Kelley" who was in Florida in 1966. Williams v. State confirms this conclusion. 447 So. 2d 442 (Fla.5th DCA 1984). In Williams, defense counsel's insufficient pretrial investigation failed to uncover impeachment evidence useful against two key witnesses. Id. The Court opined, "These omissions, if true, could be found to be substantial since the crux of the trial was the credibility clash between the defendant's version of the facts and that of the two victims." Id. at 443. The present case exactly mirrors the Williams case -- the crux of the trial was the

credibility clash between Mr. Kelley's version of the facts and that of Sweet's.

Additionally, counsel failed to interview or subpoena Roma Trulock, even though Mr. Trulock might have provided valuable exculpatory and impeachment evidence concerning John Sweet. See Flint v. State, 502 So. 2d 1 (Fla.4th DCA 1986) (counsel failed to depose witness whose information might have exonerated defendant).

But still worse, defense counsel, in attempting to rectify his own erroneous designation of a licence plate, removed any doubt in the jurors' minds that the defendant William Kelley had been registered at the Daytona Inn in 1966 when he announced, "I would like to make the statement now that the tag number on the car over there that was signed in by Kelley was the one that was on the car in 1966" (T. 755-56; Ex. C, par. 2q; Ex. D, par. 6q; App. 20-21; 25). Thus, not only did defense counsel fail to mount an adequate challenge to the prosecution's crucial evidence linking the defendant to Daytona Beach in 1966, i.e. subject the evidence to the adversarial testing process, defense counsel nullified the adversarial process by reinforcing the State's case. See United States v. Cronic, 466 U.S. 648, 659 (1984) (if counsel fails to subject the prosecution's case to meaningful adversarial testing, there has been a denial of Sixth Amendment rights which makes the adversary process itself presumptively unreliable). As the Eleventh Circuit noted in Douglas v. Wainwright, 714 F.2d 1532 (11th Cir. 1983), affirmed after remand, 739 F.2d 531 (11th Cir. 1984), a case involving concessions no less ineffective than those made by counsel at Mr. Kelley's trial,

> The most egregious examples of ineffectiveness do not always arise because of what counsel did **not** do, but from what he did do -- or say.

Id. at 1557 (emphasis in original).

Therein lies the prejudice to the defendant. See also Blake v. Kemp, 758 F.2d 523, 533 (11th Cir. 1985). After all, the 'adversarial process' connotes two versions of the facts. Here, by virtue of defense counsel's incompetence, the jury was presented with only one version: the defendant William Kelley had been

registered at the Daytona Inn on the days surrounding the murder of Maxcy, just as John Sweet had testified. This version, however, was far from accurate, and counsel had the tools with which they could have shown the jury the inaccuracy. Without a reason, they simply failed to investigate and thus failed to develop or use the tools that they had.

Ross Davis, the FBI agent who arrested the defendant, testified that upon arrest the defendant made statements indicating his knowledge of the Maxcy killing (T. **756, 760).** On cross-examination, Mr. Edmund asked Davis whether the defendant also stated that he had read about the investigation in his hometown newspaper (T. 761). Mr. Edmund asked Davis this same question at Mr. Kelley's first trial (Kelley first trial transcript, p. 10). At the **3.850** hearing, Mr. Edmund acknowledged that someone, perhaps Mr. Kelley, told him about the newspaper articles in Mr. Kelley's hometown newspaper (H.T. **409).** Counsel could have explained the defendant's awareness of the homicide investigation by presenting copies of Boston and Brockton 1981 newspaper articles describing the search for a William Kelley, a suspect in the Charles Von Maxcy killing. (Ex. **QQ-1** through **QQ-6).** Trial counsel failed to do **so** (H.T. **64-70; 358-60),** despite the fact that he had been informed of the newspaper articles. Instead, in his closing argument the prosecutor represented to the jury, "I think it is highly unlikely that Mr. Kelley is going to, off the top of his head, spout off recollections of something he read in the newspaper seventeen years ago" (T. 877)(emphasis added). Because defense counsel failed to introduce the 1981 newspaper articles, the prosecutor was able to infer to the jury that the defendant's statements concerning the crime were evidence of his guilt. They were not; they came from the newspapers; but defense counsel failed to do anything about it.

Additionally, trial counsel should have obtained affidavits and presented testimony showing that in 1982 and **1983,** Mr. Kelley sought the assistance of two Massachusetts lawyers and a Florida lawyer, who attempted to determine whether there

was an indictment and warrant for Mr. Kelley's arrest. Attorney Barry Haight would have testified that Mr. Kelley called him after reading or hearing that he had been indicted in Florida (H.T. 188-90). (One would not miss one's name associated with a homicide in one's own local newspaper.) Attorney Robert Jubinville, who is associated with Mr. Haight, also spoke with Mr. Kelley about whether there had been an indictment (H.T. 195-96). Neither attorney was contacted by the defense (H.T. 191, 198). Mr. Edmund recalls seeing Haight's name on the witness list, but has no recall of asking who he was (H.T. 403-05). The trial court opined that calling these attorneys as witnesses might have prejudiced Mr. Kelley -- that the jury would find Mr. Kelley's contacting the attorneys to be inconsistent with the behavior of a "law-abiding citizen." (App. 88). However, the attorneys' testimony would have shown that Mr. Kelley had read the newspaper articles, or been informed of them. Furthermore, it is more reasonable that any person who becomes aware that there exists an indictment and warrant for his or her arrest would contact an attorney to determine how to proceed, especially a "law-abiding citizen." Mr. Donald L. Ferguson, the Florida attorney, communicated with the defendant regarding the matter on at least twenty occasions. (H.T. 171; Ex. SS-3, par. 4). If trial counsel had merely provided the reasonable assistance required of them, they would have produced the aforementioned newspaper articles, affidavits, and live witnesses, and thus negated the impression that the defendant's statements to Davis were admissions of guilt,

The reliability of the verdict was undoubtedly undermined by this breakdown of the adversarial process. Prejudice to the defendant, by counsel's ineffectiveness, was no less because counsel had projected two theories of defense. Once the jury was satisfied by the defense that the defendant William Kelley was at the Daytona Inn with Andrew Von Etter, the second theory -- that there were no hired killers -- collapsed. It should not have.

E. ADMISSION OF EVIDENCE OF MR. KELLEY'S ALLEGED PRIOR CRIMES, BAD ACTS AND OTHER PREJUDICIAL INFORMATION

Mr. Edmund informed the jury about William Kelley being in handcuffs, being transported from the Highlands County Jail, that he was being held without bail, that there was an allegation that Mr. Kelley had sold marijuana, and also that he had beaten up John Sweet (H.T. 324-25; Ex. C, par. 2c; App. 18). Mr. Edmund also offered that Mr. Kelley was involved in highjacking, that he once told Sweet to bring a pistol, that he allegedly stabbed Sweet and that Sweet was afraid of him (Ex. C, par. 2, k, 1, n; App. 20). Also, trial counsel did not move to strike Sweet's gratuitous statement on cross-examination that he had previously not mentioned Mr. Kelley's name concerning the killing because if he had, he "wouldn't be around today," inferring that Kelley would have killed him (T. 601). Finally, Mr. Edmund attempted to offer a question concerning the defendant's purported killing of a furniture store operator named Hamilton (Ex. C, par. 2k; App. 20).

The bizarre "reason" offered by Mr. Edmund at the Rule 3.850 hearing for these strange statements was that he did these things to paint the worst possible picture of John Sweet to the jury (H.T. 322, 324-325).[14] This was clear ineffective assistance of counsel, for the attorneys bizarre comments and admissions were supported by no reasonable trial tactic. There was more than enough evidence of Sweet's misconduct without counsel's smearing of Mr. Kelley's name in the bargain. The suggestions made by counsel are even more startling when one considers that they were supported by no evidence whatsoever. Even Mr. Kunstler, Mr. Edmund's co-counsel, stated that he thought Edmund was mistaken in making the statements (H.T. 51-52, 62-3, 121-22, 124-26). Nevertheless, Mr. Kunstler allowed it to happen and,

[14] In light of the strange (and grossly prejudicial) statements made by counsel at the original trial, former counsels' admissions at the Rule 3.850 hearing that mistakes were made make perfect sense. Indeed, former trial counsels' ineffectiveness was so apparent from the trial transcript that appellant counsel sought to present the issue on direct appeal. See Kelley, 486 So. 2d at 578.

himself, mentioned some of this information in his closing argument (T. 845-47). The comments make no sense whatsoever and are absolutely unsupported by any reasonable strategy. See Douglas, supra, 714 F.2d at 1557 (Sometimes "[t]he most egregious examples of ineffectiveness" arise from what counsel "did do -- or say.")

F. THE DEADLOCK INSTRUCTION

Both of Mr. Kelley's trials were presided over by the same judge. The first 1984 trial ended in a hung jury where no verdict could be reached, even after the judge gave what appeared to be Florida Standard Jury Instruction 3.06 to the jury.

In Mr. Kelley's second trial, after deliberating, the jury returned to the courtroom stating that they had voted three times, had not reached a unanimous vote, and did not see how to overcome the impasse (T.923). The trial court launched immediately into what initially appeared to be Florida Standard Jury Instruction 3.06, which instruction he had also given at the first trial. See Florida Standard Jury Instruction 3.06 (Jury Deadlock) (1981 Edition). This instruction was approved by the Florida Supreme Court in 1981, and superceded the prior instructions, Fla. Stand. Jury Inst. 2.21, formerly 2.19, which were based on the traditional "dynamite" charge given in Allen v. United States, 164 U.S. 492 (1869). It is mandated by the Florida State Constitution (Art. V. Sec. 3) that the standard jury instructions, as promulgated by the Florida Supreme Court, be used where appropriate. Rigot v. Bucci, 245 So. 2d 51 (Fla. 1971).

In the present case, after completing the recitation of the current instruction 3.06 (T.923-24), the judge immediately added the following comments of his own in regard to the case, which in substance were taken from the outlawed versions of the "Allen Charge" (Cf. prior Fla. Jury Instruction 2.21 and 2.19):

> I would ask that you give it your full consideration. It is an important case.
>
> If you fail to reach a verdict, there is no reason to believe the case can be tried again any better or more exhaustively than it has been.
>
> There is no reason to believe there is any more evidence or clearer evidence could be produced on either side. And there is no reason to

> believe the case could be submitted to twelve more intelligent and impartial people than you are. In the future a jury would be selected in the same manner that you were. Therefore, I would ask that you retire at this time and consider whether you wish to consider the matter further. It has taken us a week to get this far, and I would ask that you retire and consider the case further.

(T. 924-25). While the Florida Supreme Court was unable to identify any prejudice resulting from the instructions given, it expressed "disapprov[al] of such departure from Florida's Standard Jury Instructions." Kelley, 486 So. 2d at 585. Mr. Kelley raised the issue in his 3.850 motion because he contends that if trial counsel had been more aggressive in arguing against the instructions, the result might have been different.

The important point is that, in the context of the entire trial, the additional instruction might very well have signalled the jury that they should reach a verdict, rather than wastefully leaving the job to a future jury. See Commonwealth v. Tuey, 62 Mass. (8 Cush.) 1 (1851)(language almost identical to that in present case); Annot., 38 A.L.R. 3d at 1289. In contrast, the instruction in Portee v. State conveyed neither the court's personal antipathy to, or the community's loss from, a trial which does not result in a verdict. 496 So. 2d 173, 174 (Fla.3d DCA 1986). There, the court made clear to the jury that a deadlock was permissible by informing them "if you can't agree on a verdict, then the Court would eventually have to declare a mistrial and try the case all over again" and "if you cannot arrive at a unanimous verdict, then there has to be a mistrial and we will try the case over again." Id. at 174-75.

Trial counsel, realizing the tenuousness of the State's case, evidenced by the hung jury in the first trial, the fact of the destroyed evidence, and the strained credibility of John Sweet, either should have objected to the additional instruction before it was delivered, or moved for a mistrial. See Kelley, 486 So. 2d at 583 (in absence of defense counsel's alternative instruction, judge's discretion will prevail); Lewis v. State, 398 So. 2d 432, 437 (Fla. 1981); cf. Rodriguez v. State,

462 So. 2d 1175, 1177 (Fla.3d DCA 1985) (manifestly coerceive deadlock charge is fundamental error even in absence of timely objection or motion).

Furthermore, paragraph three of the judge's additional charge conveying that no further evidence or clearer evidence could be produced, has been proven inaccurate. Further and clearer evidence has now come to light (as discussed in this brief) and Mr. Kelley has also demonstrated that exculpatory testimony and evidence was omitted at trial. Thus, not only was the judge's charge coercive, but subsequent discovery has rendered it incorrect. The substantive issue should now be revisited. Relief is also appropriate because of counsel's ineffectiveness.

G. JOHN SWEET'S CREDIBILITY

This Court recognized that John Sweet's testimony was central to the prosecution's case. Kelley, 486 So. 2d at 580. Without it, the defendant's indictment and trial would have been impossible. Id. at 579-80. Accordingly, applying the Strickland objective standard of reasonable legal assistance, counsel was required to utilize all possible means to impress upon the jury that Sweet was not credible. See Williams v. State, 447 So. 2d 442 (counsel's failure to uncover impeachment evidence against two key witnesses could have shown substantial error and prejudice). Unfortunately, Messrs. Edmund and Kunstler fell far short of their obligation,[15]

1. Impeachment of Sweet

Mr. Kuntsler was well aware f th import of attacking Sweet's credibility. Indeed, in the defendant's first trial, which resulted in a hung jury, Kunstler conducted most of the cross-examination, particularly of John Sweet (H.T. 323-24;

[15]Perhaps their omission was motivated by Mr. Edmund's admitted desire to "speed things up." (Ex. C, par. 2.d. and g.; Ex. D, par. 6.d and g.; App. 18-19, 23). Such a preoccupation, standing alone, places in question Mr. Edmund's performance, particularly where he was willing to waive the number of jurors from the original twelve to ten (Ex. C, par. 2.d., Ex. D, par. 6.d; App 18, 23) cf. Nova v. State, 439 So. 2d 255 (Fla.3d DCA 1983) (due process requires that person accused of capital crime be tried by twelve-person jury unless defendant voluntarily and intelligently waives right).

Ex. D, par. 3; App. 22). Yet, during the second trial, he stood by while Mr Edmund neglected to point out the contradictions between Sweet's testimony in the first trial and Sweet's testimony in the second trial, both of which took place during the same year, as well as contradictions solely within his testimony at the second trial.[16] At the 3.850 hearing, Mr. Edmund said that ". . . Sweet hadn't been gone at hard enough" in the first trial (H.T. 322) and that he wanted to go harder on Sweet at the second trial (H.T. 323). However, inconsistently, Mr. Edmund also testified that bringing out certain inconsistencies in Sweet's testimony amounted to "nit-picking" (H.T. 337-38; 371). It is hard to imagine how Sweet's inconsistent description of his alleged actions, and purported observations and interaction with Mr. Kelley just prior to and subsequent to the offense (Ex. C, par. h (i) - (viii); App. 19-20), could be considered "nit-picking". Presenting such inconsistencies was, after all, at the core of Mr. Edmund's and Mr. Kunstler's defense. For example, in Mr. Kelley's second trial, Sweet testified that Mr. Kelley was carrying a bag which contained guns, knives and a glove (T. 593). The other glove was on Mr. Kelley's hand (T. 593). Yet, in Mr. Kelley's first trial, Sweet testified that Mr. Kelley wore gloves, and the bag contained only knives and revolvers (first trial transcript, p. 27-29). When the prosecutor asked whether there was anything else in the bag, Sweet answered in the negative (Id.). The inconsistency regarding these details goes to the very heart of Sweet's story. The jury certainly would have seen that if he was telling the truth, Sweet would have remembered these things because they are important and not likely to be forgotten. Conversely, if Sweet was fabricating Mr. Kelley's involvement, he would be apt to forget these kinds of details from one instance of testimony to the next. If counsel had done their job, Sweet would have looked even less credible at Mr. Kelley's second trial than he did

[16]For a list of specific testimonial contradictions, the Court is referred to the Affidavits of Counsel, 3.850 Memorandum Exhibit C, par. 2.b (i-viii) and Exhibit D, par. 6.h (i-viii; App. 18-26).

at Mr. Kelley's first trial. Ironically, his credibility was attacked much less at the second trial than at the first.

Moreover, counsel failed to obtain and utilize available evidence of Sweet's crime. For example, an August 14, 1977, Massachusetts State Police Memorandum concerning an investigation of John Sweet's criminal activities (Ex. VV) demonstrated that Sweet was involved in prostituting young women under fourteen years of age,[17] and murder.[18]

Sweet further testified that two or three years after his court proceedings, he met William Kelley at the 123 Club in Brockton, Massachusetts (T.602-04). As Sweet noted in his testimony before the Bristol County Grand Jury, the 123 Motel in Brockton is also known as the Carleton House (Excerpt from Sweet's March 18, 1981 Bristol County Grand Jury Testimony, Ex. WW-2). Counsel should have obtained witnesses to testify that the defendant was never at the Carleton House until October, 1974 (see Affidavits of Al Santilli and Franklin Wynn, Ex. WW-3 and WW-4), thus, attacking Sweet's claim of meeting Mr. Kelley there in 1970 or 1971. This evidence and a great deal more was available to destroy the bargained-for testimony of Sweet, but counsel failed with regard to a matter that they themselves knew to be central to the defense.

2. The Jury's Request for Information Concerning Sweet's Immunity and Motive for Testifying

Once the jury received the court's deadlock charge, they retired to resume deliberations. Shortly thereafter, the panel sent a note asking the Judge if John

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[17]Mr. Edmund brought out that Sweet had received immunity for prostitution, but when the prosecutor objected to his questions concerning the prostitutes' ages, Mr. Edmund backed down and agreed not to pursue this line of questioning (T. 621-22). Surely, the jury would have viewed Sweet's credibility with more suspicion if they knew the women he prostituted were less than fourteen years old.

[18]Mr. Edmund raised the issue of Sweet's involvement in one Mario's murder, but retreated when the State objected (T. 630-31). "Then at the recess or something I will just proffer" was Edmund's weak response (T. 631). However, the jury should have heard Sweet cross-examined about these and other criminal acts.

J. Sweet received immunity in Florida for first degree murder and perjury before he gave information on the Maxcy trial, and if he had anything to gain by his testimony (T. **925**). Unfortunately, because the prosecutor denied that Sweet also received immunity in Massachusetts for his cooperation **(T.863)**, the jurors never even considered this additional issue. Nevertheless, it **is** clear that the jury's decision whether to find guilt rested on whether Sweet had a motive to incriminate Mr. Kelley. He did. He received extensive immunity in Florida and Massachusetts (App. **61-62; 70-72**). Presumably, then, the answer to the jury's question would have broken the deadlock in the defendant's favor. Even the court recognized that at the end of the trial, "there were serious doubts that the jury would be . . . convinced . . . that Sweet was telling the truth" (App. **88**). The court noted that the request ". . . be treated as a request for testimony" **(T. 927)** and that "that **is** an interesting thought. The testimony was, he was given immunity by Florida" **(T. 926)**. Instead of answering the question, the judge advised the jury that they could have portions of the testimony read back, provided that 1) the jury identify the portions of the testimony it wanted, and **2)** the requested testimony was not too lengthy (T. **936**).

It is more than obvious that the jury was dissuaded from pursuing its concerns about Sweet's credibility when presented with the exacting task of identifying the desired portions, and only if those portions were not too lengthy. In essence, the jury had already identified the desired section -- the cross-examination of Sweet concerning Sweet's receipt of immunity for first degree murder and perjury in Florida (T. **614-15**).

Herein lies one of Messrs. Kunstler's and Edmund's most glaring omissions -- neither took a strong position nor voiced an objection to the court's erroneous response to the jurors. Yet, during jury deliberations in Mr. Kelley's first trial, when the jury requested a copy of Sweet's testimony, or to hear Sweet's testimony read back, the court reporter read back Sweet's testimony (Ex. KKK; App. **67-68**).

Shortly thereafter, the jury stated it was unable to reach a verdict, and the judge declared a mistrial (id.; App. 69).

In Kesick v. State, the court reversed the appellant's conviction and remanded for an evidentiary hearing where defense counsel failed to act when informed that a juror was sleeping during a portion of the trial. 448 So. 2d 644 (Fla.4th DCA 1984). In the instant case, it was counsel who were sleeping. Based on counsels' experience in the first trial, not to mention common sense, nothing could be more obvious than the jury's concern for the tenuousness of John Sweet's credibility, and the effect that informed concern could have on a verdict. (At the 3.850 hearing, Mr. Edmund testified that he could not even remember if Sweet's immunity was the subject of a jury question in each trial! H.T. 354). On appeal, this Court noted that the trial court has a wide latitude in deciding whether to have testimony re-read to the jurors. Kelley, 486 So. 2d at 583. It also decided that Mr. Kelley's claims of ineffective assistance of counsel were indeterminable "by the record as it stands[,]" Id. at 585, and further rejected another of Mr. Kelley's claims of error "noting that no additional or different instructions on the matter were proposed by the defense below." Id. at 583. Effective counsel would have objected to the trial court's actions, would have proposed a proper instruction, or would at a minimum have requested the same action taken by the trial court in the first trial -- to have Sweet's testimony read back to the jury, or at least to have those portions regarding his immunity read back. But counsel here did nothing.

Where the jury's question pertains to a material issue which would have been readily resolved by reading back testimony to them, it is error not to do so. LaMonte v. State, 145 So. 2d 889, 893 (Fla. 2d DCA 1962). Thus, trial counsel's omission fell far below an objective standard of reasonableness in not proposing a different, more accommodating response to the jury's inquiry. Strickland, 104 S. Ct. at 2065. Additionally, on cross examination Sweet asked Edmund if he had a copy of Sweet's immunity papers (T. 625). Counsel should have obtained and offered

these papers. If they had done so, this documentary proof would have gone into the jury room during deliberations, and would have gone a long way towards satisfying the jurors' concerns.

Whether the State offered a key witness preferred treatment is unquestionably a material fact. In the case at bar, John Sweet's immunity was a very material fact due to the paucity of other evidence of the defendant's guilt, Kelley, 486 So. 2d at 580, 582, Sweet's admission that he lied at both of his own trials (T. 600). and Sweet's admission that he was involved in Maxcy's murder (T. 592-96). Above all, materiality is highlighted by the hung jury which occurred in the first trial shortly after the jury listened a second time to John Sweet's testimony (Ex. KKK; App. 65-69). Although Mr. Edmund cross-examined Sweet about Sweet's receipt of immunity, neither trial counsel persisted when the jury in the second trial expressed its forgetfulness on that issue.

Moreover, defense counsel, the prosecution and the court engaged in a lengthy contemplation as to whether Sweet testified that he received immunity in Florida before he gave Florida information, and/or whether Sweet testified before the grand jury in Florida believing that he would subsequently receive immunity (T. 925-936). In their preoccupation with this issue, they failed to recognize the broader scope and importance of the actual question raised by the jury:

> As the Jury, we would like to know if John J. Sweet received immunity in Florida for first degree murder and perjury before he gave information on the Maxcy trial, and if he had anything to gain by his testimony.

(T. 925)(emphasis added).

Thus, not only did the jury want to know whether Sweet received immunity before giving information, they also expressed the more general concern: whether Sweet had anything to gain by his testimony. Unfortunately, defense counsel (and the prosecutor and court) never addressed this crucial question.

Furthermore, the court initially suggested that all of Sweet's testimony be read to the jury, and that the jury was entitled to rehear the testimony (T. 931,

934). However, defense counsel sat idly by while the prosecutor persuaded the court not to reread Sweet's entire testimony to the jury (T. 931-32). Sweet's testimony should have been read back. After all, it was only eighteen pages longer than Sweet's testimony in Mr. Kelley's first trial and that was read back (Ex. $$$).

In short, counsel failed to ensure that Sweet's interest was "made abundantly clear shown to the jury. This deficiency, coupled with the earlier failure to point out contradictions in Sweet's testimony and his prior criminal activities, deprived the jury of important information concerning Sweet's credibility. Most importantly, because Sweet's testimony was the essence of the State's case, if Sweet's bias and credibility had been properly put at issue, there is a strong possibility that the jury, like many of the jurors in Mr. Kelley's first trial, would have had a reasonable doubt concerning the defendant's guilt. Strickland, 104 S. Ct. at 2069.

H. FAILURE TO REQUEST A CHANGE OF VENUE

A change of venue is required where,

> the general state of mind of the inhabitants of a community is so infected by knowledge of the incident and accompanying prejudice, bias, and preconceived opinions that jurors could not possibly put these matters out of their minds and try the case solely upon the evidence presented in the courtroom.

McCaskill v. State, 344 So. 2d 1276, 1278 (Fla. 1977). Even where the jury panel members assert that their familiarity with the offense will not infringe on their impartiality, the defendant may show juror hostility. Copeland v. State, 457 So. 2d 1012, 1017 (Fla. 1984) (citing Murphy v. Florida, 421 U.S. 794, 800 (1975)). Two factors showing hostility are (1) inflamamtory publicity; and (2) difficulty in selecting a jury. Id. Where an outsider is charged with killing a well-known, well-liked member of the community, jury prejudice often results. Mills v. State, 462 So. 2d 1075, 1078 (Fla. 1985); Manninn v. State, 378 So. 2d 274 (Fla. 1979).

In Mr. Kelley's case, almost all of the venire persons admitted they had heard about the case through extensive pretrial publicity (excerpts from William Kelley's second trial transcript concerning examination of jurors, Ex. BBB). Even the judge

acknowledged the extensive publicity (Id., p. 406). An article in the Tampa Tribune claimed that an anonymous juror from the first trial reported that some of the twelve person jury at that trial favored conviction (H.T. 61; February 1, 1984, Tampa Tribune article, Ex. BBB-1; App. 63-64). The jurors in the second trial could not help but be influenced by such inflammatory publicity.

Charles Von Maxcy was a well-known, well-liked person in the community, whereas his alleged killer, William Kelley, was an outsider from another state. These factors present the possibility that the jury was biased against Mr. Kelley from the start, even though some jurors asserted the contrary (T. 167, 283, 329, 353, 368-69). Some jurors who expressed doubts about being impartial, specifically Mr. Jennings, Mr. Green, Ms. Fulton and Ms. McCormack, were later excused (T. 160-161, 164). However, Ms. Good, who "thought" she could be impartial, but was not certain, remained (T. 162). See Copeland, supra; Manning, supra. Unfortunately, however, despite the fatal possibility of juror bias, defense counsel never moved for a change of venue (H.T. 61-62). Mr. Edmund's explanation for not requesting the change is far from lucid (See H.T. 329-30). Further, that counsel failed to exhaust their peremptory challenges does not justify their failure to move for a change of venue. Such inadequate representation could well have led to Mr. Kelley's conviction by a jury which was not impartial. In view of the jury's difficulty in reaching a verdict, any subtle prejudice held by any one juror may well have tipped the decision to Mr. Kelley's detriment and blurred an otherwise reasonable doubt.

In sum, counsels' representations fell below an objective standard of reasonableness. Strickland, 104 S. Ct. at 2065. Where there are numerous errors by counsel, as in the present case, ineffectiveness may be shown by an "aggregation of indicia of incompetence". United States v. DeWolf, 696 F.2d 1, 4 (1st Cir. 1982). Each error, by itself, and certainly the aggregation of errors here, demonstrates that absent counsels' mistakes, the fact finder would have had at least a reasonable doubt respecting guilt. Strickland, 104 S. Ct. 2069. Rule 3.850 relief is proper.

CLAIM VIII

MR. KELLEY'S TRIAL WAS TAINTED BY PREJUDICIAL JUROR MISCONDUCT, IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

A. PERTINENT FACTS AND TESTIMONY

The Defendant's Motion To Interview Jurors was supported by an Affidavit of Counsel (App. 94-100). The affidavit stated, in pertinent part:

> 9. On September 22, 1988, I received a letter from Judge Bentley informing me that Attorneys Oberhausen and Gray had contacted him with some information concerning alleged jury conduct during the Kelley trial. Judge Bentley felt that he could not make any determination from the information he had, but felt obliged to advise counsel of the matter so that they could inquire of Attorneys Oberhausen and Gray and take any further action that the attorneys for the defense or the state deemed appropriate.
>
> 10. I made some preliminary investigation, and learned that Frank Oberhausen represented the juror who had initially approached him. On October 11, 1988, the juror voluntarily spoke with me by telephone from Mr. Oberhausen's office.
>
> 11. During the October 11, 1988 telephone conversation, the juror informed me of the following:
>
> a. At the conclusion of Mr. Kelley's hearing on his pending motion in July of 1988, the juror had occasion to have a conversation with Attorney Frank Oberhausen and Attorney Rob Gray in Sir Walter's Cafe.
>
> b. As a result of that conversation Mr. Oberhausen went to see Judge Bentley.
>
> c. At Sir Walter's Cafe, the juror told the lawyers that he had some reservations concerning the trial, as a result of the fact that a certain juror's conduct appeared to him to be wrong and in violation of the Court's orders.
>
> d. A young woman juror in the case appeared to have read the newspapers on a daily basis. In particular, he recalls her saying that she read the Tampa Tribune, Heartland Section, during the trial.
>
> e. During the course of the trial, this woman discussed certain information with him that she read in the newspaper. She did this on, at least, two or three occasions.
>
> f. The juror recalls one distinct incident that took place during lunch at the Cat House. Present were this juror, a young man from Avon Park, an older man, and the young woman. The young woman told them that when Mr. Kelley was arrested in Tampa he had in his possession a lot of money. She also informed me that she had read that he was the "top hitman for the mob". The juror further recalled her mentioning that Mrs. Von Maxcy had been convicted of perjury and was sentenced to life in prison. She also stated that Mr. Von Maxcy's daughter was present at the trial and

that she believed that Mr. Kelley was innocent.[19]

g. Because these events happened so long ago, it is unclear to the juror what was actually brought out during the trial, and what was told to him by this woman as a result of her reading certain items in the newspaper. In other words, he is aware that this juror told him that she had read these items in the newspaper, but he is not sure whether he had also heard them in the court or only from her as a result of what she read in the paper.

h. The juror believes that Mr. Kelley is guilty and that the electric chair is appropriate. However, he also believes in the judicial system and believes that a person should have a fair trial, which is conducted according to the rules.

i. It is unclear to the juror whether or not this information had any impact on him. He can only say that subconsciously it might have but he is not sure. It was a hard case and he did think about it alot.

j. Additionally, some of the jurors did not seem to take the trial seriously. At various times during the proceedings, some jurors played tic-tac-toe.

k. The first jury vote was six to six. The second jury vote was the same. The third jury vote was ten in favor of a guilty verdict, two for acquittal. The fourth vote was eleven for a guilty verdict, one for acquittal. However, the person voting for acquittal stated that she had social commitments on the weekend and because it was late Friday afternoon, she did not want to be held in deliberations over the weekend. She then abruptly changed her vote to guilty. This was the same woman who had read the newspaper articles and shared the information with this juror and others.

1. The juror was concerned that if it became known that he had come forward with this information, there would be reprisals for his actions. In particular, he is concerned that both he and his wife could lose their jobs. However, he stated that he was glad to have finally come forward because this situation has bothered him since the day they returned the verdict. He believes that the conduct that he described was in violation of the Court's order.

(Affidavit Of Counsel In Support Of Defendant's Motion To Interview Jurors And Motion To Disqualify Judge, App. 95-98).

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[19]The footnote explained:

I have since spoken with Attorney Rob Gray. He recalled the juror stating that the young woman juror had sought out and obtained information on the Kelley case from the media and other sources, and that she discussed this information individually and collectively with the jurors.

After this Court relinquished jurisdiction, the trial court granted the Motion To Interview Jurors and suggested that both parties submit proposed questions to be asked of the jurors, Both parties filed proposed questions which are included in the record (I.T.4). The court subpoenaed the jurors to an April **27, 1989** hearing.

1. Testimonv of Attornev Robert Hatton Grav

Robert Hatton Gray is the chief assistant public defender for the Highlands County branch of the Tenth Judicial Circuit (I.T. **112).** He has been with the Office Of Public Defender for a little over five years **(Id.).** He never had any contact with Mr. Kelley's current counsel until defense counsel contacted him pursuant to Judge Bentley's September **22, 1988** letter **(Id.** at **113-14).**

Mr. Gray testified that on the evening that the **3.850** hearing adjourned in the case of State V. Kelley, he went to Sir Walter's Lounge in Sebring, Florida **(Id.** at **115).** Upon entering the lounge, he recognized Frank Oberhausen, a local attorney, and sat beside him at the bar **(Id.** at 116). The two lawyers began discussing the Kelley **3.850** proceedings which had adjourned that day and had generated much interest in the local legal community (Id. at 117).

Shortly thereafter, they were interrupted by a man he later learned to be "Tom Barret" **(Id.** at **115, 117).** Mr. Barret indicated that he had been a juror at Mr. Kelley's trial "and that it was a shame--injustice, or something to that extent--the manner in which that decision was rendered" **(Id.** at 118). Barret told Gray and Oberhausen that he had thought many times about contacting the judge about his concerns (Id.). He was about to tell the lawyers what happened when Mr. Oberhausen interrupted, stating that as a juror he had an absolute right not to discuss what occurred in the jury room **(Id. 118-19).** Mr. Barret insisted that he knew Gray and Oberhausen were lawyers and that he wanted to talk about what had occurred **(Id.** at 119).

Mr. Barret related the following information to Attorneys Gray and Oberhausen:

a. There was a juror .. Mr. Gray believes she was described as a young lady

from Lake Placid -- who sought out information from the media or from non-jurors, and who on different and multiple occasions conveyed this information to Mr. Barret and several other jurors (Id. 121-22, 138). Mr. Gray recalled the information to be that when Mr. Kelley was arrested he had a large sum of money in his possession, that Mr. Kelley was reputed to have Mafia ties and he was reputed to be a professional killer (Id. at 122). (No such evidence was introduced at trial, or exists.) It was Mr. Gray's understanding that the entire jury ultimately was exposed to the information (Id. at 139). Mr. Barret indicated that the information about being a "hitman" for the Mafia and the large sum of money became critical factors in their decision, at least for certain jurors (Id. at 139-140).

b. There was a juror who changed her vote to accommodate an out-of-town social engagement that she wanted to attend (Id. at 121, 125).

c. Jurors were playing tic-tac-toe, but Mr. Gray was uncertain whether this occurred in the courtroom while evidence was being received, or during jury deliberation (Id. at 121, 124).

Mr. Gray further testified that Mr. Barret said he wanted the misconduct to be disclosed, but that he had a very strong concern about his name being made public regarding the disclosure (Id. at 123, 125). One source of his concern was that he believed the information that Mr. Kelley was involved with organized crime and he was therefore concerned for his own and his family's safety (Id. at 123). He also was afraid that he might lose his job if it appeared to the community that he was being paid off or otherwise aiding to escape his sentence the person whom Mr. Barret perceived to be Von Maxcy's killer (Id.).

Mr. Gray subsequently contacted the Florida Bar Ethics Hot-line, which after further inquiry advised Mr. Gray that when Mr. Barret spoke with Gray and Oberhausen, the attorneys were acting as citizens, and not as attorneys or officers of the court and that, therefore, they had no inherent responsibility to report the matter (Id. at 131). Rather, it was within the attorneys' discretion to decide the

appropriate course of action (Id. at 131-32). After further consultation with several senior attorneys at his office and with Mr. Oberhausen, Mr. Gray decided that the matter was sufficiently important to bring to the attention of the court (Id. at 132-33).

Both attorneys then met with the trial judge, E. Randolph Bentley. Judge Bentley was apprised of the same details that Mr. Gray recounted at the hearing, including Mr. Barret's desire to remain anonymous (Id. at 133-34, 136).

2. Testimony of Frank C. Oberhausen, Jr.

Mr. Oberhausen is self-employed and has been an attorney for approximately seventeen (17) years (I.T. at 142-43). At no time was he working on behalf of defense counsel in this case (Id. at 190-91). Rather, he acted solely on behalf of Mr. Barret, as his attorney (Id. at 191-92). In July of 1988, at Sir Walter's Cafe, he recalls having a discussion with Rob Gray about Mr. Kelley's case (Id. at 143-44). Suddenly, during this discussion, Mr. Barret approached Attorneys Gray and Oberhausen while they were seated at the bar (Id. at 145).

When questioned about the ensuing conversation, Mr. Oberhausen declined to answer on the basis of the attorney-client relationship, in that he believed he had entered into such a relationship with Mr. Barret during the conversation that evening (Id.). The court ruled that no such relationship existed because Mr. Gray was present during the conversation and because the conversation was subsequently disclosed to the court (Id. at 151).

Mr. Oberhausen then testified to the conversation at Sir Walter's Cafe as follows: Mr. Barret said that he had overheard Attorneys Gray and Oberhausen discussing the Kelley case (Id. at 152). He advised them that he had been a juror in the case and that he had some concerns about it (Id.). Attorneys Gray and Oberhausen immediately advised Mr. Barret several times that he had no obligation to tell anybody what happened (Id.). Mr. Barret responded that he wanted to discuss what happened because it had been bothering him and he wanted to get it off his

chest (Id.).

When Mr. Barret started to mention some things that appeared to be juror misconduct, Mr. Oberhausen suggested that they move to a more private location at the establishment (Id. at 153). Mr. Barret then explained that a juror had read newspaper articles during the trial and related their contents to Mr. Barret and other jurors (Id. at 154-55). He believed she might have told Barret and several other jurors this information at a lunch at the Cathouse Restaurant (Id. at 155). He described the juror as a young attractive woman from Lake Placid (Id. at 156). Apparently, Mr. Barret was unsure whether the information he recalled had come from this juror or whether it had come out at trial (Id.). The content of the information was that Mr. Kelley supposedly was a "hitman" for the Mafia and that when he was arrested he was in possession of an extremely large amount of cash (Id. at 156-57). Mr. Barret was also concerned that one of the jurors had changed their mind at the last minute because it appeared that the jury would otherwise have to deliberate through the weekend (Id. at 157).

Mr. Barret stated that he personally believed that Mr. Kelley was guilty but, nevertheless, he was upset about what happened, and said that it made him never want to have a jury trial (Id. at 159). According to Mr. Oberhausen's notes, at another point Mr. Barret stated he was unsure whether the information swayed him in his decision (Id. at 200). He also said that he wanted the truth to come out but he did not want his name to be used because he was afraid that he and his wife might lose their jobs (Id. at 160). Mr. Oberhausen said he would do his best to help Mr. Barret through the matter (Id. at 158).

Subsequently, Mr. Oberhausen contacted the Bar Association which advised him to report the matter to the trial judge (Id. at 161-62). On or about July 28, 1988, Attorneys Oberhausen and Gray met with Judge Bentley in chambers (Id. at 164). Mr. Gray told the judge about the conversation with Mr. Barret at Sir Walter's (Id. at 167). Mr. Oberhausen told the judge that the juror wanted to come forward but he

wanted his name kept as quiet as possible (Id. at 167). He believes he told the judge that his client would be willing to come and speak with the judge, but the judge felt that might be inappropriate, especially without the presence of counsel (Id. at 186, 194). The judge stated that it was a serious matter and he wished to do research on the proper way to handle it (Id. at 168-69).

On or about October 2, 1988, pursuant to Judge Bentley's letter, defense counsel contacted Mr. Oberhausen (Id. at 171). Mr. Oberhausen did not reveal his client, Mr. Barret's, name to defense counsel (Id.). He told counsel that the juror wished to remain as anonymous as possible but that he wanted to get matters off his chest and would be happy to discuss the matter with the defense (Id. at 171-72). .On October 11, 1988 a telephone call was arranged between Mr. Barret and defense counsel, with Mr. Barret speaking from Mr. Oberhausen's office (Id. at 172). Mr. Barret did not disclose his identity to defense counsel (Id.). However, Mr. Barret was willing to and desirous of making a statement (Id. at 173). He stated over the telephone to defense counsel that he was prepared to sign an affidavit (Id. at 175).

After the telephone call, Mr. Oberhuasen received an affidavit for the juror, prepared by defense counsel; the affidavit accurately reflected the notes Mr. Oberhausen had taken during the telephone conversation (Id. at 173-74). The defense moved to introduce the affidavit (Id. at 175). The judge refused to admit the affidavit as evidence and it was thereafter marked for identification (Id. at 178-79).

Mr. Oberhausen reiterated on the witness stand the content of the October 11, 1988 telephone conversation between Mr. Barret and defense counsel (Id. at 180-183; ~~see also~~ Affidavit of Counsel, App. 94-100). The conversation essentially was a duplication of what Mr. Barret said at Sir Walter's Cafe.

Mr. Oberhausen had a few subsequent conversations with Mr. Barret in which Mr. Barret asked what was going to happen next (Id. at 183). Mr. Oberhausen told him

that he would contact him when the affidavit was available for him to review (Id.). Defense counsel sent the aforementioned affidavit to Mr. Oberhausen in mid-February (Id. at 183). Mr. Oberhausen and his secretary attempted to contact Mr. Barret, but their calls were never returned (Id. at 184). Finally, Mr. Oberhausen spoke with Mr. Barret, who said that he had changed his position and no longer wished to cooperate (Id.). Mr. Barret mentioned reading in the newspaper something about a judge's order saying no one was supposed to talk to the jurors (Id. at 186). Mr. Oberhausen believed that Mr. Barret may have read something about the judge's November 30th order prohibiting juror interviews and that made him believe he was wrong to come forward with the information (Id. at 187).

3. Testimony of Glen Thomas Barret, Jr.

Mr. Barret testified that he was one of the jurors in the case of State v. William Kelley (I.T. 25). He was at Sir Walter's Cafe with his brother in July, 1988, when Mr. Oberhausen and another lawyer were there (Id. at 26). Mr. Barret, in his testimony, claimed that Mr. Oberhausen approached him, saying that he had heard Barret talking about the trial (Id. at 33). Mr. Barret said, allegedly to his brother, "Well, I'm glad it's over. Because there were about three things that bothered me about the trial" (Id.). Those three things were:

a. A juror, whom Barret later described as Susan (Hargrove) Ricketts (Id. at 77), told him that she and her mother read the newspaper (Id. at 34-35). He could not remember her exact words, but it was something about "when they picked him up in Tampa" there was so much money found in the hotel (Id. at 35). Mr. Barret also stated that he wasn't sure whether that was brought up in the trial or by the juror (Id.). (It was not brought up at the trial.) He tried to block *it* out when he was deciding the verdict (Id). Regarding his conversation with Mr. Oberhausen, Mr. Barret said "and then, half the things I told him, I told him, you know, I was not definite but trying to--he told me to remember to the best of my ability. That's what I did" (Id.). Later in his testimony he denied hearing any other extraneous

information (Id. at 41).

Mr. Barret said he had lunch with Ms. Ricketts three or four times at the Cathouse Restaurant (Id. at 36). He thinks it was just the two of them but there might have been another juror present (Id. at 34, 51). He also said she was a very talkative, friendly person (Id. at 40).

b. Mr. Barret said he didn't know if a juror was playing tic-tac-toe during the trial (Id. at 36-37). But he saw her drawing and said she could have been playing tic-tac-toe (Id.)

c. On Friday afternoon, a bailiff came into the jury room and asked if they had a verdict (Id. at 38). They responded in the negative; the vote was then eleven to one (Id.) The same young woman (apparently Ms. Ricketts) approached Mr. Barret and asked "what does this mean?" (Id.) Mr. Barret responded that they might have to stay all weekend until they reached a verdict (Id.). The woman responded "I can't, I got to be at the Lake Placid skating rink at seven o'clock . . . I can't." (Id. at 39).

Shortly thereafter, someone suggested taking another vote (Id). They did, and the vote was twelve to zero (Id). Although the voting was by secret ballot, Mr. Barret believed it was Ms. Ricketts who changed her vote (Id.). She told him that she had changed her vote back and forth two or three times (Id. at 39, 40).

Mr. Barret also testified that the reason he went to Mr. Oberhausen's office was that Mr. Oberhausen told him that he had to give a statement (Id. at 32). But a few days later he read in the newspaper that Judge Bentley said no one had to give statements (Id.). Mr. Barret then called the judge's office looking for guidance, because Mr. Oberhausen had asked him to come in to sign a statement (Id.). The judge's legal assistant told him not to speak with anyone (See Affidavit of Counsel, App. 98-99).

4. Testimony of Susan (Hargrove) Ricketts

Ms. Rickets denied having read, watched or listened to any media accounts about

the case, the defendant or the trial while she was sitting as a juror (I.T. 59-60). She said she was unaware of any other jurors having done so (Id. at 60). She denied any awareness of any jurors bringing in any extraneous information (Id.). She denied ever having lunch at the Cathouse Restaurant, and she denied ever having lunch with Mr. Barret at any restaurant (Id. at 80). She denied having any conversation with Mr. Barret concerning extraneous information, including the amount of money the defendant had on him when arrested (Id.). She denied having any conversation with Mr. Barret whatsoever during the trial, stating: "I don't even know who he is" (Id. at 82). When the court described him to her as "The first fellow that came in to testify this morning" she replied "The only time I knew him was when we were picked for jury. That's the only time" (Id.). She did state that she was from Lake Placid (Id. at 83).

5. Testimony of the remaining jurors

The remaining jurors generally denied having read any extraneous information. However, Juror Charlotte Fulton's answers were somewhat equivocal (See. I.T. 71-72). She also acknowledged that earlier that morning, while waiting to be called to testify, she and some of the other jurors were "trying to decide what we'd done while we was [sic] . . ." The court interrupted saying "All right thank you" (Id. at 103)(emphasis added). Moreover, Ms. Fulton acknowledged that she read recent newspaper accounts about the Defendant's Motion To Interview Jurors (Id. at 72). Accordingly, she, and certainly the other jurors, were apprised of what would be asked of them. They also had time, both individually and as a group, to compose their responses. The defense attempted to minimize this possibility by moving that jurors be separated from one another both before and after their testimony (Id. at 20-21). This motion initially was made prior to the hearing, in the Proposed Questions To Be Asked Of All Jurors. The judge denied the motion (Id. at 21).

There were other inconsistencies in the testimony. For example, Delores Ulrich testified that she ate lunch at the Cathouse before the jurors were picked, that she

ate there with two friends who were never actually chosen for the jury (Id. at 74). Yet Juror Dorothea Good testified that she ate lunch at the Cathouse with Delores Ulrich and another juror (Id. at 95-96).

B. MR. KELLEY ADEQUATELY DEMONSTRATED THAT THE TRIAL AND VERDICT WERE TAINTED WITH JUROR MISCONDUCT

The general rule is that "a verdict is not subject to attack upon matters that 'inhere in the verdict.'" Sconvers v. State, 513 So. 2d 1113, 1115 (Fla. 2d DCA 1987). "Matters which 'inhere in the verdict' have been defined as 'those which arise during the deliberation process.'" Id. (quoting State v. Blasi, 411 So. 2d 1320 (Fla. 2d DCA 1981)). However, the trial Court may receive affidavits and testimony of jurors

> . . . for the purpose of avoiding a verdict, to show any matter occurring during the trial or in the jury room, which does not essentially inhere in the verdict itself, as that a juror'was improperly approached by a party, his agent, or attorney; that witnesses or others conversed as to the facts or merits of the cause, out of court and in the presence of jurors; that the verdict was determined by aggregation and average or by lot, game or chance or other artifice or improper manner; but that such affidavit to avoid the verdict may not be received to show any matter which does essentially inhere in the verdict itself, as that the juror did not assent to the verdict; that he misunderstood the instructions of the court; the statement of the witnesses or the pleadings in the case; that he was unduly influenced by the statements or otherwise of his fellow jurors, or mistaken in his calculation or judgment, or other matter resting alone in the juror's breast.

Russ v. State, 95 So. 2d 594, 600 (Fla. 1957)(citations omitted).

The judge assumed that it was the defendant's burden to show, either by a preponderance of the evidence or by clear and convincing evidence, that the jurors acted improperly (I.T. 219-220). The court then stated that he believed Mr. Oberhausen's and Mr. Gray's testimony, but disbelieved Mr. Barret's out-of-court statements to Oberhausen and Gray, and disbelieved Mr. Barret's in-court testimony (Id. at 219). Thus, the court found that the defense had failed to show that the jurors acted improperly (Id. at 219-20).

Mr. Kelley contends that the defense demonstrated juror misconduct through affidavits and testimony concerning three matters which did not essentially inhere

in the verdict. The lower court misunderstood the essence of the evidence before it -- that serious concerns about juror misconduct have been raised in this capital case, concerns which require reversal because they show, at a minimum, the appearance of impropriety. See, e.g., Gardner v. Florida, 430 U.S. 349 (1977)(eighth amendment requires that even appearance of impropriety be avoided in capital proceedings); Beck v. Alabama, supra. In a capital case, after all, all doubts must be resolved in the defendant's favor.

1. The Extraneous Information

Extraneous information about Mr. Kelley was presented to and discussed among the jurors. At the interview hearing, Mr. Barret admitted that a young woman juror, whose description fit that of Susan Hargrove Ricketts, had learned from the newspaper something about a lot of money being found in the hotel when Mr. Kelley was arrested in Tampa (I.T. 33-35). Mr. Gray's and Mr. Oberhausen's testimony corroborates this testimony, as Mr. Barret told them of it in July, 1988 (Id. at 122, 156-57). Mr. Oberhausen also confirmed that Mr. Barret told this to defense counsel by telephone on October 11, 1988 (Id. at 173-74; Affidavit of Counsel, App. 95-98). At the hearing, Mr. Barret testified that he didn't think any other jurors were present when Ms. Ricketts told him the information (I.T. 34, 51). Also, he did not mention that the juror had read that Mr. Kelley had "Mafia ties" or that he was a purported professional killer. (Allegations borne out by no evidence.) Both through proposed questions submitted prior to the hearing, and at the hearing, the defense asked the judge to question Mr. Barret and the other jurors regarding extraneous information that Mr. Kelley was linked to the Mafia and that he was a professional killer (E.g. Id. at 11-23, 54, 202-203). The judge declined, even though he initially stated he would ask that question in a different form (Id. 13, 54). The judge also denied the defendant's motion for counsel to conduct the questioning of the jurors (Id. at 17, 19).

Thereafter, each juror was questioned by the court. All jurors, including

Susan (Hargrove) Ricketts, denied having seen, read or heard any extraneous information regarding Mr. Kelley, the trial or the Von Maxcy killing. They all denied having any discussions about extraneous information. Most denied ever having lunch with Tom Barret. However, as described above, one juror was somewhat equivocal and some jurors' testimony was contradictory both internally and externally.

In sum, the defense did the best it could under the circumstances to demonstrate that the jury was infected by extraneous information. See Diaz v. State, 435 So. 2d 911, 912-13 (Fla. 4th DCA 1983)(circumstances imposed too great a burden on defendant to prove prejudice). Mr. Barret admitted that Ms. Rickets had access to newspaper stories and that she told him that Mr. Kelley had a lot of money in his possession when he was arrested. Although at certain points Mr. Barret said he was not sure if he learned this through Ms. Ricketts or through the trial evidence, he had to have learned it through Ms. Ricketts because no such information was introduced at trial.

At the hearing, Mr. Barret claimed he was unable to remember what else he told Attorneys Oberhausen and Gray, although he acknowledged that he spoke with them for 30-45 minutes (I.T. 53), and inferred that he said many things (See Id. at 34-35). Both Mr. Oberhausen and Mr. Gray testified Mr. Barret told them that the young woman juror told him that Mr. Kelley was affiliated with the Mafia and that he was a professional killer. Mr. Oberhausen also confirmed that Mr. Barret told this information to defense counsel by telephone. Mr. Barret could not have learned this information at the trial because it, too, was never introduced at trial. Moreover, Attorneys Oberhausen and Gray, both officers of the court, have no reason to lie about the matter. The judge, noting that these matters were never introduced at trial (Id. at 217-18), stated that he believed Mr. Oberhausen's and Mr. Gray's in-court testimony (Id. at 218-219). The judge stated that to believe Mr. Barret's in-court statements he would have to disbelieve the hearing testimony that was

"subject to cross-examination" (Id. at 219). This is incorrect -- Mr. Barret and the other jurors, over the defendant's objection, were not subject to cross-examination,[20] while Mr. Oberhausen and Mr. Gray were examined by defense counsel and cross-examined by the State. See Brooks v. Herndon Ambulance Service, 510 So. 2d 1220, 1221 (Fla. 5th DCA 1987)(parties should be permitted to question jurors); See also Fla. R. Crim. P. 3.300(b) (counsel for State and defendant shall have right to examine jurors orally on voir dire); Fla. Bar Rules of Prof. Conduct, R. 4-3.5(d)(4) (attorney may conduct juror interviews).

The trial court erred in refusing to allow the defense to question the jurors and in refusing to provide the jurors with the questions suggested by the defense, questions which were directly pertinent, and this matter should therefore be remanded for proper trial court proceedings on this critical issue. Mr. Barret and the other jurors had the time, ability and motive to craft their testimony to protect themselves and their fellow jurors. Because the judge failed to timely act on the information Mr. Oberhausen and Mr. Gray brought to him, because he did not ask the jurors the more probing questions suggested by the defense, and because he denied the defendant's motion to examine the jurors, the jurors were able to "close ranks" and deny any wrongdoing.

Further, Mr. Barret, well aware by this time that his coming forward was out in the open, was afraid he would be blamed if the verdict was overturned. From the start, he was very concerned about maintaining his anonymity. He feared that he and his wife would be harmed or lose their jobs. In fact, much of his fear apparently was based on his belief that Mr. Kelley was affiliated with the Mafia (I.T. 123), which would explain why he was afraid to raise this information in court,

Yet, the truthfulness of Mr. Barret's out-of-court statements to Attorneys Gray and Oberhausen, made immediately after the 3.850 hearing, is demonstrated by the

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[20] In fact, the judge specifically stated that he would not ask the jurors leading questions (I.T. 13).

fact that he was willing to go to the judge to disclose these matters. Much of Mr. Barret's in-court-testimony had the ring of him trying to protect himself (E.g. I.T. *34-36)*. The same can be said of the other jurors' testimony, particularly Ms. Rickett's. For example, she denied even knowing Mr. Barret (Id. at *82)*. But there is no reasonable explanation as to why Mr. Barret would lie or be mistaken about knowing Ms. Ricketts or about having lunch with her three or four times. Moreover, there is no reasonable explanation as to why he would fabricate the things he told Attorneys Oberhausen and Gray at Sir Walter's Cafe, or the things he testified to at the hearing. Conversely, he told Oberhausen and Gray that he was glad to get it off his chest because it had bothered him very much.

The court further facilitated the jurors in locking in their denials by failing to state to the jurors the introductory remarks requested by the defense, which were as follows:

> We have assembled you here today because there are certain procedural matters that the Court must determine. You should not be concerned with the purpose of this proceeding. You are here solely to answer certain inquiries.
>
> It is not my intention, not the intention of Mr. Kelley's lawyer(s) or the state's lawyer(s) to place any blame or criticism upon any of you. Each of you will be asked various questions, and it is your sole duty to answer each question truthfully and to the best of your ability.

(Proposed Questions, pp. *1-2)*. Rather, the court made some perfunctory remarks and told the jurors not to discuss the case or anything that occurred during the case (See I.T. *23-24*, *103-104)*. Additionally, the court denied the defendant's request to sequester each juror from the others to prevent discussions among them (Id. at 20-21). And Juror Fulton testified that she and some of the others were trying to "decide" what they had done (Id. at 103). She also stated that she had read in the newspaper about the issues which were the subject of the hearing (Id. at *72)*.

Because the court denied the defendant crucial safeguards and inquiry, the facts were not fully probed or revealed. That truth may in fact be forever buried. The interview hearing put the final lid on the truth by forever locking the jurors

into their testimony at the hearing. If they were not willing to disclose at the hearing what actually happened, they may well be unwilling in the future to admit they failed to tell the truth under oath at the hearing. Even on this record, however, Mr. Kelley has demonstrated his entitlement to relief.

2. The Juror Changing Her Vote

Mr. Barret testified that the young woman from Lake Placid (Ms. Ricketts) changed her vote to guilty so she would not have to be sequestered for the weekend (I.T. 38-41). The judge refused to question Ms. Ricketts or the other jurors on this matter, and did not consider the matter in deciding whether to overturn the verdict, reasoning that the matter inhered in the verdict and, therefore, was not open to consideration (Id. at 18, 81).

Mr. Kelley maintains that this issue did not inhere in the verdict. Rather, this is a situation where the verdict, at least regarding Ms. Ricketts, was determined by "chance or other artifice or improper manner" and, thus, the conduct does not inhere in the verdict. See Russ, 95 So. 2d at 600. Whether a juror based his or her vote on whim, expediency or other outside consideration, "'. . . it is certainly illegal and reprehensible in a juror . . . to resort to lot or the like to determine a verdict, which ought always to be the result of deliberate judgment . . .'" Preast v. Amica Mutual Ins. Co., 483 So. 2d 83, 86 (Fla. 2d DCA 1986)(citations omitted). Ms. Ricketts' vote was not based on deliberate judgment, nor was it based on the evidence presented at trial.

In State v. Ramirez, this Court distinguished between matters resting in a juror's "personal consciousness" and "matters of sight and hearing . . . therefore accessible to the testimony of others and subject to contradiction . . ." 73 So. 2d 218, 220 (Fla. 1954); accord Mattox v. United States, 146 U.S. 140, 148-149 (1892); Marks v. State Road Department, 69 So. 2d 771, 775 (Fla. 1954); "[T]he interests of justice will be promoted and no sound public policy disturbed if the secrecy of the jury box is not permitted to be the safe cover for the perpetration of wrongs upon

parties litigant." Ramirez, 73 So. 2d at 220. When a juror acts

> entirely independent and outside of [her] duty and in violation of it and the law, there can be no sound public policy which should prevent a court from hearing the best evidence of which the matter is susceptible, in order to administer justice to the party whose rights have been prejudiced by such unlawful act.

Marks, 69 So. 2d at 775.

In our case, Ms. Ricketts' actions and words were seen and heard by at least one other juror -- Mr. Barret. The judge declined to question the other jurors on the matter. The matter should have been probed. Ms. Ricketts' conduct was in violation of her duty to decide the verdict solely on the law and the evidence. This case is similar to United States v. Ross, 203 F. Supp. 100, 102-03 (E.D. Penn 1962), where the judge inquired into whether a juror's deliberations were affected by the fact that her husband had been injured in an automible accident during the deliberation period. In Mr. Kelley's case, the requested inquiry was never made. Moreover, ". . . the Supreme Court's decision in Parker v. Gladden . . . suggests that in criminal cases, at least, constitutional rights may require inquiry into the circumstances regarding a jury's deliberation regardless of the jurisdiction's rule on impeachment by jurors." Weinstein and Berger, WEINSTEIN'S EVIDENCE 606-32 (citing Parker v. Gladden, 385 U.S. 363, 364 (1966)).

Finally, this whole incident was prompted by the bailiff having entered the jury room and asked whether there was a verdict (I.T. 38). See Parker v. Gladden, supra; see also Mattox v. United States, 146 U.S. at 149-150 (baliff in jury room during deliberation results in pressure and coercion). The bailiff's conduct was in violation of sec. 918.07 Fla. Stat (1985) which provides in relevant part that the court "officer shall not communicate with the jurors on any subject connected with the trial and shall return the jurors to court as directed by the court." The question as to whether there was a verdict on Friday afternoon should have been asked by the court to the jury foreperson in the presence of the defendant and his counsel. Any necessary response, such as whether weekend sequestration would be

required, should also have been handled in open court in the presence of, and after consultation with, counsel. If such proper procedure had been followed, the incident likely would have been avoided or dealt with so as to avoid the prejudice which in fact resulted. The bailiff's interference is itself sufficient to warrant reversal.

3. Jurors Playing Tic-Tac-Toe

Mr. Gray testified that Mr. Barret told him that jurors were playing tic-tac-toe at some point during the trial or deliberations (I.T. 121, 124). Mr. Barret testified that a juror may have been playing tic-tac-toe during the trial, but he was not sure (Id. ***36-37).*** The judge declined to question other jurors on this matter or to consider it in his ruling because he reasoned that such a matter inhered in the verdict (Id. at ***18).*** Conversely, this matter, too, does not inhere in the verdict because it involves external, observable conduct, rather than a matter which resides in a juror's personal consciousness. See Ramirez, supra. As defense counsel argued at the hearing, tic-tac-toe is a game of challenge, involving more than one person (I.T. ***49).***

The defendant has a right to a fair and impartial trial, where the jurors are attentive during the presentation of evidence. Whitehead v. State, ***446 So.*** 2d ***194, 196*** (Fla. 4th DCA ***1984).*** In Whitehead, juror attentiveness was suspected and inquired into during the trial. Id. However, this matter went unnoticed during Mr. Kelley's trial and, therefore, was never investigated. If the jurors in our case were playing tic-tac-toe, it may not have been visible during the trial. If the jurors were playing tic-tac-toe, Mr. Kelley did not receive a fair trial.

C. MR. KELLEY HAS ADEQUATELY DEMONSTRATED THAT THE JUROR MISCONDUCT WAS PREJUDICIAL AND IN VIOLATION OF HIS STATE AND FEDERAL CONSTITUTIONAL RIGHTS

The trial court opined that even if this Court finds that the defendant adequately demonstrated juror misconduct, there was no showing of prejudice (I.T. 220). The judge was not convinced that it was the State's burden to go forward but,

regardless, the court refused to find prejudice (Id.). The federal rule is explicit on the issue of who carries the burden:

> The moving party has the burden of demonstrating misconduct, but the question whether the misconduct affected the verdict cannot be resolved by asking jurors why they voted as they did or what information they took into account; their testimony or affidavits can establish no more than the occurrence and nature of any overt acts and the number of jurors who knew about or participated in them. The question whether prejudice resulted must be resolved by drawing inferences: "Though a judge lacks even the insight of a psychiatrist, he must reach a judgment concerning the subjective effects of objective facts without benefit of couch-interview introspections." A rebuttable presumption often comes to the aid of the moving party and the court, since many kinds of misconduct are considered presumptively prejudicial, especially in criminal but also sometimes in civil cases.

Louisell and Mueller, FEDERAL EVIDENCE, Sec. 291 at 160-61 (1979)(citation omitted)(emphasis supplied); see also Weinstein and Berger, 606(05) at 606-59 (same, but stating that presumption of prejudice is automatically established by showing there was extraneous information, thus shifting burden to prosecution); Remmer v. United States, 347 U.S. 227, 229 (1954)(any outside contact with jurors presumptively prejudicial; burden rests "heavily upon Government" to show harmlessness). The burden is thus on the State, the misconduct shown on the record is presumptively prejudicial, and the State presented the trial court with nothing sufficient to meet its "heavy burden" of demonstrating that there was no harm.

The Florida case law is somewhat stricter as to the burden of showing prejudice:

> If the statements by the jurors are such that they would probably influence the jury, and the evidence in the cause is Conflicting, the onus is not on the accused to show he was prejudiced for the law presumes he was.

Russ, 95 So. 2d at 600-01 (emphasis added). Moreover, the United States Supreme Court has decided that certain extraneous information is so inherently prejudicial that it automatically violates a defendant's due process rights. Parker v. Gladden, 385 U.S. 363, 365 (1966); see also Russ at 601. In our case, the evidence was certainly conflicting -- the first trial resulted in a hung jury and the second jury

was deadlocked after three votes. The trial court noted that there was no evidence at trial that Mr. Kelley was a professional "hitman" or that he had money in his possession when arrested (I.T. 216-218). However, the court reasoned that this information was not prejudicial because the jury could have inferred these things from the role in which the State cast the defendant (Id. at 217). This reasoning is patently unfair. It turns the problem outside in. The questions at trial were whether Sweet had truly hired others to do the killing (or whether he did it himself) and, if so, whether Mr. Kelley was truly the individual hired. Therefore, Sweet's claim that Mr. Kelley was the individual who was hired to kill Maxcy would be bolstered by improper and inflammatory information that Mr. Kelley was a professional killer, that he was shown to possess large sums of money, or that he worked for the "Mafia". The fact that all of this was inaccurate should also not be ignored -- there is no evidence to corroborate what the newspapers said. Further, because the jury (in both trials) had doubts about Sweet's credibility, the extraneous information certainly would make a profound difference in evaluating the truth of Sweet's testimony and in evaluating Mr. Kelley's guilt.

Accordingly, the nature of the misconduct -- the type of extraneous evidence that infected the jury, the juror's changing her vote to guilty to avoid sequestration, and the risk that jurors played tic-tac-toe during the trial -- is so inherently prejudicial that Mr. Kelley was denied a fair trial. Indeed, Mr. Kelley never had an opportunity to confront what the newspapers said. The misconduct at issue here was inherently prejudicial, see Parker v. Gladden, suora, and raises a presumption of prejudice that was not rebutted by the State."

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[21] The State below merely argued that Mr. Barret was not credible and that the remaining jurors had no recollection of the alleged misconduct. But the State cannot explain why Mr. Barret would fabricate the allegations except to say that the conversation with Attorneys Oberhausen and Gray was mere "bar talk". Mr. Gray testified that Mr. Barret did not appear intoxicated (I.T. 128). Further, the State's explanation does not explain Mr. Barret's in-court testimony. The remaining jurors' denial of any misconduct was pat. They were not sequestered, not fully probed on specific issues and not cross-examined. It is more reasonable to believe (continued...)

CLAIM IX

THE JUDGE ERRED IN FAILING TO DISQUALIFY HIMSELF

On April 7, 1989, Mr. Kelley filed a Motion To Disqualify Judge. The motion requested that Judge E. Randolph Bentley disqualify himself from presiding over Defendant's Motion To Interview Jurors and any other proceedings in the case.

> "Prejudice of a judge is a delicate question to raise but when raised as a bar to the trial of a cause, if predicated on grounds with a modicum of reason, the judge against whom raised, should be prompt to recuse himself. No judge under any circumstances is warranted in sitting in the trial of a cause whose neutrality is shadowed or even questioned."

Livinnston v. State, 441 So. 2d 1083, 1085 (Fla. 1983)(quoting Dickenson v. Parks, 140 So. 459, 462 (1932)). In ruling on a motion to disqualify, the judge is required to make a bare determination of the motion's legal sufficiency. See Jackson v. Korda, 402 So. 2d 1362 (Fla. 4th DCA 1981)(motion containing specific factual allegations, certification of good faith, and supporting affidavits of the defendant and his attorney is legally sufficient). The judge "shall not pass on the truth of the facts alleged nor adjudicate the question of disqualification." Fla. R. Crim. P. 3.230(d); Bundy v. Rudd, 366 So. 2d 440, 442 (Fla. 1978). The question is "whether the facts alleged would place a reasonably prudent person in fear of not receiving a fair and impartial trial." Livinaston, 441 So. 2d at 1087; Lewis v. State, 530 So. 2d 449, 450 (Fla. 1st DCA 1988). Here, a trial was not at issue, However, at issue was a matter that might eventually lead to a new trial. Moreover, a judge's role is less in a jury trial, whereas in this instance the judge is the

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[21](...continued)
that the jurors were protecting themselves than to believe that Mr. Barret is delusional, that he imagined these things happened when they truly did not. Such a conclusion is absurd. Mr. Barret clearly had strong feelings that an injustice occurred, and he felt this despite the fact that he still believed Mr. Kelley to be guilty. Moreover, he came forward with the information even though he feared for his safety and that it would cost him and his wife their jobs. There is, thus, no reasonable explanation why Mr. Barret's statements could be anything but truthful. Doubtful situations should be resolved in the defendant's favor. State v. Thomas, 405 So. 2d 220 (Fla. 3d DCA 1981), rev. den. 415 So. 2d 1361 (Fla. 1982), especially in a capital case. Beck, supra.

sole factfinder. The rule "was expressly designed to prevent . . . the creation of 'an intolerable adversary atmosphere' between the trial judge and the litigant." Bundy, 366 So. 2d at 442 (quoting Department of Revenue v. Golder, 322 So. 2d 1, 7 (Fla. 1975)).

Mr. Kelley's motion contained his attorney's certification of good faith and was supported by affidavits from defense counsel and Mr. Kelley. Further, the motion raised the following specific, detailed factual allegations:

1. In the August 11, 1988 Order Denying Defendant's Motion To Vacate, the court stated that it ". . . was left with a strong conviction that the defendant is guilty of the crime charged . . ." (App. 91). In State v. Chappell, the court held that the defendants' bare claim, supported by affidavits, that the judge had already formed an opinion as to the defendants' guilt, and had expressed that opinion, was sufficient to justify the judge's disqualification. 344 So. 2d 925 (Fla. 3d DCA 1977). The claim, alone, showed the actual fear in the minds of the defendants that they would not receive a fair trial. Id. at 926.

In our case we have more than a bare claim regarding the judge's opinion. The judge expressely stated in his order that he has a strong conviction that Mr. Kelley is guilty. As alleged in his affidavit, Mr. Kelley maintains that this strong conviction colors any decisions made by the judge, particularly a determination as to whether juror misconduct occurred and, ultimately, whether the misconduct prejudiced Mr. Kelley so that he is entitled to a new trial on the issue of his guilt or innocence.

2. The judge's bias is further demonstrated by the fact that approximately the last week in July, 1988, two Florida attorneys, Robert Gray and Frank Oberhausen, contacted Judge Bentley and informed him of alleged specific, detailed juror misconduct in Mr. Kelley's trial (I.T. 112-134). Their testimony was described above. The information was conveyed to Judge Bentley in late July, 1988 (Id. at 133-34, 164-67). Mr. Oberhausen told the judge that the juror wanted to

come forward but he wanted his name kept as quiet as possible (Id at 167). Mr. Oberhausen believes he and the judge discussed certain methods of maintaining Mr. Barret's anonymity (Id.; See also Id. at 136). The judge indicated that he needed to research the matter (Id. at 136, 168-69). Yet despite the information, received the last week of July, the judge, in August, issued his Order denying Mr. Kelley's Rule 3.850 motion without any mention of these new developments.

Moreover, on September 7, 1988, the judge denied defendant's August 26, 1988, Petition For Rehearing, prompting defense counsel to file a notice of appeal. Not until September 22, 1988, did Judge Bentley inform defense counsel of the alleged juror misconduct (See September 22, 1988 letter from Judge Bentley to counsel, App. 93). By that time, the circuit court had already lost jurisdiction of the case.

After making some preliminary investigation pursuant to the judge's letter, defense counsel filed in the circuit court Defendant's Notice Of Intention To Interview Jurors. Judge Bentley issued an order prohibiting the defendant from interviewing jurors until he complied with the applicable rules and until the court had jurisdiction of the matter. The order was an adoption of the request of Assistant State Attorney Pickard. This Court subsequently granted the circuit court jurisdiction to consider the Motion To Interview Jurors.

By this time it was already February. Mr. Barret had told Mr. Oberhausen that he would sign an affidavit describing the juror misconduct previously described (I.T. 183-84). But when Mr. Oberhausen's secretary attempted to reach Mr. Barret in mid-February, Mr. Barret did not return the calls (Id. at 184). In late February or early March, Mr. Oberhausen spoke with Mr. Barret, who stated that he no longer wished to come forward, apparently for fear of his identity being made public (Id. at 184-85). Also, Mr. Oberhausen believed that Mr. Barret read in the newspaper about the judge's order prohibiting juror interviews, and that Mr. Barret's initial wish to come forward was stifled because he thought he was acting improperly (Id. 186-87).

In sum, the judge's initial failure to act, and the subsequent ramifications of that failure demonstrate his reluctance to probe the issue of juror misconduct. See Fitzell v. Rama Industries. Inc., 416 So. 2d 1246 (Fla. 4th DCA 1982)(once trial judge learned of possible impropriety he should have notified counsel and entertained promptly motion to interview jurors). By the time the proper procedures were in place, Mr. Barret, as well as the other jurors, had become apprised that an investigation was afoot, and were frightened and unwilling to acknowledge that misconduct had occurred.

3. Both Mr. Kelley and his attorney, Mr. Wilson, believe that the judge harbors animosity towards Mr. Wilson. This is borne out by the judge's implications that Mr. Wilson violated the Order Prohibiting Juror Interview, a matter which was mentioned throughout the hearing on the Motion To Interview Jurors, and was also inferred in a letter prior to the hearing (See Affidavit Of Counsel, App. 98-99). Moreover, at the 3.850 hearing, Judge Bentley suggested that Mr. Wilson had characterized the court as being part of a small Southern town with mob justice (H.T. 438-39). These suggestions depict the court's animosity towards Mr. Wilson, and the court's defensiveness regarding the case. A judge's prejudice towards an attorney can be ". . . of such degree that it adversely affects the client." Livingston, 441 So. 2d at 1087 (quoting Ginsberg v. Holt, 86 So. 2d 650, 651 (Fla. 1956)). This is especially true here, where the judge's opinions and perceptions of Mr. Wilson's conduct may be a material factor in determining whether the allegations of juror misconduct are valid and sufficient to necessitate a new trial. Furthermore, a defendant's fear of not receiving a fair trial due to a judge's bias against an attorney are especially significant in a first degree murder case. Livingston at 1087.

4. The judge should have disqualified himself because the defense alleged that he would be a material witness in the hearing on the Motion To Interview Jurors. See Fla. R. Crim. P. 3.230(a). Where a judge possesses relevant

information "going to some fact affecting the merits of the cause and about which no other witness might testify," he should be disqualified. Van Fripp v. State, 412 So. 2d 914 (Fla. 4th DCA 1982) (quoting Wingate v. Mach, 157 S. 421, 422 (1934)). Here the judge was involved in initial conversations regarding Mr. Barret's having come forward to the two Florida attorneys. Mr. Oberhausen's testimony on this matter may have been limited by the attorney-client privilege. Although the judge ruled that the attorney-client privilege did not apply, that ruling was not evident at the time the judge denied the motion to disqualify. Further, the judge or his legal assistant's testimony may have been necessary as to Mr. Barret's subsequent telephone conversations with Ms. Vandewalker. the legal assistant. Ms. Vandewalker called Mr. Barret back and told him not to talk to anyone, and if he received a subpoena to call her immediately (**See** Affidavit of Counsel, App. 99). It can be assumed that Ms. Vandewalker called Mr. Barret back after conferring with Judge Bentley.

In conclusion, there were several specific allegations as to why the judge should disqualify himself. By not doing so, he deprived Mr. Kelley of an impartial forum or, at the minimum, of the appearance of an impartial forum.

CONCLUSION

Mr. Kelley was tried for the most serious of crimes, convicted, and sentenced to the gravest, most irreversible penalty -- death. However, the separate threads holding together the fabric of his conviction are very weak indeed. The acts and omissions of both the prosecution and trial counsel deprived Mr. Kelley of a fair trial. The totality of the circumstances surrounding the defendant's trial seriously undermine confidence in the jury's verdict.

Based on the foregoing, Mr. Kelley respectfully requests that the Court vacate the judgment of conviction and set aside his sentence; vacate the judge's denial of

his motions to be declared indigent and for funds to hire experts; remand this action for the necessary further trial court proceedings; and provide such relief as the Court deems just and proper.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail, first class, postage prepaid, to Robert Krauss, Assistant Attorney General, Park Trammel Building] 1313 Tampa Street, Tampa, Florida 33602, this 28th day of August, 1989.

Billy H Nolas
Attorney