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

REPLY BRIEF OF APPELLANT
(WITH SUPPLEMENTARY APPENDIX)

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PRELIMINARY STATEMENT

What follows is a brief response and rebuttal to the argument presented in the State's answer brief. The issues are complex and many facts bear on more than one issue. A more thorough argument on these matters is presented in the Initial Brief Of Appellant.

The appellant relies upon the references and abbreviations designated in the Initial Brief Of Appellant and the Brief Of Appellee, as described in the Preliminary Statement of each. Based on the State's answer, the Appellant has found it necessary to include additional portions of the record in a Supplemental Appendix. These record excerpts are included in a Supplementary Appendix to this Reply Brief and shall be cited as "Supp. App. _____."

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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.

The State argues that trial counsel was aware of the destruction of not only the Sweet trial evidence but, also, the fruits of the police investigation in the case, negating the claim that the prosecution withheld from the defense the nature and extent of the lost evidence, The State further argues that Mr. Kelley's supplemental brief on direct appeal discussed the missing crime scene evidence and, thus, the issue was fully raised on direct appeal and cannot be raised in a 3.850 motion. The State's argument fails for the following reasons:

1. Trial counsel failed to fully investigate and apprise the trial court of the missing crime scene evidence (See H.T. 32-34, 41-42; 345-47; see also respective affidavits of trial counsel, App. 18, paragraph 2.a. and App. 22-23, paragraph 6.a). Based on the 3.850 hearing testimony and the affidavits, it is evident that at some point trial counsel became aware that the fruits of the police investigation had been destroyed, but were unaware of the specific items destroyed. The items were in fact not even mentioned in the initial brief on direct appeal.

Here, the prosecutor was also responsible for the omission, because he 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. There is very little actual physical evidence" (T. 68- 69) (emphasis added). Moreover, testimony at the 3.850 hearing suggests that some or all of the crime scene evidence may still exist (H.T. 309-17).

2. Although Mr. Kelley's supplemental brief (filed by Attorneys Barry Haight and Donald L. Ferguson, who were not trial counsel) refers to the crime scene evidence, it does not mention all of that evidence. Indeed, page 15 of the supplemental brief states that "at least twenty-two according to the list submitted to the police laboratory and perhaps as many as forty" crime scene items were destroyed (emphasis added). Accordingly, counsel on the supplemental brief were not specifically aware of the remaining items, listed as Exhibit Nos. 23-40. These items, including specified items of the victim's clothing and accessories, metal fragments removed from the rear internal areas of the victim's head, keys to the victim's car, other sections of the victim's car, and four knives were not mentioned in the supplemental brief, and indeed were unknown to the defense prior to the 3.850 proceedings. Nor were the tape recordings of the Sweet/Irene Von Maxcy telephone conversations mentioned. If counsel on the supplemental brief were aware of these items, they would have been discussed. Further, the State, on appeal, failed to discuss any of these additional items and, thus, never carried its burden of showing that the destruction of these items did not prejudice Mr. Kelley.

3. In the supplemental brief on direct appeal, new counsel raised the destruction of evidence claim as a separate issue, and later referred to it under the ineffective assistance of counsel claim. On direct appeal, this Court only considered the following real evidence in deciding the destruction of evidence claim: "a bullet, a bloody bedsheet . . . and a shred of the victim's shirt."[1] Kelley v. State, 486 So. 2d 578, 580 (Fla. 1986). As to the ineffective assistance of counsel claim, this Court determined that said claim could not be decided by the record as it stood, and thus ruled that the claim should be raised in a motion for 3.850 relief. Id. at 585.

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[1] This was the destroyed real evidence presented to this Court by trial counsel in the initial direct appeal Brief of Appellant.

Based on the foregoing, Mr. Kelley submits that this Court was unable to decide on direct appeal the destruction of evidence issue as it related to ineffective assistance of counsel and prosecutorial misconduct because at that point the record was insufficiently developed. The record as presently developed demonstrates that neither the trial court nor this Court on direct appeal considered the true nature and extent of destroyed and/or missing evidence. Further, the record as presently developed demonstrates that Mr. Kelley was denied due process of law because of trial counsel's ineffectiveness and the prosecutor's misconduct.

Finally, the State argues that Mr. Kelley's claim should fail because it is analogous to the issue in Arizona v. Youngblood, 57 U.S.L.W. 4013 (1988). There, the Court recently held that unless a defendant shows bad faith on the part of the police, failure to preserve potentially useful evidence generally does not constitute a due process violation. Id. at 4015. This standard appears to be somewhat stricter than that enunciated by the Supreme Court of Florida, for example, even in the direct appeal in this case. See also Youngblood at 4016 (Stevens, J., concurring in Court's judgment but not its opinion)(". . . there may well be cases in which the defendant is unable to prove that the State acted in bad faith but in which the loss of destruction of evidence is nontheless so critical to the defendant as to make a criminal trial fundamentally unfair"). Nevertheless, Youngblood is distinguishable from the present case.

The holding in Youngblood was based on two critical factors, relied upon by the Supreme Court, which simply do not exist in Mr. Kelley's case. In Youngblood: (1) the State, pretrial, made known to the defense the existence of the physical evidence and that the victim had been examined at a hospital; and (2) the defendant's expert had access to the evidence but declined to perform any tests thereon. Id. at 4014-15. Neither of these crucial circumstances

occurred in the present case. Furthermore, in this case, the defense has shown the prosecution's bad faith. Youngblood does not apply to Mr. Kelley's case.

Additionally, the test enunciated in Youngblood is an inquiry into whether the State's actions deprived the defendant of the opportunity to determine the exculpatory value of the missing evidence. See 57 U.S.L.W. 4016-19 (Blackmun, Brennan, and Marshall, JJ., dissenting). Particularly true in our case is what was noted in Youngblood itself: "[a]s technology develops, the potential for this type of evidence to provide conclusive results on any number of questions will increase." Id. at 4018. Moreover, as in our case, where guilt or innocence is a closer question, lost evidence may have appeared more exculpatory to the jury. Id. at 4016 (Stevens, J., concurring). Under Youngblood, Mr. Kelley is entitled to Rule 3.850 relief.

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.

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

The State attempts to dispose of the prosecutor's obligation to provide Sweet's first trial transcript by arguing that (1) Mr. Pickard (the trial prosecutor) was unaware of the status of the transcripts and, therefore, suggested that Mr. Kelley's lawyers contact the court reporter(s); and (2) the transcript was not Bradv material because it was a public record to which the defense had access.

These arguments must fail. First, the transcript was not a public record because Sweet's first trial resulted in a mistrial and, therefore, was never appealed. Further, on June 29, 1983, the Circuit Court, McDonald, J., granted Mr. Kelley's Motion For Copies Of Transcripts (Supp. App. 9, 12); the State had

the obligation to supply them.[2] Moreover, it has come to present counsels' attention that the court reporter for Mr. Sweet's trial destroyed her notes of the trial proceedings in the beginning of 1983. On January 19, 1984, Mr. Kelley's attorney filed in the second district court of appeal a Petition For Writ Of Prohibition Or, In The Alternative, Writ Of Habeas Corpus (Supp. App. 13). Counsel stated therein that the court reporter had destroyed her notes of John Sweet's trial (Supp. App. 17-18), and included in the appendix, Exhibit F, to said Petition the Certificate Of Official Court Reporter, certifying that the reporter had destroyed the notes in the beginning of 1983 (Supp. App. 33). Thus, apparently, Mr. Pickard must have known the notes were destroyed when he told Attorney Dinsmore,[3] in August, 1983, that he was unaware of the status of the transcript and that he should contact the court reporter(s).[4] At a minimum, the prosecution led the defense on a wild goose chase when, in fact, the prosecutor had the transcript in his possession.

Second, it defies logic to believe that the prosecutor was not in possession of or, at a minimum, that he was unaware of the whereabouts of Sweet's transcript subsequent to Mr. Kelley's indictment. On February 21, 1981, Florida Department of Law Enforcement Special Agent Joe Mitchell wrote a report describing the communications and negotiations between Florida and Massachusetts law enforcement personnel concerning John Sweet (See Ex. S-2, App. 50). The

[2]On page 25 of its answer brief, the State admits that the defense did not have access to Sweet's first trial transcript. At the 3.850 hearing, Mr. Kunstler (trial defense counsel) testified that he understood that the court reporter had destroyed her notes or that the notes were unavailable and no transcript could be produced (H.T. 44).

[3]The transcript was in fact obtained by current counsel from Mr. Pickard himself, pursuant to a Fla. Stat. section 119 public records request.

[4]A related question raised is why did the court reporter destroy the notes to Sweet's trial in the beginning of 1983, when she served as a court reporter for the Tenth Judicial Circuit only through August 19, 1979 (see Supp. App. 33), and Mr. Kelley was not indicted until 1981? If the notes still existed in 1981, why were they then destoyed while Mr. Kelley's prosecution was pending?

report states that Mr. Mitchell reviewed with the prosecutors the potential problems "which could affect a successful prosecution of William Kelley by the State of Florida." (Ex, S-2, App. 53). The first problem listed was:

> 1. The testimony of John Sweet, which would be in conflict with testimony he provided in 1967, during the trial which would automatically place his testimony in the impeachable category.

(Ex. S-2; App. 53).

Wisely, the prosecution was concerned about conflicts between Sweet s prior testimony and his expected testimony if the Kelley prosecution went forward. Soon after the above-described prosecution meeting, on June 3, 1981, Massachusetts State Police Trooper Robert St. Jean sent Mr. Mitchell a copy of St. Jean's interview with John Sweet (See letter from St. Jean to Mitchell, Ex. S, Supp. App. 1 and St. Jean's report of interview with Sweet, Ex. S-1, Supp. App. 2). In St. Jean's report of his interview with Sweet, he notes that Sweet provided him "with transcripts of both trials . . ." (Ex. S-1, Supp. App. 6). Thus, at a minimum, Mssrs. Mitchell and Pickard were notified that Trooper St. Jean was in possession of the transcripts. Most likely, the Massachusetts authorities had already relinquished the transcripts to the Florida authorities at one of the joint meetings that occurred in March, 1981 (See Ex. S-2, App. 51), because Massachusetts would have no need for the transcripts.

Furthermore, on page 3 of the State's Response To Defendant's Motion For Post Conviction Relief And Motion For Summary Denial, "[t]he State admits that included within the multitude of reports and transcripts in its possession were either the entire transcript of Sweet's first trial or at least portions of it." The State denies that it withheld same from the defense deliberately. Mr. Kelley challenges this denial, pointing out that the transcript was too important to the prosecution for it to be lost among the "multitude of reports and transcripts." Rather, the transcript was important enough to the defense, and detrimental to a successful prosecution because of its impeachment value

(see Exhibit S-2, App. 53, discussed supra) to motivate the State's deliberate withholding of this evidence. Again, Sweet's testimony was essential to Mr. Kelley's indictment and prosecution. Kelley, 486 So. 2d at 580, 581.

The first trial transcript was material because it would have provided sworn testimony for impeachment of Sweet, including (1) whether he lied about Irene Maxcy's sexual conduct to discredit her and save himself; (2) his first trial version of the Maxcy killing which differed from the version he gave at Mr. Kelley's two trials and at Sweet's second trial; and (3) whether he told Irene Maxcy that he did not know a William Kelley. The State argues that Sweet's second trial transcript concerning the Sweet/Irene Von Maxcy tape-recorded conversations negates the materiality of testimony about these conversations in Sweet's first trial. This argument totally ignores the distinctions between Sweet's testimony at his first and second trials concerning the tape-recorded conversations. Specifically, the second trial transcript merely alerted defense counsel to one telephone call that Sweet already knew was being recorded by the police; thus, defense counsel could conclude that no valuable exculpatory information would be gleaned from a tape of that call. In contrast, the first trial transcript spoke of one-hundred and fifty telephone calls that Sweet did not know were taped by the police, in one of which Sweet told Irene Maxcy that he did not know a William Kelley. Thus, the defense was mislead on a material, exculpatory issue (See Initial Brief Of Appellant, p. 17-18, 26-27).

Sweet's lying to the police is not evidence that he lied to Irene Maxcy, his lover and co-conspirator. It was for the jury to decide Sweet's credibility after hearing all of the relevant and contradictory evidence. Had all that evidence been avialable there is a reasonable likelihood that the outcome of the trial would have been different.

B. THE FINGERPRINT REPORT

Although the defense knew that Mr. Kelley's fingerprints were not found at the crime scene, possession of the actual fingerprint report would have enabled them to make inquiries regarding the twenty-three finger impressions and nineteen palmer impressions that were compared with finger and palm prints of eighty-one persons (Ex. T, App. 56-57; see also trial counsel's 3.850 testimony at H.T. 129-130). The report also would have notified the defense that none of the prints matched those of Andrew Von Etter (Ex. T, App. 57; H.T. 129-30). This would have shown significant defects in Sweet's testimony; after all, Sweet claimed that Von Etter assisted Mr. Kelley in the killing, Kelley, 486 So. 2d at 579, and he did not testify that Von Etter was wearing gloves (See T. 593). Indeed, contrary to the lower court's finding, Sweet testified that Mr. Kelley had a glove on only one hand (T. 593). Thus, all of the information in the fingerprint report would have been material and exculpatory. Without the report, however, there was almost nothing which counsel could have used.

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

The State argues, contrary to the lower court's finding, that trial counsel was in possession of the March 18, 1967, police report which stated that Kaye Carter was shown a photograph of William Kelley and could not make a positive identification because the person she saw in 1966 with Andrew Von Etter was older than Mr. Kelley's 26 years. This report is Exhibit V to Mr. Kelley's 3.850 Motion (App. 58-59). The State argues that trial counsel quoted extensively from this report in cross-examining Kaye Carter.

Conversely, the lower court found, and Mr. Kelley agrees, that trial counsel cross-examined Kaye Carter from Roma Trulock's interview summary which makes no mention of Ms. Carter's negative photographic identification. This interview summary (reproduced at Supp. App. 7) was attached as Exhibit C to the

State's Response to Mr. Kelley's Rule 3.850 motion. The interview summary, in pertinent part, states:

> The man was described as being about 40, 6' to 6'2" tall, medium build, dark hair, (kind of curly) with a deep husky voice. The woman was about 35, plump, short black hair, medium complexion. May have three children. May be named Charlotte. She and her husband were heavy drinkers.

(Supp. App. 7)(emphasis added).

This language corresponds verbatim to trial counsel's cross-examination of Kaye Carter, referred to by the State. The cross-examination, in pertinent part, is as follows:

> Q. Mrs. Carter, did you describe the woman whom you know as Charlotte Kelley to be about thirty-five, plump, short, black hair, medium complexion, and she may have three children?
>
> A. Yes, sir.
>
> Q. And that she and her husband were heavy drinkers?
>
> A. Yes, sir.
>
> Q. Did you describe the man who was with her, who was Mr. Kelley, as being about forty years old, six foot to six foot two inches tall, medium build, with dark hair that was kind of curly, and spoke with a deep, husky voice?
>
> A. Yes, sir.

(T. 684-85)(emphasis added).

By contrast, the police report which the State withheld reads in pertinent part as follows:

> This car was driven by a white male described as being about 40, 6' medium build, dark hair, kind of curly, husky voice. This picture of William Harold Kelley looks something like him although she is sure that he was older than the 26 years of his description.
>
> His wife was also along. She was described as being about 34-35, plump, short black hair, medium complexion, may have three children. Name may be Charlotte. Both she and her husband drank heavily.

(Exhibit V, App. 58-59)(emphasis added).

Clearly, the language in the police report does not correspond to the language used in cross-examining Kaye Carter, quoted supra. Certainly, if trial

counsel had been in possession of the police report he would have cross-examined Kaye Carter concerning the actual negative photographic identification, which is far more exculpatory than the information contained in the interview summary. The State, by attempting to substitute the interview summary for the police report, attempts to whitewash the issue and the State's accompanying misconduct.

D. THE CRIME SCENE PHOTOGRAPHS

The State claims that the four crime scene photographs showing bloody footprints or smudge marks, although not introduced at trial, were available for trial counsel's examination at any time. There is no evidence on the record to support this contention. It is made out of thin air. There is a reasonable probability that the outcome of the trial would have been different had the jury seen the photographs showing bloody footprints or smudge marks, particularly if they had seen these photographs in conjunction with the crime scene carpets, hallway runners, brake pedal, floor mats and other sections from the victim's car. Mr. Kelley's initial brief discussed these issues, and that discussion will not be repeated again herein.

E. JOHN SWEET'S IMMUNITY

The State claims there was no relationship between Sweet's Massachusetts and Florida grants of immunity, and no relationship between Sweet's receiving immunity in Massachusetts and testifying in Mr. Kelley's case. Anyone reading the relevant documents (presented as exhibits in Mr. Kelley's 3.850 proceedings) can discern that there certainly was cooperation and collaboration between the Florida and Massachusetts authorities (See Exhibits S, S-1, S-2 and S-3 attached to 3.850 Motion). The prosecutor met with the Massachusetts authorities on March 6, 1981, at the State Attorney's Office in Bartow, Florida "to discuss actions to be taken in conjunction with the information being provided by John Sweet . . ." (Ex. S-2, App. 51).

The following week, State Attorney Quillian Yancy, Assistant State Attorney

Hardy Pickard, and Special Agent Joseph Mitchell traveled to the office of the District Attorney in New Bedford, Massachusetts, to interview John Sweet concerning the Maxcy killing (Id.). John Sweet gave an extensive interview, providing a detailed account of his version of the Maxcy killing (See Exhibit S-2, App. 51-52). The following day, John Sweet received immunity in Massachusetts (Order In Re: John J. Sweet Ex. LL, App. 61). Why was Sweet debriefed in Massachusetts by Florida prosecutors concerning the Maxcy killing one day prior to his being granted immunity in Massachusetts? Clearly, because Massachusetts agreed to use its leverage to aid Florida in securing Sweet's promise to cooperate in William Kelley's prosecution. Once Sweet complied, his Massachusetts immunity was secure. It must be remembered that ". . . Sweet, in 1981, became involved in a criminal situation he found threatening and approached law enforcement authorities in order to seek some protection by receiving immunity in return for his testimony as to a wide variety of crimes." Kelley, 486 So. 2d at 579-80.

Trial counsel, and the jury, should have been informed of the manner in which Sweet was granted immunity in both states, and the manner in which Florida and Massachusetts worked together to secure Sweet's cooperation. In fact, the jury's question of the court, discussed in Mr. Kelley's initial brief, shows that they were very concerned with this matter.

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.

The facts underlying this claim are one more demonstration of the improper prosecutorial tactics utilized to prove a case which otherwise likely would have resulted in acquittal, or at least a second hung jury.

CLAIM IV

MR. KELLEY 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.

Mr. Kelley must reiterate that this issue could not have been raised on appeal because neither trial nor appellate counsel had the information necessary to raise the issue. Furthermore, such a weak, technical excuse should never permit prosecutorial misconduct to go unchecked, particularly in a capital case. In fact, the lower court, although it previously ruled that this issue should have been raised on appeal, found that the defense did not possess the police report concerning Kaye Carter's viewing of Mr. Kelley's photograph (App. 84).

A. KAYE CARTER'S NEGATIVE IDENTIFICATION OF WILLIAM KELLEY'S PHOTOGRAPH

Kaye Carter's having given a description of the man alleged to be Mr. Kelley cannot be equated with her having looked at his photograph and stated that the man she saw was older than the man in the photograph. The prosecutor's statement to the jury about Kaye Carter's inability to identify Mr. Kelley seventeen years later was false and misleading.

B. THE 1981 NEWSPAPER ARTICLES

The State mischaracterizes Mr. Kelley's position concerning the 1981 newspaper articles and fails to even acknowledge that the prosecutor's statement to the jury was unequivocally false. The testimony at the 3.850 hearing showed that Mr. Pickard knew that in December, 1981, at least one greater Boston newspaper (the Brockton Enterprise) had published stories concerning Mr. Kelley's alleged involvement in the Maxcy murder (H.T. 179-88; Ex. D, App. 60). The reporter, James Harrington, informed Mr. Pickard of the articles in December, 1981 (Ex. DD, App. 60; H.T. 182-85). He also sent him copies of the articles and photographs (H.T. 183). Yet in his closing, Mr. Pickard argued that any newspaper articles would have come out in 1966 and 1967, seventeen or

eighteen years earlier (T. 877). Defense counsel was not aware that Mr. Pickard knew about the 1981 newspaper articles (H.T. 77, 360, 363-67).

Evidence at the 3.850 hearing showed that Mr. Kelley contacted two Massachusetts lawyers and one Florida lawyer in 1981 and 1982, because he had read or heard that he had been indicted in Florida (H.T. 171, 188-90; 195-96). Further, the Brockton Enterprise newspaper reporter, James Harrington, testified that he believed the Brockton Enterprise was the largest newspaper in Plymouth County excluding the Boston Globe and the Boston Herald (H.T. 184). He also knew that in 1981, Mr. Kelley had a Brockton address and had family living there (H.T. 184, 186). Additionally, an article on the case came out in the Boston Globe on December 20, 1981 (H.T. 185). An inference could easily be drawn that Mr. Kelley either read or was informed about the newspaper articles discussing his alleged link to the Maxcy killing. And Attorney Haight testified that Mr. Kelley told him that he had either read or heard that he had been indicted in Florida (H.T. 190). Otherwise, what would have prompted him to contact three lawyers to determine if an indictment and warrant were outstanding in Florida?

C. THE TRUE FACTS BEHIND JOHN SWEET'S MASSACHUSETTS GRANT OF IMMUNITY

On March 13, 1981, John Sweet was debriefed in Massachusetts concerning the details of the Maxcy killing (Ex. S-2, App. 51-52). Mr. Pickard travelled to Massachusetts and participated in the debriefing (Id.). Sweet there stated that he would testify for the State of Florida if Florida decided to prosecute Mr. Kelley (Id. at 52). The following day, March 13, 1981, John Sweet received immunity in Massachusetts (Ex. LL, App. 61). Mr. Pickard argued to the jury that Sweet "gave them Kelley" after receiving immunity in Massachusetts, and that the Massachusetts immunity had

> nothing to do with the Maxcy case or giving them Kelley on the Florida cases.
>
> 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). As previously discussed in Claim II, supra, there clearly was some relationship between the Massachusetts grant of immunity and Sweet's testifying at Mr. Kelley's trial, The prosecutor physically travelled to Massachusetts and there participated in debriefing Sweet concerning the Maxcy case (Ex. S-2, App. 51). On that day, Sweet had not yet received immunity from Massachusetts; significantly, however, he did receive immunity in Massachusetts the very next day (Exhibit LL, App. 61).

Accordingly, it was an outright falsehood that Sweet "gave them Kelley" after receiving immunity in Massachusetts and that the Massachusetts immunity had nothing to do with the Maxcy case. Certainly, Mr. Pickard did not forget about his trip to Massachusetts, and the purpose of the trip. Yet, if one merely heard his closing argument, one would never guess he, personally, went to Massachusetts, where Sweet "gave him Kelley" prior to receiving his Massachusetts immunity.

The further harm caused by Mr. Pickard's remarks to the jury on this matter is that it destroyed any belief the jury had that Sweet would do anything to stay out of jail, including lie about William Kelley. The defense had brought out that reality during Sweet's cross-examination, asking Sweet about all the immunity he received in Massachusetts. But the prosecutor nullified that reality by arguing falsely.

Mr. Pickard intentionally misled the jury on a critical matter that might well have affected the outcome of the trial. After all, the jurors were quite concerned about whether Sweet had anything to gain by testifying against Mr. Kelley, as evidenced by their question to the judge.

In sum, the prosecutor intentionally made three false and misleading statements in his closing argument. These false and misleading statements went

to the heart of the issues of John Sweet's credibility and Mr. Kelley's innocence or guilt. It cannot be argued that the statements were immaterial; if they were immaterial Mr. Pickard would not have included them in his closing argument. Mr. Pickard argued these matters to the jury in an attempt to distort the true weaknesses in the case against Mr. Kelley. Because trial and appellate counsel were not in possession of and had no knowledge of documents and information disclosing Mr. Pickard's deception, they could not challenge his misconduct (See H.T. 85-86, 88-89, 160, 291-95, 356-57).

CLAIMS V AND VI

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 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.

The State appears to argue that Mr. Kelley sought funds to pay his private counsel. This is incorrect. He sought funds solely for expert witness fees, based on his assertion that he qualifies as an indigent. Mr. Kelley's request for funding should not be rejected because he has spared the public the burden of his legal fees.

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 LAW 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.

A. THE DESTROYED, MISPLACED AND UNACCOUNTED FOR EVIDENCE

The record, as well as the Court's opinion on direct appeal, show that trial and appellate counsel did not fully present to either court the nature and extent of the missing evidence. Trial counsel admitted this at the 3.850 hearing, and their admissions are substantiated by the record. Trial counsels'

failure to investigate the full extent and nature of missing evidence and to apprise the court of same, was ineffective and denied Mr. Kelley a fair trial.

B. 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

The State attempts to dispose of this claim by arguing that the testimony and evidence at issue was not that of expert witnesses, and merely dealt with crime scene evidence. First, the witnesses at issue, Heinrich Schmidt, a medical examiner, James Halligan, a laboratory examiner, and J.C. Murdock, a deputy sheriff, were experts in that they testified concerning matters that were beyond the knowledge and experience of the jury, including scientific analysis. Mr. Murdock testified not only to his observations, but to the procedures he used to lift fingerprints at the crime scene (T. ***478-79, 490-92).*** Yet Mr. Murdock could only testify that to the best of his knowledge, no fingerprints were ever identified[5] (T. ***479, 488).*** Counsel failed to protect Mr. Kelley's rights to confront and cross-examine these witnesses, and failed to conduct the discovery that would have aided them to do so.

Attorney Edmund claimed that his stipulation as to James Halligan's expected testimony regarding the number of holes in the sheet was of no consequences and that he did not want to drag things out (H.T. 337). Mr. Halligan's testimony could have been challenged; it conflicted with the written laboratory analysis concerning the size of the slits and, also, the number and size of the slits in the victim's shirt (Compare T. ***707-08*** with App. ***14).*** Such a challenge would have been important because it would have impeached John Sweet's claim that the sheet was thrown over the victim during the repeated stabbings. See Kelley at ***580.*** The State relied on this statement to explain why no blood was seen on the suspected assailants immediately after the killing

[5]The latent fingerprint report would have made a difference here.

(T. 869).

C. FAILURE TO DEVELOP DEFENSE THEORIES

The trial court reasoned that Mr. Kelley was not prejudiced by trial counsel's failure to obtain a handwriting comparison because the State never contended that Mr. Kelley signed the motel register, and that Mr. Kelley's companion may have signed (App. 87). Even though there was no outright contention that Mr. Kelley , himself, signed the register, and even though his alleged companion "may have" signed, 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 doubts in the jurors' minds.

Collateral counsel did offer proof on trial counsels' failure to investigate and utilize the inconsistency in the time period on the evening of the killing. That proof consisted of a Certified Weather Statement for October 3, 1966 (Ex. TTT-1, App. 73) and a letter from the American Automobile Association stating that the distance between Sebring and Daytona Beach, Florida is one hundred and forty miles (Ex. TTT-2, App. 74). As explained in the Initial Brief Of Appellant, Mr. Edmund's attempt to point out the time period inconsistencies to the jury was inadequate, inaccurate, and ineffective.

The State argues that the Margaret McEvoy, in her affidavit, states that at the time of the murder William Kelley was 6'5" - 6'6" and weighed 200-230 lbs., and that her description is "not too different from Sweet's recollected estimation of 6'5", 280-290 lbs." It is amazing that the State considers a difference of fifty pounds, at a minimum, to be insignificant. Further, other witnesses who trial counsel could have called would have estimated Mr. Kelley as weighing a lot less (See Ex. MM-1 through MM-5). Even more significant would have been the contrast between these descriptions and Kaye Carter's description of a man six foot to six foot-two inches tall with a medium build.

The State argues that Mr. Kelley's reliance on Williams v. State is

misplaced because Mr. Kelley did not testify as to his version of the facts. Regardless, Mr. Kelley's version of the facts -- that he was not the man registered at the Daytona Inn in October, 1966, and that John Sweet had not hired others but had performed the killing himself -- was elicited (however ineffectively) through cross-examination of the State's witnesses (see, e.g., T. 845-847).

The 1981 newspaper articles would have explained how Mr. Kelley knew, at the time of his arrest, about the Maxcy homicide investigation. The articles did describe Mr. Kelley as a criminal, but they could have been sanitized. Better yet, they could have been referred to through witnesses whom Mr. Kelley contacted to inquire whether an indictment and warrant against him were outstanding in Florida (See discussion, supra concerning three attorneys whom Kelley contacted in 1981 and 1982). One of the attorneys, Barry Haight, was on the defense witness list, but was never contacted. Mr. Haight recalls Mr. Kelley telling him he had read or heard about the Florida indictment (H.T. 190). Again, based on Mr. Kelley's conversations with the three attorneys, and based on the wide coverage of the newspaper articles in Mr. Kelley's hometown and the greater Boston area generally, Mr. Kelley had either read the newspaper articles or had been told of them by friends or family.

The trial court's reasoning that testimony that Mr. Kelley contacted the attorneys might appear to the jurors to be behavior inconsistent with a "law-abiding citizen" (App. 88) is illogical because trial counsel had already painted Mr. Kelley as a non-law-abiding citizen by bringing out numerous incidents of his alleged prior crimes and bad acts. On the one hand, the State agrees with the judge's ruling that the newspaper articles would have prejudicially portrayed Mr. Kelley as not a law-abiding citizen. On the other hand, the State argues that it was reasonable trial strategy for counsel to elicit evidence of Mr. Kelley's alleged, prior crimes and bad acts.

Finally, the State argues that even assuming that Mr. Kelley knew that he was wanted, FBI agent Davis' testimony would have been the same.[6] Yes, Agent Davis' testimony would have been the same, but Mr. Kelley's statement would have been explained as other than evidence of consciousness of guilt.

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

The State argues that it was reasonable trial strategy for trial counsel to show that Sweet and Kelley had been involved together in prior criminal activity and "had had problems," thus showing Sweet's motive to "get back" at Kelley. This supposed trial tactic is actually childish, and pales next to demonstrating Sweet's motive to lie about Kelley to save himself -- there could be no better motive than that for a man like John Sweet, who managed to negotiate his immunity for an astonishingly long list of crimes. In any event, no "strategy" can be deemed effective when it is based on a lack of investigation. Such is the case here.

E. JOHN SWEET'S CREDIBILITY

The State argues that trial counsel did an "excellent job" of making Sweet appear not credible, and that further impeachment would not have effected the outcome of the trial. What this argument misses is that the jury ultimately decided that Sweet **was** credible, as evidenced by their guilty verdict. Evidence which reasonably competent counsel would and should have investigated, however,

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[6] Agent Davis testified as follows:

> A. I told Mr. Kelley that he had been charged with murder in Highlands County, Florida. At that time he thought about it a moment and he said, "That must be a 17 or 18 year old case." Then he mentioned that that was the case that Sweet and Bennett were involved in.
>
> I asked him if he meant Wimpy Bennett and he said, "No, Walter."
>
> He then said he thought all the witnesses were dead in this case, and he said it was a lousy case and the State would never make that case.

was available which would have conclusively shown that Sweet was not worthy of belief. The jury's verdict was reached with much difficulty, and only after three votes and an impasse, at which time the judge gave an Allen charge. The jury submitted a question which bore on Sweet's credibility. If counsel had impeached Sweet effectively, using compelling evidence which counsel without a reason negected to investigate -- particularly as to his testimonial contradictions regarding the actual crime and Sweet's role therein and observations thereto' -- there is a reasonable probability that the outcome of the trial would have been different.

CLAIM VIII

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

The State's half-hearted suggestion that Mr. Barret's allegations of juror misconduct were "a bunch of bar talk" certainly does not explain Mr. Barret's in-court testimony about the misconduct that occurred. Further, the State cannot rely on Mr. Barret's testimony that he was not sure if the prejudicial information was brought up at trial or learned through Ms. Rickett's having access to newspaper articles because, as the lower court noted, the prejudicial information was not part of the evidence at trial (I.T. 216-18).

Also, the State cannot explain why Mr. Barret would fabricate his allegations. Conversely, Mr. Kelley offers a reasonable explanation of why the

[7]It must be recognized that access to the first trial transcript would have made an important difference here, as well. However, trial counsel failed to make adequate use of the transcripts they did have. Specifically, the transcripts of John Sweet's second trial and William Kelley's first trial (See Ex. C., par 2.b (i-viii) and Ex. D., par. 6.h (i-viii); App. 18-26).

Mr. Edmund testified that he hesitated to impeach Sweet with things Sweet said at Mr. Kelley's prior trial for fear the jury would be prejudiced by knowledge that Mr. Kelley had already been tried before on the murder charge (H.T. 337-38). A reasonable trial lawyer would refer to a witness' testimony in a prior "proceeding," thus eliminating any negative inferences regarding a prior trial on the same charges. Mr. Edmund's conflicting position on this issue made no sense.

remaining jurors, especially Ms. Ricketts, would deny the allegations of misconduct. Specifically, the jurors were confronted with having disobeyed the court's orders pertaining to their conduct as jurors. It would have taken much courage to admit the wrongdoing. Further, much time had passed since the events and it was safer and easier to deny that any misconduct occurred.

CONCLUSION

Based on the foregoing, and recognizing the difficulty the State had in finally securing a conviction, and particularly the State's failure with the first jury and its difficulty in convincing the second jury that John Sweet was telling the truth, William Kelley respectfully requests that the Court find that his conviction and death sentence were obtained in violation of his constitutional rights, and in violation of all notions of fairness and decency and, therefore, that the Court grant him a new trial.

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 Trummel Building, 1313 Tampa Street, Tampa, Florida 33602, this 27th day of November, 1989.

Billy H. Nolas/SEK
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