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IN THE SUPREME COURT OF FLORIDA

WILLIAM HAROLD KELLEY,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

Case Number 65134 ~~61-851~~

On Direct Appeal From The Circuit Court Of The Tenth Judicial Circuit Of Florida In And For Highlands County

BRIEF OF APPELLANT

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Statement of Facts

A. The Relevant Trial Testimony[1]

1. J.C. Murdock

J. C. Murdock, Highlands County Deputy Sheriff in 1966, had reported to the Maxcy house "around 10:00 or 10:15 p.m." on the night of the murder, often being alerted on his car radio by the dispatcher. (R. 477). He had found no signs of forcible entry, (R. 478), and he had lifted a number of fingerprints which had been sent to "what was then the Sheriff's Bureau in Tallahassee." (R. 479). He testified that there was "an awful lot of blood" on Maxcy's body, ibid, "Q: And it looked like there had been a struggle?" A: Yes, sir." (R. 494), "an awful lot of blood on the walls, (R. 493), "blood all around this carpet where the body was," ibid, "blood on the floor in the bedroom" (R. 494), and "in the hallway," ibid. Later, he had determined there were three stab wounds in the back and a bullet wound in the facc. (R. 48). A .38 caliber bullet had been found "three or four feet" from the body. Ibid.

He had taken a number of black and white photographs of the scene while another deputy, now deceased, had taken color ones. (R. 481). State No. 3 was a black and white

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[1]All references to the record on appeal will be designated as "R," followed by the appropriate pagination.

For the purposes of clarity and brevity, the Appellant, WILLIAM HAROLD KELLEY, will be referred to as "defendant." The Appellee, the State of Florida, will be referred to as "the State."

print showing the sheet, which was not on the body but "in the hallway" (R. 494) it contained "knife holes. . . and blood." (R. 483). The sheet, as well as the bullet, were also sent to the Sheriff's Bureau. (R. 484). He had found no indication that any blood had been washed off in the house by the killer and no blood in Maxcy's car. (R. 496).

2. Dr. Heinrich Schmidt

Dr. Heinrich Schmidt had conducted the autopsy on Maxcy's body at Highlands General Hospital the morning after the murder. (R. 512). He found four stab wounds on the left back and a gunshot wound in the right lower eye." Ibid. The stab wounds were "deep" ones. (R. 514). In his opinion, any of the wounds would have caused death. (R. 515). He believed that the stab wounds "came first" because the gunshot wound would have "immediately completely paralyzed him." (R. 516). With the stab wounds alone, "he would have been able to struggle for a considerable period of time, at least minutes . . . He would be able to fight and move." Ibid. Bleeding would have continued after the stab wounds and would not have ceased until "the heart stops." (R. 517). "Q: The way you have described Mr. Maxcy, after being stabbed, the heart would not have automatically stopped? A: It would not. Q: And he would have continued to bleed? A: Yes, sir." (R. 518).

3. John J. Sweet

a. Direct Examination

John J. Sweet, 68 years old, testified that he had begun having an affair with Irene Von Maxcy, and that this was known to her husband. (R. 568-69). There had come a time when Irene told him that Maxcy intended to divorce her. (R. 570). She was afraid that a divorce would not only cut her out of her husband's will but also cause her to lose their child. (R. 571). She had shown Sweet "a will and trust fund she had" which amounted to $2,300,000.00. (R. 572).[2]

As a result of Irene's urging (R. 579, 644), he had contacted a Walter Bennett, a man in Dorchester, Massachusetts, with whom he used to bet (R. 573), in order to arrange for Maxcy's murder. (R. 579). Bennett had given him a price of $20,000 for the job. Ibid. The money was to be paid "5,000 front money. . . and the balance . . . . after the job was completed." (R. 580). Sweet had paid the "front money" to Bennett. (R. 581).

He had then received a telephone call from one Andrew Von Etter who was staying at a Daytone Beach motel. (R. 582-83). The witness had then gone to Daytona Beach, talked to Von Etter in the motel's parking lot, and then returned

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[2]C.W. Davis, the former vice-president and senior trust officer of the Citizens Bank of Orlando, the co-executor, along with Irene, of Maxcy's estate (R. 686), testified that the value of the gross estate was $1,864,656.59, plus $300,000 in life insurance. (R. 689).

to Sebring. (R. 583).[3] Several days later, Von Etter had driven to Sebring and Sweet had met him at a shopping center and driven him to the Maxcy home. (R. 584-85). He had also given him a description of the victim and "the type car he drove." (R. 586).

The evening before the murder, he had received a call from Von Etter "from Daytona." Ibid. Von Etter had said that his "friend" was here and that the killing would occur "tomorrow." (R. 587). Sweet had then checked with Irene who was to make sure that the door was unlocked. Ibid. During the conversation with Von Etter, they had arranged to meet at the same Sebring shopping center where they had met earlier "between 4:30 and 5:00. . . [B]ecause Irene said Von usually came home from work approximately 5:00 o'clock in the evening." (R. 588).

Von Etter and his "friend" had arrived at the center in "a sports car, a convertible, I believe," (R. 588), at "maybe 4:00 or 4:30. . ." (R. 587).[4] A "big fellow" had come over to his car and said, "I'm Bill Kelley. I'm here to kill Von Maxcy." (R. 589).[5] The latter had asked Sweet

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[3]On cross-examination, he maintained that he didn't meet Von Etter until February of 1982. (R. 637-38). According to his widow, Von Etter had died on February 1, 1967. (R. 722).

[4]Later, he said "Between 4:30 and 5:00, I believe." (R. 589).

[5]The witness identified defendant as the man who had
(Footnote Continued)

to drive him and Von Etter to Maxcy's house and they had done so in the murderer's car because the witness was afraid his would be too easily recognizable. (R. 589).

"Kelley," who was carrying a satchel, and Von Etter, had gotten into the back seat of their car and "bent down as close as they could to the floor." (R. 591). They had then driven to the Maxcy home. En route, Sweet, who noticed one of the Carlton neighbors "coming toward me," donned a hat and tilted his sun visor down. (R. 591-92). Arriving at Maxcy's, he "pulled in under the carport," and let his passengers out. (R. 592). "Kelley," who was wearing "a glove in one hand" (R. 593), had then opened his satchel and exhibited its contents of "two or three knives and two or three revolvers" to Sweet. (R. 592-93). After the assassins had entered the house, the witness drove back to the shopping center, turned down the vehicle's Massachusetts license plates, which had been "tilted up," and "left their car with the keys in it. . . ." (R. 592). He had then driven around Sebring until he saw Maxcy's car parked there, when he had gone to the Elks Club. (R. 594).

He has paid Bennett and Von Etter the remaining $15,000 at a Howard Johnson's restaurant in Boston "two or three

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(Footnote Continued)
approached him, but stated that he was "forty or fifty pounds" lighter than the man in the parking lot whom he described as "six foot five and . . . two eighty or two ninety." (R. 590).

weeks later. . ." (R. 596)[6] and he had kept $5,000 as an advance on her promise to pay him $25,000 a year "to handle her estates. . . " (R. 598).[7] Earlier, she had repaid him the $5,000 he had advanced to Bennett. Ibid.

He admitted that, at his two trials for Maxcy's murder, he had lied "many times," and denied his involvement in the crime. (R. 600-01). After his first trial had ended in a hung jury, he had been tried and convicted (R. 599-600), but his conviction had been reversed and he was never tried again. (R. 600). After remaining in Florida for "some two or three years," (R. 602), he had "returned to Massachusetts." Ibid. He had then learned of the address of "Kelley's" wife or girlfriend from Walter Bennett's wife. (R. 603). He had left his telephone with a woman at that address and "Kelley" had then contacted him. The latter had told him all of the details of the Maxcy murder and that he had received $5,000 for his share. (R. 604-05).

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[6]Although he testified he went to Boston alone to deliver the $15,000 to Walter Bennett and that only the latter and Von Etter were present (R. 596), he had testified at defendant's first trial that Irene had accompanied him on that occasion because "she wanted to see Boston. . . that's when I paid off this balance to Walter Bennett." (R. 660).

[7]On November 7, 1966, Irene had received a $25,000 check from her insurance trust (State's Exhibit 22, R. 698) and had, three days later, endorsed and cashed it at the First National Bank of Sebring. Ibid. She had received the proceeds in hundred dollar bills, the serial numbers of which were recorded by the bank. (R. 699). Testimony of Alfred Roepstorff, then vice-president of the said bank. (R. 698).

Recently, he had contacted his son-in-law, a police officer, and "told him that I just had to talk with somebody. . . ." (R. 605). His son-in-law had introduced him to a state trooper to whom he "told . . . everything, just as I am telling it now." (R. 606). He had found out the "next day or two days later" that he had been given immunity for hijacking and loansharking. (R. 606). He had told them about "the Maxcy case." (R. 607). He believed that his lawyer had worked out "an immunity agreement in Florida." (R. 608).

b. Cross-Examination

Upon cross-examination, Mr. Sweet conceded that he had received immunity for Maxcy's murder (R. 614), as well as his perjury at both of the Florida trials. (R. 615). In Massachusetts, he had been granted freedom from prosecution for breaking and entering, (Ibid), prostitution (R. 618), narcotics violations (R. 625-26), larceny (R. 626), arson (R. 627), bribery of a police officer (R. 628), bookmaking (Ibid.), giving false statements to police officers (R. 629), and ownership of ten-dollar counterfeit plates (R. 632). In addition, he admitted to a number of other crimes, including adultery, having lied to the police (R. 638-39), and wagering on sports (R. 642). For a time, he was in the Federal Witness Program and living in an apartment with one of his prostitutes. (R. 633, 652). Moreover, he had sued Irene for $250,000 "and then called it off." (R. 654).

He did not know anyone by the name of Abe Namia, even when informed that the latter had been one of his attorney's private investigators in 1966. (R. 671). He had never read any of Namia's reports (R. 672), and, when asked whether he had confessed to the private investigator "that [he] had hired two people to come down to Florida and kill Von Maxcy," replied, "No way." (Ibid.) (emphasis added). The pertinent testimony was as follows:

> Q: Back in 1967 before your trial in Boston, Massachusetts, did you confess to a private investigator by the name of Abe Namia that you had hired two people to come down to Florida and kill Von Maxcy?
>
> A: No way.
>
> Q: Did you confess to a private investigator named Abe Namia in October, 1967--and it would be on or about the 3rd, 4th, 5th and 6th of October, 1967, a year after the killing--that you hired someone at Mrs. Maxcy's request to come down to Florida and kill Von Maxcy?
>
> A: I don't recall that at all.
>
> Q: You never made any such statements to a private detective, did you?
>
> A: Not to my knowledge that I can remember.
>
> Q: You didn't make any confessions before your trials, did you?
>
> A: Make any confessions?
>
> Q: You didn't confess to your lawyers that you had hired anybody to come and kill Von Maxcy, did you?
>
> A: No, sir.
>
> Q: You didn't confess to anybody that worked for your lawyers that you had hired somebody to coime and kill Von Maxcy, did you?
>
> A: No, sir.

(R. 672-73).

Q: When your lawyers took you to trial in 1967 and '68 they thought you were telling the truth when you were on the witness stand, didn't they?

A: I believe so, yes.

Q: And you never admitted to a living soul that you hired somebody to come down and kill Von Maxcy, did you?

A: Not to my recollection.

Q: The first time you told anybody that was when you talked to the police in Massachusetts in 1981?

A: That's correct.

Q: 1981?

A: I don't know.

Q:. Well, sir, I am not trying to trap you on anything like that. February 4, 1981, right?

A: Yes.

(R. 672-73).

4. Annette Abrams

Annette Abrams, Von Etter's widow, testified that she had accompanied her husband and son to Florida in late September or early October of 1966. (R. 723). They had stayed at "the Daytona Inn," and, one morning, she had seen Andrew talking to a bald man on the beach. (R. 725). Andrew had then flown back to Massachusetts for a court date "on Wednesday of that week." (R. 727).

He had returned "the following Sunday night," (Ibid.), having driven from Massachusetts with some friends, "Bill

Kelley and Jennie Adams"[8] (Ibid.), people she had never met before or even heard their names. (R. 728). On Monday, "Kelley" and her husband "had taken off in the morning to go somewhere. . . about 9:00." (R. 730, 735). They had returned "after dark." (Ibid.). Upon his return, she had not noticed anything that made her think he had changed his clothes and saw no blood on him or his clothes. (R. 735).

5. Abe Namia

Private investigator Abe Namia, the last witness for the State,[9] had formerly been employed by the Hillsborough State Attorney's Office and, before that, by the Hillsborough Sheriff's Office. (R. 766). He had also been a deputy sheriff in Indiana. (R. 773). He had met Sweet before his first trial when he had been employed by his lawyer, James M. McEwan, as an investigator. (R. 767). At McEwan's request, he had accompanied Sweet to Boston "[To see witnesses, just get several background information and determine what was going on in the community at that time."

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[8] On cross, she stated that she had a fear of flying (R. 740), and that, during Sweet's 1968 trial, her husband had returned to Daytona "so I wouldn't have to fly back." (R. 743).

[9] The State also relied on a number of stipulations regarding the identity of the deceased (R. 703), various registrations at Daytona Beach motels during September and early October of 1966 (R. 703-705), the renting by Sweet of a Hertz car (R. 706), records of telephone calls to and from Sweet (R. 706-07), the receipt by the Florida Department of Law Enforcement of a bullet and a sheet on October 6, 1966 (R. 707), and the results of laboratory tests thereon. (R. 707-08).

(R. 768). He claimed that Sweet had shown him "a residence that was supposed to be the home of Mr. Kelley" (R. 768), and "Mrs. Von Etter's residence. . ." (R. 769).

He testified that during this trip, Sweet had told him the "three phases" of the Maxcy murder. (Ibid.) These "phases" included (a) Sweet relaying Irene's need for someone to do "some work in Florida" (R. 770) to Wimpy Bennett;[10] (b) the sending of two unidentified young men who flew to Sarasota and then returned to Boston (R. 770); (c) the arrival of another man who was taken by Sweet to Maxcy's car which was parked in the shopping center and with a tire and helping Maxcy to fix it "so he could readily identify the man" (R. 771), and then returned north without committing the crime; (d) Andrew Von Etter arrives, confers with Sweet, and then returns to Boston (R. 771) and (e) Von Etter and Kelley commit the murder (R. 772).

He insisted that he had told Mr. McEwan what Sweet had related to him during the Boston trip (R. 774). Although he had written extensive notes about his activities on this trip, including "what John Sweet had told [him]" (R. 774), his paginated reports, located by defense counsel (R. 795-96), did not contain "a single word" to anything Sweet had allegedly told him during the trip (R. 806). Of the three volumes of reports, only one, with 84 pages, related

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[10] Wimpy was not Walter Bennett, but his brother. (R. 807).

to the Boston investigation (R. 801). It contained reports of interviews with prospective witnesses for the defense but not what Sweet purportedly had told him (R. 806).

He maintained that he had never followed the Sweet trial in the newspapers (R. 775), or on television (R. 776), even though it had been "extensively reported" (R. 775-76), and then and now, he "read the newspapers every day" (R. 780). "Q: And it is your testimony that you never read a word of what John Sweet said on the stand? A: During that first trial, no, sir, I never did." (R. 776). In addition, he had never attended any sessions of Sweet's trial and did not know that he had taken the stand "and denied anything like a conspiracy." (R. 775).[11]

It had not been until October of 1983 that he had first told anyone in authority about Sweet's confession (R. 777). He had called up a "good friend" of his, one Sam Jones, a Florida Department of Law Enforcement (FDLE) officer "during the summer of 1983,"[12] (Ibid.), and told him he had information "to help strengthen the state's case." (R. 781-82). Before doing so, he had read an article about

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[11] Although he now testified that he was "fully aware" when he was hired by Mr. McEwan "what the situation was facing Mr. Sweet" (R. 789), at defendant's first trial he had stated that he did not know what that situation was. (Ibid.) He attributed the contradiction to the court reporter's error (R. 790, 794), just as he said all "mistakes" in Mitchell's report were those of the interviewer. (R. 793).

[12] June 29, 1983, to be exact. (R. 782).

defendant's arrest "in the Tampa paper," (R. 787), an article which, among other things, "told some of the details. . . of the past trials." (R. 788).

On October 19, 1983, he was interviewed by one Joseph Mitchell at the FDLE Tampa office. (R. 782-83). The four-page, single-spaced typewritten report of that interview was all culled from his memory. (R. 783-84). Although he denied knowing what Sweet had testified to at trial (R. 784), Mitchell's report indicated that some of the information Namia was furnishing "was testified to at trial." (Ibid.) The witness then claimed that he had heard of Sweet's testimony "in general conversation in the sixteen- year period after the trial" (Ibid.), but could not recall "a soul" who had told him about it. (R. 785).

Statement of the Case

On December 16, 1981, defendant was charged by a single-count indictment with murder in the first degree. (R. 1012). The indictment, by a Highlands County grand jury, charged defendant with violation of §782.04, Fla. Stats. Defendant was not arrested on this charge until June 16, 1983, in Tampa, Florida (R. 756). He apparently pleaded not guilty.

Motions were filed to dismiss the indictment on the ground that the lengthy pre-indictment delay denied defendant's rights to a fair trial, to a speedy trial, and to due process of law (R. 1034), and on the ground that the State's willful destruction of evidence deprived defendant

of his right to present a defense, to cross-examine witnesses, and to a fair trial. (R. 1174-1208). The motions were denied.

Defendant's first trial ended in a mistrial, with the jury unable to agree upon a verdict. (R. 1215).

Defendant's second trial began with jury selection on March 26, 1984 (R. 1227),[13] and the State presented 16 witnesses on March 27th, March 28th,[14] and March 29th, resting at noon on the latter date. (Ibid.) After the denial of the motion for acquittal (R. 1232, R. 812-813), defendant then rested. (R. 1227). Closing arguments occurred on the afternoon of March 29th (Ibid.), and the jury, after being charged on the morning of the next day (R. 909-921), began its deliberations at 9:25 a.m. (R. 1227).

During deliberations, the jury foreperson announced that the jury was "at an impasse." The court gave an Allen

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[13] Sua sponte, the trial judge furnished the jurors with pads and pencils "for those of you who wish to take notes." (R. 412). Defendant's motion objecting to this procedure was denied. (R. 421-423).

[14] On this date, the State filed and served a motion in limine to prevent defense counsel from interrogating John J. Sweet, its witness-in-chief, as to immunity received by him in Massachusetts "on homicide and prostitution, when the defendant is prepared to rebut, with evidence, a negative answer from the witness." (R. 1226). During cross-examination, the court prohibited defense counsel from going into some details about crimes committed by Sweet, such as the ages of prostitutes "managed" by him. (R. 621-622. However, the court would not let the defense question the witness as to a police report that he had committed a murder in Massachusetts. (R. 630).

charge (R. 923-925). The jury then sent a note requesting that the judge inform them whether Sweet received immunity. (R. 925, 1230). The judge refused to answer the question. (R. 927-933, 936).

An hour later, the jury returned its verdict, finding the defendant guilty as charged. (R. 937-1231). The jury imposed the penalty of death by a vote of 8-3.

Defendant duly and timely appealed directly to this Court, pursuant to Art. V, §3(b)(1), Fla. Const. (1972), from said judgment and sentence, on April 2, 1984. (R. 1254). On April 5, 1984, he moved for a new trial on a number of grounds, including (1) the denial of his pre-trial motions; (2) the admission of the testimony of Abe Nomia; (3) permitting the jurors to take notes and failing to preserve same; and (4) refusing to answer the jurors' question about John J. Sweet's immunity. (R. 1255). Although there is no indication in the Record on Appeal as to this motion's disposition, undoubtedly it was either denied or mooted out by the filing of the notice of appeal. On April 18, 1984, per the trial judge's verbal order, and over defendant's objection (R. 987), the jurors' notes, after being sealed and preserved for two weeks[15] (R. 989),

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[15]There seems to have been a misnumbering of transcript pages as 988 is missing, but there is no break in the narrative.

"were destroyed by soaking in gasoline and burning." (R. 1259).

Issues Presented for Review

I. WHETHER THE TRIAL JUDGE ERRED IN REFUSING TO DISMISS THE INDICTMENT OR BAR THE PROSECUTION BECAUSE OF THE STATE'S WILLFUL AND DELIBERATE DESTRUCTION OF THE EVIDENCE.

II. WHETHER THE TRIAL JUDGE ERRED IN PERMITTING THE WITNESS NAMIA TO TESTIFY TO AN ALLEGED CONVERSATION WITH JOHN J. SWEET IN 1967.

III. WHETHER THE TRIAL JUDGE ERRED IN REFUSING TO ANSWER A QUESTION BY THE JURY DURING ITS DELIBERATIONS AS TO WHEN JOHN J. SWEET RECEIVED IMMUNITY IN FLORIDA FOR MURDER AND PERJURY.

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

V. WHETHER THE TRIAL COURT ERRED IN ADMITTING DEFENDANT'S POST ARREST STATEMENTS.

VI. WHETHER SECTIONS OF FLORIDA STATUTES AUTHORIZING THE IMPOSITION OF THE DEATH PENALTY AND/OR ESTABLISHING THE PROCEDURE RELATING TO THE JURY'S RECOMMENDATIONS FOLLOWING CONVICTION OF A CAPITAL OFFENSE ARE VIOLATIVE OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

ARGUMENT

Because of the universal judicial recognition of the unique and irreversible nature of the death penalty, Furman v. Georgia, 408 U.S. 238 (1972) and Gardner v. Florida, 430 U.S. 349 (1977), "this aspect of the difference between death and other penalties would undoubtedly support statutory provisions for especially careful review. . . where the death penalty is imposed. Gardner at 323. In compliance with this principle, §921.141(4), Florida Statutes (1977), imposes a special obligation on this Court to review independently the facts in capital cases. Songer

v. State, 322 So. 2d 481 (1975). Most significantly, §9.140(f), Florida Rules of Appellate Procedure, provides, in pertinent part, that

> [I]n the interest of justice, the court may grant any relief to which any party is entitled. In capital cases, the court shall review the evidence to determine if the interest of justice requires a new trial, whether or not the sufficiency of the evidence is an issue presented for review.

It is in this spirit that the Court must, as a convocation of thinking human beings, approach the argument which follows this prefatory statement. If it does so, faithful to the logic and morality which buttress it, defendant's conviction must be reversed and the charge against him dismissed.

I. THE TRIAL JUDGE ERRED IN REFUSING TO DISMISS THE INDICTMENT OR BAR THE PROSECUTION BECAUSE OF THE STATE'S WILLFUL AND DELIBERATE DESTRUCTION OF THE EVIDENCE.

A. Introduction

John J. Sweet moved to dismiss his indictment following the reversal of his conviction for the murder of Charles Von Maxcy. State v. Sweet, 235 So.2d 40 (Fla. Dist. Ct. App., 1970) (R. 1109, 1204). The State responded that because of its inability to call certain witnesses at a third trial, it was "of the opinion that this case cannot be tried. . ." (R. 111). Accordingly, Sweet's motion was granted.

(R.1200-1201), and the file transmitted to the Clerk of the Court for maintenance. (R. 1203).[16]

On April 23, 1976, the State motioned for an order "to dispose of evidence" in Sweet's case. (R. 1115). On April 30, 1976, the said petition was granted and the clerk was "authorized and directed to dispose of all evidence held by said clerk in the above entitled cause." (Ibid.) All of the said evidence, described at R. 1206-1208, was duly destroyed. Included in such evidence were a "tire," a "white bed sheet," a "section of shirt," a "bullet and/or slug," and two "hand-written statement[s]." (R. 1207-1208). The reason for the State's said petition was that the clerk had informed the then State's Attorney that "he needed a space and asked if I would . . . get him an order allowing . . . the evidence to be destroyed so he could have the space." (R. 83).[17]

While the State had copies of many of the destroyed documents (R. 69), it could not produce the tire, the sheet, the bullet and/or slug, a section of the victim's shirt or two 1967 statements by Sweet. The absence of these irreplacable items deprived defendant of a fair trial. The

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[16] Because of a successful motion for a change of venue, Sweet's two trials had taken place in Polk County.

[17] ". . . Neither administrative convenience nor inadequate facilities, where it is not shown facilities could not be obtained, justifies a failure to preserve potential evidence." State v. Wright, 557 P. 2d at 7.

destruction of evidence was particularly egregious here, with a crime almost two decades old. The critical destroyed items will be discussed seriatem.

B. The Destroyed Items[18]

1. The Bedsheet

Then Deputy Sheriff J. C. Murdock had observed a bedsheet "in the hallway" outside the bedroom where Maxcy's body had been found. (R. 494). The State's theory was that this sheet had been wrapped around the victim before he was stabbed. As the prosecutor's summation put it, in attempting to explain away the fact that, although Kelley and Van Etter returned to the Daytona Motor Inn on the evening of the crime in the same clothes they had worn that morning, they were not stained with blood (R. 735): "I also believe I remember the testimony is before the knifing of Mr. Maxcy, a sheet was thrown over his body. . . ."[19] (R. 869). This reliance on an item of evidence that was no longer available to the defense and which could have completely refuted the State's argument and, as a corollary, confirmed the defense's contention, makes its absence per se prejudicial.

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[18]Counsel will only discuss the destroyed physical evidence and two handwritten statements by Sweet, but it should be kept in mind that many of the destroyed original documents (R. 1206-1208) also curtailed and hampered defendant's defense, by preventing, among other things, fingerprints, paper, ink and handwriting tests. A continuing objection to the introduction of copies of all destroyed documents was made and allowed. (R. 421).

[19]There appears to be no such testimony in the record.

In a remarkably parallel case, the Washington Supreme Court in 1976, reversed the first degree murder convcition of a defendant and dismissed the charges against him on the ground that due process of law had been violated "by the destruction of numerous items of material evidence prior to trial." State v. Wright, 87 Wn. 2d 783, 783, 557 P. 2d 1, 1-2 (1976). Among the items destroyed were, the "blanket, pillowcase and sheet the body was wrapped in, the blanket and mattress the body lay on [and] the rugs and pillows on the floor." 83 Wn. 2d at 785, 557 P. 2d at 3. The purpose of the destruction, with police permission, was "'to clean the room up'" for the owner of the house. Id.[20]

Lacking the sheet, any of the clothes worn by the victim, and the carpet on which the body lay, defendant was in no position to buttress his claim that the person or persons who killed Maxcy would, in all likelihood, have been saturated with blood. The record is replete with police testimony that there was "an awful lot of blood on the walls" (R. 493), "blood all around this carpet where the body was" (Id.), "blood on the floor" of the bedroom (R.

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[20]The additional reasons were far more substantial than merely providing additional storage "space" for a court clerk. As the Washington court noted, the bedclothes, as well as the body and the bed, were infested with maggots. In its words, ". . . [i]t would have been necessary to store the evidence in a small freezer in the [police] property room and that if the containing package broke, it would probably contaminate other evidence in the freezer." 87 Wn. at 785, 557 P. 2d at 3.

494), and "in the hallway" outside the bedroom (Id.) The medical examiner testified that bleeding would have continued after the stab wounds were inflicted "for a considerable period of time, at least minutes. . ." (R. 516). There was also testimony that there had been an enormous struggle to subdue the victim. (R. 516, 604). Anyone involved in such a life and death encounter would have been inundated with blood and thus the missing sheet, even if it absorbed some of the flow, would have stained the clothing of anyone attempting to hold it around the body of a struggling man, particularly one fighting for his very life.

2. The Section of Shirt

Many of the same reasons advanced above would apply to the section of shirt, assuming it to be the one worn by Maxcy on the night of his death. The amount of blood and the position of any cuts in the fabric would have been extremely significant to the defense in the same manner as the sheet. Incidentally, it might be noted that neither the blood-stained carpet upon which Maxcy's body was found nor any of the rest of his clothing was apparently preserved as evidence.

3. The Tire

According to Namia, Sweet had told him of an unidentified man who had preceded Von Etter and Kelley to Florida and who, in his presence, had "cut a tire" on Maxcy's car at the Sebring Southgate Shopping Center, and

"remained there until Maxcy came back, assisted in changing the tire so he could readily identify the man." Without the benefit of the tire, the defense was unable to cross-examine either Sweet or Namia adequately about this episode. It is obvious that a destruction of this material and relevant piece of evidence cut off a significant area of examination.

4. The Bullet and/or Slug

It is almost unheard of for a murder case to be conducted following the willful destruction of the key instrument of death before trial. (R. 516). Although the defense had information that Sweet had killed at least one man with a handgun and possessed a revolver of the same caliber as the destroyed bullet, the absence of the latter made any possible test or comparison impossible. This Court has recognized the vital importance of the "fatal bullet" in a murder case in State v. Johnson, 280 So. 2d 673, 675 (Fla. 1973), when it stated, [S]ub judice, respondent was effectively prevented from rebutting the State's conclusion concerning the fatal bullet when the bullet disappeared before it could be examined by his ballistics expert." See also, People v. Hitch, 11 Cal. 3d 159, 520 P. 2d 974, 113 Cal. Rptr. 158, vacated, 12 Cal. 3d 641, 527 P. 2d 361, 117 Cal. Rptr. 9 (1974); United States v. Bryant, 439 F. 2d 642 (D.C. Cir. 1971); Moore v. Illinois, 408 U.S. 786 (1972); and Brady v. Maryland, 373 U.S. 83 (1963).

5. The Sweet Statements

Among the destroyed items were two "handwritten statement[s]" (R. 1208), which were taken from Sweet by C.R. Trulock, the chief investigator for the State, in 1967. The first, a note written by Mr. Sweet and signed by him on July 30, 1967 (R. 1180), the other on August 3, 1967 (R. 1185), had to do with negotiations between the two men for "some type of deal" on the pending prosecution (R. 1184-1186). The unavailability of these statements deprived the defense of what could have been crucial impeachment material insofar as Sweet was concerned, particularly in view of the fact that when shown a number of photographs by Trulock of Bostonians, including at least one of defendant, he identified some but not the latter. (R. 1186, 1192).

C. The Applicable Law

The State has an affirmative duty to safeguard and preserve evidence. This duty is derived from the State's duty to disclose exulpatory evidence. See, e.g., Brady v. Maryland, 373 U.S. 83 (1963), Fla. R. Crim. Proc. R. 3.220. This Court has held that when the State loses or destroys evidence, the conviction must be reversed if the error "injuriously affected the substantial rights of the defendants." Salvatore v. State, 366 So. 745, 751 (Fla. 1979).

In State v. Wright, 87 Wn. 2d 783, 557 P.2d 1 (1976), the en banc Supreme Court of Washington reversed a conviction for murder, holding: "the failure to preserve evidence. . . which, it is a reasonable possibility, was

material and favorable to appellant, deprived him of due process." Id. at 7. Accord, Government of the Virgin Islands v. Testamark, 570 F. 2d 1162, 1168 (3d Cir. 1978); People v. Moore, 34 Cal. 3d 215, 666 P. 2d 419, 193 Cal. Rptr. 404 (1983); (failure to preserve urine sample); People v. Harmes, 560 P. 2d 470 (Cal. Ct. App. 1976) (erasure of videotape of alleged police station assault); People ex rel. Gallagher, 656 P. 2d 1287 (Colo. 1983) (scrubbing of hands of murder victim); Seattle v. Fettig, 519 P. 2d 1002 (Wash. App. 1974) (loss of videotape of defendant's performance of standard coordination and balancing tests at time of arrest); State v. Brown, ___ Iowa ___, 337 N.W. 2d 507 (Iowa, 1983) (failure to preserve defendant's blood sample after fatal accident); Stipp v. State, 371 So. 2d 712 (Fla. Dist. Ct. App. 1979)(inadvertent destruction of cocaine allegedly seized from defendant); People v. Shepard, 118 Misc. 2d 365 (Sup.Ct. N.Y. 1983)(failure to preserve breath sample); Jarriel v. State, 317 So. 2d 141 (Fla. Dist. Ct. App. 1975)(unintentional destruction of tape recording of the transaction out of which defendants were charged with larceny); and State v. Counce, 392 So. 2d 1029 (Fla. Dist. Ct. App. 1981)(police destruction in arson case of beer bottle containing a liquid that smelled and tasted like gasoline and a charred piece of paper recovered from burned premises).

In assessing whether the State's destruction of evidence requires reversal, courts have looked to both the

significance of the evidence, and to the degree of culpability on the part of the State.[21] In this case, both factors mandate reversal.

There can be no gainsaying that the destroyed evidence was material. Even though the Supreme Court has never attempted precisely to define "material evidence" or the degree of prejudices to which must be shown by the defense to make out a violation, many courts have defined materiality quite broadly. In this connection, see, e.g., Levin v. Katzenbach, 124 U.S. App. DC. 158, 363 F. 2d 287, 291 (1966) (evidence which "might have led the jury to entertain a reasonable doubt about [the defendant's] guilt"); Griffin v. United States, 87 U.S. App. D.C. 172, 183 F. 2d 990, 993 (1950) ("evidence that may reasonably be

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[21] Destruction of evidence cases cannot be resolved by relying on a United States v. Agurs, 427 U.S. 97 (1976) definition of "materiality," nor on a Killian v. United States, 368 U.S. 231 (1961) "good faith" standard. As noted in a recent commentary:

> Destruction of evidence cases are fundamentally unsuitable to these modes of analysis. Since the evidence has been permanently destroyed, materiality is an exceptionally difficult and rarely applicable standard. Most often, nothing approaching even partial incorporation has occurred. Good faith becomes a much shallower barrier between justice and abuse when the evidence, rather than being notes on an interview used to jolt an agent's memory, is the very proof of guilt or innocence. What amounts to a ritual in notes destruction cases--a stab at principled adjudication frustrated from the start--becomes a dangerous flaw in destruction cases. The courts, however, are becoming aware of the inadequacies of these two tests and are developing alternative approaches to destruction cases.

considered admissible and useful to the defense"); Curran v. Delaware, 259 F. 2d 707, 711 (3d Cir. 1958) ("pertinent facts relating to [the] defense"). Moreover, neither the police nor the prosecution can decide for a defendant what is favorable on material evidence. Cf. Barbee v. Warden, 331 F. 2d 842, 845 (4th Cir. 1964); Griffin v. United States at 993. Often, it is only the defense which can accurately appraise the usefulness of available evidence. In this connection, see, Alderman v. United States, 394 U.S. 165, 182 (1967), where the Supreme Court emphasized that a defendant had a right to examine government surveillance records because

> An apparently innocent phrase, a chance remark, a reference to what appears to be a neutral person or event, the identity of a caller or the individual on the other end of the telephone, or even the manner of speaking may have special significance to one who knows the more intricate facts of an accused's life.

How much more significant in a capital case is all of the physical evidence of the murder in question!

Here, an item of the deceased's, clothing, the very bullet which killed him, and the sheet allegedly used to subdue him and/or shield his killer or killers from bloodstains were deliberately destroyed far in advance of defendant's trial. It goes without saying that these items were "intimately related to the very existence of a homicide." Wright, 557 P. 2d at 5, and that, considering all the trial evidence, "make[s] it clear that there was a reasonable possibility that the evidence destroyed. . . was

material to guilt or innocence and favorable to appellant." Id. at 6.

As in Wright, defendant can enumerate many areas "where the existence of the evidence destroyed could possibly have been of assistance to him. . ." Id. Counsel have already discussed, supra at pp. 10, 21-23, the issue of the lack of bloodstains on "Kelley" and Von Etter shortly after the murder, and the prosecution's theory as to the function of the sheet. Others include: (1) the presence of a laundry mark or other identifying mark on the sheet might have pointed the finger elsewhere than at the defendant; (2) the sheet might have, under modern testing procedures, revealed the existence of latent or patent fingerprints; (3) if there was blood, some may have been of a type dissimilar to that of the deceased, given the ferocity of the struggle that ensued during the commission of the crime; (4) the absence or presence of blood on the sheet would have been of assistance in determining whether the victim was stabbed with or without the sheet around him; and (5) given the location of the sheet by the police, there might have been bloody fingerprints thereon.[22] As the Wright court put it,

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[22]Many of the same hypotheses are equally applicable to the destroyed sweater and the carpet on which the body was found which, apparently were not preserved. Significantly, given the nature of Sweet's defense at his two trials, none of these possibilities would have been remotely helpful to him and might well have strengthened the State's case against him.

"[T]he scope of this evidence and its proximity to the crime. . . would have been very helpful even to the prosecution in confirming many aspects of the State's theory of the case." Id. It should also be noted that this case does not involve accidental or negligent destruction of evidence. Quite the contrary--the prosecution, upon the request of the Circuit clerk, initiated a petition for the authority to destroy the evidence. Significantly, at the time of the petition and for a considerable period of time before, defendant was an active suspect. (R. 82-83). Gleyn Darty, the State Attorney in 1966 through at least the destruction of the evidence in 1976, testified that, in his opinion, "I had reached the conclusion that he [defendant] was actually involved in the death of Von Maxcy" (R. 84), and he had not changed his mind "that [defendant] was involved to this day." (R. 85).

Feeling as he did about defendant's involvement, it was inexcusable negligence on his part to seek the destruction of the evidence. Since the crime of murder in Florida has no statute of limitations, Florida Statutes, §775.15(1), a prosecutor as experienced as Mr. Darty would have to have foreseen that future events in a highly-publicized murder case with an extremely well-known victim might well bring it back to life, particularly with an active suspect like defendant in the picture. Rather than find some secure space in which to store the evidence in question, he participated in the formalities necessary to insure its

destruction. Any onus to the State was the product of its own willful act and it must bear the consequences thereof.

Even though it cannot be proven that the evidence was destroyed "with the intent of handicapping the defense," State v. Wright, 557 P. 2d at 3, the result is exactly the same as if overt bad faith was the generating factor. As the Bryant court stated, "the degree of negligence . . . involved," 439 F. 2d at 653, is one of the factors that may be considered in evidence destruction cases. In the instant case, the State deliberately destroyed material evidence for reasons of administrative convenience. This Court should, on much the same factual background, reach the same determination as did the en banc Supreme Court of Washington, that the willful destruction of material evidence denied defendant due process of law and requires reversal.

II. THE TRIAL JUDGE ERRED IN PERMITTING THE WITNESS NAMIA TO TESTIFY TO AN ALLEGED CONVERSATION WITH JOHN J. SWEET IN 1967.

On March 29, 1984, defendant asked the trial judge to "consider our oral motion in limine and prohibit the testimony of Abe Namia." (R. 764). The court below denied the motion, saying: "[A]fter all, we don't want to deny Mr. Kunstler his fun with the witness." (R. 765). Mr. Namia then testified. A continuing objection to the witness' testimony as to what "Sweet said to him" (R. 77) was made and allowed during Namia's direct examination. (Id.)

Prior consistent statements of a witness are admissible only to rebut a claim of recent fabrication. See Fla. R. Evid. §90.801(2)(b). Even then, the statements are admissible only "in those few exceptional situations where, as experience has taught, they could be of clear help to the factfinder in determining whether the witness is truthful." Coltrane v. United States, 418 F.2d 1131, 1140 (D.C. Cir. 1969) (emphasis added). See also, Cores v. United States, 345 F.2d 723, 725 n. 3 (D.C. Cir. 1964); Cafasso v. Pennsylvania R.R., 169 F.2d 451, 453 (3d Cir. 1948); 4 J. Wigmore, Evidence, §§1119-29 (3d ed. 1940); and C. McCormick, Evidence, §§105-109 (1954). Under no circumstances can prior consistent statements be used merely to bolster a witness' testimony. United States v. Dennis, 625 F.2d 782 (8th Cir. 1980), and United States v. Allen, 579 F.2d 531, 532-33 (9th Cir.), cert. denied 439 U.S. 933 (1978). Lastly, they must have "high probative value." United States v. Dennis, 625 F.2d 782, 797 (8th Cir. 1980).

Where prior extrajudicial statements by a witness have been admitted to disprove a claim of recent fabrication, they must:

a. be consistent with the witness' sworn testimony;

b. be made soon after the transactions to which they relate; and

c. contain facts as will reasonably furnish some test of the witness' integrity or accuracy of recollection.

In the instant case, Namia's testimony concerning Sweet's alleged statement was inconsistent with the latter's sworn testimony and certainly did nothing to establish the witness' integrity or accuracy of recollection. In fact, the prior statement directly refuted Sweet's testimony that he never spoke to Namia or anyone else about the planning and execution of Maxcy's murder until February of 1981. (R. 672-673).

In United States v. DeVore, 423 F.2d 1069 (4th Cir. 1970), the court held that corroborative evidence is only admissible if a proper foundation for its introduction has been laid. Dr. Devore, charged with multiple narcotic violations interposed a defense that the drugs in question were meant to trap thieves. In this vein, he attempted to introduce the testimony of his wife that, after a particular break-in, he had told her that he intended to set a snare for future burglars. The trial court refused to admit the proffered testimony on the ground that the physician had failed to mention this incident during his direct examination and that, therefore, no proper foundation had been established for the wife's said testimony, a position sustained by the Fourth Circuit.

In the instant case, not only did Sweet not mention making the prior consistent statement to Namia or anyone else during his direct examination, but he expressly and unequivocally denied making it at all. (R. 672-673). It would be utterly incongruous to permit such a denial to

serve as the "foundation" for contradictory hearsay evidence of the type here involved. Otherwise, any hearsay evidence could be admitted for corroborative purposes by the simple mechanism of having the witness deny that he ever made the statement sought to be introduced.[23]

This Court, in Sosa (Greene) v. State, 215 So. 2d 736 (Fla. 1968), in a first-degree murder prosecution, considered the issue of "[W]hether reversible error was committed by the lower court in admitting into evidence certain extrajudicial statements of witnesses for the state." 215 So. 2d at 737. Before reaching the merits of appellants' contention, the Sosa Court set forth the Florida rule as follows:

> We recognize the rule that a witness' testimony may not be corroborated by his own prior consistent statement and the exception that such statement may become relevant if an attempt is made to show a recent fabrication. the exception is based on the theory that once the witness' story is undertaken, by imputation, insinuation, or direct evidence, to be assailed as a recent fabrication, the admission of an earlier consistent statement rebuts the suggestion of improper motive and the challenge of his integrity.

215 So. 2d at 743. (emphasis supplied).

After finding that the defendants tried "to show or insinuate that the witnesses' testimony [sought to be

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[23]For an analogous case, see State v. Freber, 366 So. 2d 426 (Fla. 1978), where this Court held that "testimony of a prior extrajudicial identification is admissible . . . if the identifying witness testifies to the fact that a prior identification was made." 366 So. 2d at 428.

corroborated] was the product of a motive to fabricate," 215 So.2d at 743-744, and that "the extrajudicial statements ... were uttered prior to the existence of this particular motive to fabricate" Id. at 744, this Court considered the "requirement of consistency" that "the prior statements be consistent with the witness' testimony in chief." Id. A reading of Namia's direct testimony (R. 768-772) clearly indicates that much of it "exceeded the limitation of consistency and presented evidence going far beyond [Sweet's] testimony in chief." Id. at 745.

A few examples will amply illustrate the glaring discrepancies between Sweet's testimony and his alleged statement as testified to by Namia. They are as follows:

1. (a) Sweet testified he had contacted Walter Bennett to arrange for Maxcy's death (R. 573) and dealt with him thereafter;
(b) Namia testified that Sweet said he had dealt with Wimpy Bennett and that "from that time forward, most of the conversations took place between Bennett and Irene. . ." (R. 770);

2. (a) Sweet testified that he had driven the murderers to the Maxcy home in their car because his would be too easily recognized (R. 589);
(b) Namia testified that Sweet said that "[T]hey [the murderers] leave the car that Kelley and Von Etter had come in at the parking lot. Sweet puts them in the car, takes them to the Maxcy residence, leaves them and returns to town." (R. 772);

3. (a) Sweet testified that he had never met Kelley before October 3, 1966, and that he did not know his address until after 1970 at the earliest, when he had learned it from Walter Bennett's wife who was working as a waitress in a restaurant (R. 603);

   (b) Namia testified that while he and Sweet were in Boston in 1967, the latter "had pointed out a

> residence that was supposed to be the home of Mr. Kelley." (R. 768).

Moreover, the extrajudicial statements related by Namia are replete with the "additional and extrinsic facts" so soundly condemned by this Court in Sosa. 215 So.2d. at 745. For example, Namia recounted that Sweet had told him "[T]he first contact. . . was with two young men, who flew down from the Boston area into the Sarasota airport." (R. 770). They were given a ride to town by a deputy sheriff, but returned to Boston without doing the job. (R. 770-771). Sweet had then related that the "second one. . . approached" came to Sebring and was taken by the witness "to Maxcy's car so it could be identified." (R. 771). This "second one" had cut the victim's tire, "remained there until Maxcy came back, and assisted in changing the tire so he could readily identify the man." Id. He, too, had gone "back north." Id.

As this Court so strongly emphasized in Sosa, "a failure to properly adhere to the requirement of consistency tends to border on a disregard of the dangers sought to be restrained by the hearsay rule." 215 So.2d at 745. It went on to stress that, in such circumstance, even "cautionary instructions to the jury," Id, would probably not suffice:

> . . . Even then, however, if the extrajudicial statements contain references to facts that are new or extrinsic to the testimony in chief, the jury may well be influenced to consider only the substance of such facts, since by virtue of their extrinsic nature they would be devoid of corroborative propensities. Therefore, while the belief if generally asserted that the introduction of prior consistent statements for the purpose of corroborating a witness is an exception to, or not a violation of the hearsay rule, this conclusion

> is justified only when the limiting principles in the exception are properly adhered to and applied.

Id.

Five years prior to Sosa, the North Carolina Supreme Court, in State v. Brooks, 260 N.C. 186, 132 S.E.2d 354 (N.C. 1963) considered, in another homicide case, the admissibility of the signed statement of one of the State's eyewitnesses, made to the police on the day of the crime. Although the court affirmed the defendant's conviction because it could "perceive no substantial variance between the signed statement and [the witness'] testimony at the trial. . . [and] [N]o part of the written statement contradicted his testimony. . ." it went on to state:

> If a prior statement of a witness, offered in corroboration of his testimony at trial, contains additional evidence going beyond his testimony, the State is not entitled to introduce this 'new' evidence under a claim of corroboration. Neither may the State impeach or discredit its own witness by introducing his prior contradictory statements under the guise of corroboration. State v. Bagley, 229 N.C. 723, 51 S.E.2d 298; State v. Melvin, 194 N.C. 394, 139 S.E.762; State v. Scoggins, 225 N.C. 71, 33 S.E.2d 473. However, if the previous statements offered in corroboration are generally consistent with the witness' testimony, slight variations between them will not render the statements inadmissible. Such variations affect only the credibility of the evidence which is always for the jury. State v. Case, 253 N.C. 130, 116 S.E. 2d 429; State v. Walker, 226 N.C. 458, 38 S.E. 2d 531; State v. Scoggins.

Id. at 189. Significantly, a cautionary instruction was given by the trial judge. Id.

Additionally, it must be borne in mind that Namia's testimony was impeaching of Sweet in a number of significant areas as previously delineated above, including the very

making of the extrajudicial statement itself. Since Florida does not permit a party to impeach his own witness, unless the latter proves to be hostile, Poitier v. State, 303 So.2d 409 (Fla. App. 1974); Johnson v. State, 178 So.2d 724 (Fla. Dist. Ct. App. 1965); and Jones v. State, 273 So. 2d 8 (Fla. 3 D.C.A. 1973), Namia's testimony should have been excluded. See also, Throckmorten v. St. Louis-San Francisco Ry., 129 F.2d 165 (8th Cir.), cert. denied, 339 U.S. 944 (1950), cited with approval in Gregory v. United States, 369 F.2d 185 (D.C.Cir. 1966); and United States v. Smith, 490 F.2d 789 (8th Cir. 1974). In October, 1983, Namia, from memory, gave a four-page, single-spaced, typewritten statement to an FDLE officer (R. 782-784).

Although he insisted that he had told Sweet's lawyer all about the statement[24] (R. 774), the latter, if Namia is to be believed, had permitted his client to perjure himself at both trials. (R. 600-601). Incredibly, Namia, despite his professional involvement in Sweet's case, and the fact that he "read the newspapers every day" (R. 780), had never read or heard "a word of what John Sweet said on the stand . . ." (R. 776).

Putting aside his contradictions and misstatements, all of which he attributed to the mistakes of court reporters or police interviewers (R. 790, 793, 794), the most telling

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[24]The convenient fact that the lawyer in question was dead left no one to contradict his assertion.

blow to his credibility came from the fact that none of his reports, obtained from Mr. McEwan's son, who had located them in a warehouse (R. 795), contained a word about Sweet's statement (R. 806). He testified that he had included "what John Sweet had told [him]" (R. 774), in his written reports, but conceded that the statement did not appear in any of the reports even though one 84-page volume (R. 801), represented his Boston trip with Sweet. (R. 801-806).

In determining whether the trial judge should have permitted Namia to testify, the issue of the latter's credibility is more than just a jury question. Since we are dealing with an exception to the hearsay rule, as well as a death penalty case, Namia's truthfulness, or lack of it, must be closely scrutinized by this Court. To decide whether Sweet's alleged extrajudicial statement involves one of "those few exceptional situations where . . . [it] could be of clear help to the factfinder in determining whether the witness is truthful," Coltrane v. United States, 418 F.2d 1131 at 1140, it is vitally important to examine closely the one who is reporting what the witness in question is supposed to have related to him.

Tested in the crucible of common sense, it is clear that Namia perjured himself for motives that are not too difficult to comprehend, a factor which merits this Court's consideration.

III. THE TRIAL JUDGE ERRED IN REFUSING TO ANSWER A QUESTION BY THE JURY DURING ITS DELIBERATIONS AS TO WHETHER JOHN J. SWEET RECEIVED IMMUNITY IN FLORIDA FOR MURDER AND PERJURY

The jury, after many hours of deliberation, announced that, after taking three votes, it was at "an impasse. . . and we do not see how to overcome this impasse." (R. 923). After receiving an Allen charge (R. 923-925), it then resumed deliberation. At about 4:00 p.m., it wanted 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." (R. 925, 1230).

In the ensuing colloquy the prosecutor conceded that Sweet had been given immunity in Florida "before he testified in front of a grand jury." (R. 927). The trial judge, however, refused to tell the jury at least that much. (R. 927, 934). The most he would do, after telling the jurors "I regret to advise you I cannot answer your question" (R. 935), was to say that testimony could be read back if the witness' name was designated and, if that witness had testified "for some time" (R. 936), "if you can clearly identify the portions of the testimony you want you can have it read back." (Id.) However, he warned the panel that specified testimony would be read back only "if it's not too lengthy." (Id.)

The transcript of Sweet's testimony which was not available during the trial, clearly showed that the witness was asked directly whether he had "received immunity for

first degree murder in Florida" (R. 614), and answered, "yes, sir." (Id.) He was also asked whether he had "received immunity from the perjury you committed in your two trials in Florida?" (R. 615), and answered again, "yes, sir." (Id.) These questions and answers, together with the prosecutor's concession that Sweet testified at the grand jury after receiving immunity for these crimes (R. 927), was certainly enough to justify, in a capital case, the answer suggested to the court by counsel--"he was given immunity in Florida before he testified in front of a grand jury." (Id.)

In LaMonte v. State, 145 So.2d 889 (D.C.A. 2, 1962), the court, in remarkably similar language to that used below, refused to answer two questions as to factual matters,[25] namely, as to where a rubber mask was found and whether there was a rear as well as a side and front door in defendant's home. 145 So.2d at 892. The District Court of Appeals held that, since the first question pertained "to a material issue which could have been readily resolved by reading this testimony to them, Id., the trial court had committed reversible error in refusing to have this done. Id. See also, Penton v. State, 106 So.2d 577 (D.C.A. 1958), and Furr v. State, 9 So.2d 801 (Fla. 1942).

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[25] Cf., State v. Ratliff, 329 So.2d 285 (Fla. 1976), where this Court held that a jury question which did not pertain only to the law of the case did not have to be answered by the trial judge.

In United States v. Anderton, 629 F.2d 1044 (5th Cir. 1980), the jury, in an official bribery case, sent a note to the trial judge asking if a certain Pittman who contacted the defendant "could. . . have been considered acting as an agent of the government official." 629 F.2d at 1046. The court responded by informing the jury "that this is a factual issue to be decided by the jury under the facts heard in court and the court's instructions as to the law." Id. The jury then returned its guilty verdicts on all counts of the indictment. In reversing, the Fifth Circuit emphasized, in quoting from Bollenbach v. United States, 326 U.S. 607, 612-613 (1946), that "[W]hen a jury makes explicit its difficulties, a trial judge should clear them away with concrete accuracy." 629 F.2d at 1049. See also, United States v. Bolden, 514 F.2d 1301, 1307-1309 (D.C. Cir. 1975); Wright v. United States, 250 F.2d 4, 11 (D.C. Cir. 1957) (en banc); and United States v. Grover, 485 F.2d 1039, 1044, 1046 (D.C.Cir. 1973) (Bazelon, C.J., dissenting).

In the instant case, the only issue of any significance was the credibility of John J. Sweet. If the jury believed him, then it would convict; if not, it would acquit. There can be no doubt, given the announced impasse in reaching a verdict (R. 923), shortly before the question regarding Sweet's Florida immunity, that some jurors either did not believe Sweet or were leaning in that direction. If a trial is indeed a search for the truth, and the record contained the information sufficient to answer the jurors' question,

as it did, it was the trial judge's duty "to provide the jury with light and guidance in the performance of its difficult task." Wright v. United States, 250 F.2d at 11.

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

After voir dire and just before opening statements, the trial judge, without any advance notice to or consultation with counsel, announced to the jurors that they would be given "small note pads and pencils for those of you who wish to take notes." (R. 412). The defense objected. (R. 422-423).

While counsel concede that note-taking by jurors is generally a matter of judicial discretion, United States v. Johnson, 584 F.2d 148 (6th Cir. 1978), cert. denied, 440 U.S. 918; United States v. Riebold, 557 F.2d 697 (10th Cir.1977), cert. denied, 434 U.S. 860; and United States v. Rhodes, 631 F.2d 43 (5th Cir. 1980), it is beyond cavil that "[M]any trial judges strongly disapprove of the practice . . ." Harris v. United States, 261 F.2d 792, 796 (9th Cir. 1958). See also, Bomberger & McNagney, Should Jurors Be Allowed to Take Notes? 32 J. Am. Jud. Soc. 57 (1948) and United States v. McLean, 578 F.2d 64, 66 (3d Cir. 1978), where the court stated:

> Probably the gravest concern is that the best note takers (or the only note taker) may dominate jury deliberations. It has been asserted that a dishonest juror could sway the verdict by falsifying notes. Others fear that jurors will attach too much significance to their notes merely because they are in writing, and attach too little significance to their own independent memory. Another concern is that jurors, busily taking

> notes, may miss important testimony. Jurors, who are not trained or experienced in note-taking, may accentuate irrelevancies in their notes and ignore the more substantial issues and evidence. Also, note-taking jurors may not pay sufficient attention to witnesses' behavior which is so important in assessing credibility.

Where note-taking has been permitted, jurors should be instructed that their notes should not be given precedence over their independent recollection of the evidence, and that they must not allow note-taking to distract them from the ongoing proceedings, United States v. Rhodes, 631 F.2d at 45-46; United States v. McLean, 578 F.2d at 66-67; United States v. Riebold, 557 F.2d at 706; United States v. Berfdotti, 529 F.2d 149, 160 (2d Cir. 1975); and Toles v. United States, 308 F.2d 590, 594, cert. denied, 375 U.S. 836, which the trial judge failed to do. Moreover, where a court plans to permit jurors to take notes, counsel should be informed of this intention before voir dire and allowed full latitude in examining prospective jurors on their ability to take such notes. United States v. Standard Oil Co., 316 F.2d 884, 896-897 (7th Cir. 1963).

The court below, over defense objection, ordered that the notes be destroyed (R. 988-89, 1259). Therefore, it is impossible to demonstrate specific instances of prejudice. This Court, in the interest of justice, should reverse the conviction both because jurors were allowed to take notes, and because the court below willfully sabotaged meaningful appellate review.

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

Miranda v. Arizona requires that the explanation of one's right against self-incrimination be meaningfully given and reasonably implemented in order that its constitutional purpose be served. 384 U.S. 436 (1966).

William Kelley was intoxicated at the time of his arrest. George Kraut and Ross Davis, the two arresting officers, both testified that Kelley was "obviously" inebriated; he staggered, his eyes were glazed, his speech slurred, and he was "belligerent" (R. 109-113, 120). Davis handed Kelley a "rights sheet" and despite appellant's confused state, made no attempt to determine if those Miranda rights were meaningfully communicated. Neither Davis nor Kraut read the rights aloud or asked if Kelley understood that he could remain silent and that any statement he made could be used to his detriment.

The arresting officers not only neglected to read Kelley his rights, but they actually took advantage of his intoxicated state to elicit inculpatory statements. Any statements made by Kelley after this procedural abuse are inadmissible in conformance with the standard set forth in Jurek v. Estelle, 623 F.2d 929, 937 (5th Cir. 1980), requiring that the accused must make "an independent and informed choice of his own free will, possessing the capability to do so, his will not being overborne by the pressures and circumstances swirling around him."

VI. FLORIDA STATUTE §921.141 WAS IMPROPERLY APPLIED TO DEFENDANT AND IS UNCONSTITUTIONAL ON ITS FACE.[26]

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

The trial judge erred in "doubling" the aggravating circumstances. Kelley was allegedly hired to kill Maxcy, therefore the court found that the defendants' participation was for pecuniary gain (R. 1001-1002). The court further found as an aggravating circumstance that the homicide was committed in a "cold, calculated, and premeditated manner. . . without any pretense of moral or legal justification." (R. 1002). The judge went on to describe the nature of the hired killing, repeating the elements of murder for pecuniary gain. These should have been treated as one aggravating circumstance.

This Court has consistently held such "doubling" of circumstances to be improper when considering the appropriate punishment in first-degree murder cases. See Palmes v. State, 397 So.2d 648 (Fla. 1981); Provence v. State, 337 So.2d 783 (Fla. 1976); Clark v. State, 379 So.2d 97 (Fla. 1980).

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[26] In the following sections A-J, defendant alleges that the Florida death penalty law constitutes cruel and unusual punishment, in violation of the Eighth and Fourteenth Amendments to the Constitution of the United States.

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

The prosecution presented aggravating circumstance (5)(d) before the jury, alleging that Kelley murdered Von Maxcy in the course of burglarizing the Maxcy residence. This claim negates the prosecution's theory of the case, namely, that Maxcy was murdered for his inheritance. This frivolous claim by the prosecutor should have been stricken from the jury's consideration because it was clearly without an evidentiary base and was designed simply to swell the jurors' tally of aggravating circumstances.

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

The Eighth and Fourteenth Amendments prohibit the court from limiting its consideration to the statutorily enumerated mitigating circumstances. Lockett v. Ohio, 438 U.S. 586 (1978); Eddings v. Oklahoma, 455 U.S. 104 (1982). Counsel suggested that the court consider the length of time since the commission of the crime. The trial judge rejected the date of the crime as a mitigating factor, because "Remoteness in time by itself is not a mitigating factor. (R. 1005). Defendant never contended that time in itself was a mitigating circumstance. Rather, counsel argued: "All you have left before you is the one man, Mr. Kelley, who is forced to defend himself 18 years after the crime, when it is virtually impossible to remember where you were and to prove where you were." (R. 975). This was improperly excluded as a mitigating factor.

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

Mitigating circumstances must be considered if they tend to follow from the facts; they do not have to be proved beyond a reasonable doubt. The facts in this case sufficiently support appellant's claim that Sweet or Von Etter actually killed Maxcy. The State never identified the actual killer. If Kelley was merely a bystander, the jury could have found his minor involvement as a mitigating circumstance. Sweet's own testimony shows that Sweet was the ringleader of the attack. The court made no mention of the fact that differences in leadership or participation call for different sentences. In Salvatore v. State, 366 So.2d 745 (Fla. 1978), Salvatore received a death sentence for masterminding a murder and actually dismembering the victim's body while Salvatore's co-participant received ten years for the same crime. The court justified these disparate sentences on the defendants' comparative involvement.

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

At the penalty phase of the trial, the State introduced before the jury, as an aggravating circumstance, evidence that Maxcy's murder was "especially heinous, atrocious, or cruel" (R. 967), in violation of Florida Statute §921.141. Von Maxcy's death was not tortuous or conscienceless, aside

from the inherent cruelty of murder. Nothing presented in the State's recitation supports such a claim:

> A sheet was put over him, he was first stabbed four times in the back, obviously causing him great pain. When that did not kill him, Mr. Von Etter and Mr. Kelley saw that the stabbing did not kill Mr. Maxcy, a gun was then produced and a final shot was put into the man's head.

(R. 967).

The State merely reiterates the crime as an aggravating circumstance without demonstrating how this crime was "especially" vicious. Surely all first-degree murders are dreadful, but the statute envisioned an extra measure of cruelty as an aggravating circumstance.

Maxcy's murder was planned and executed in a "businesslike" manner, in order to benefit from the fortune left to Maxcy's widow. The quick stabbings, followed by a single gunshot evidenced a desire to eliminate the victim as quickly and methodically as possible. This murder appears no more vile than the "norm of capital felonies." State v. Dixon, 383 So.2d 1 (Fla. 1973).

This Court declined to apply §921.141(5)(H) (hereinafter, "(5)(H)"), to cases far less aggravated on their facts. In Halliwell v. State, (5)(H) wouldn't apply where the victim was sadistically beaten to death with a breaker bar. See also, Demps v. State, 395 So.2d 501, 503 (Fla. 1982) (death by multiple stab wounds not "heinous, atrocious or cruel"); Lewis v. State, 377 So.2d 640 (Fla. 1979) (not applicable where victim was shot once and then shot several more times while attempting to flee). This case

is unlike Scott v. State, 411 So.2d 866, 869 (Fla. 1982), where the victim was beaten to death after the theft was accomplished with obvious intent to inflict additional suffering on the victim.

The trial court further erred in failing to define the aggravating circumstance (5)(H). A judge must properly define the terms "especially heinous, atrocious, or cruel," Cooper v. State, 336 So.2d 1133, 1140 (Fla. 1976). The Supreme Court held in Godfrey v. Georgia, 446 U.S. 418, 420 (1980) that the trial court has a constitutional responsibility to provide the jury with specific and detailed guidance as to its meaning. Id. at 428.

Maxcy's death was certainly needless, but the jury cannot apply (5)(H) simply because killing is unnecessary. Cooper v. State (court refused to find (5)(H) where the defendant killed a police officer to avoid apprehension, only because the killing was unnecessary). (5)(H) was meant to be limited to those circumstances where the brutality of the killing exceeds the amount required to accomplish the defendant's primary purpose. In Adams v. State, 341 So.2d 765 (Fla. 1975), by example, the evidence indicated that the defendant had beaten his robbery victim with a poker until the body was grossly mangled.

The instant murder falls into the category of a quick death where (5)(H) does not apply. See, e.g., Cooper v. State, 336 So.2d 1133, 1141 (Fla. 1976); Kampff v. State,

371 So.2d 1007 (Fla. 1979); Fleming v. State, 374 So.2d 954 (Fla. 1979).

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

According to Dixon v. State, 383 So.2d 1 (Fla.1973), the meaning of "heinous, atrocious, or cruel" is obvious, describing those crimes where

> The actual commission of the felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies. . . the conscienceless or pitiless crime which is unnecessarily tortuous to the victim. . . It is our interpretation that heinous means extremely wicked and shockingly evil; that atrocious means outrageously wicked and vile; and that cruel means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others.

Dixon at 9.

This language supposedly limits the application of the statute but, in effect, the new explanation provides little guidance to a jury in determining when to apply circumstance (5)(H). As the Eleventh Circuit recently stated:

> The modifiers in the instruction "extremely," "outrageously," "shockingly," like the term "especially" employed in the statute signal that the crime should be in some respect worse than average. The difficulty with these various adjectives used in either the statute (heinous, atrocious or cruel) or the instruction (wicked, evil, vile) is that they fail to indicate in what way the crime should be "worse." While they indicate some sense of dimension or degree, they fail to state what is being measured. As the Supreme Court has noted, '[a] person of ordinary sensibility could characterize almost every murder within such terms.' Godfrey v. Georgia, 446 U.S. 418, 428-429 (1980), and the jury in this case could well have subscribed to such a view.

Profitt v. Wainwright, 685 F.2d 1227, 1264 (11th Cir. 1982).

The vagueness of the (5)(H) language[27] has resulted in its use as a catch-all phrase to describe every imaginable type of homicide in violation of the constitutional standard set forth in Zant v. Stephens, 456 U.S.410 (1983). There, the Supreme Court held that in order to pass constitutional muster, an aggravating circumstance "must genuinely narrow the class of persons eligible for the death penalty." Zant at 417.

Circumstance (5)(H) describes deaths by strangulation, beating, and gunshot, where the victim suffered, where the victim was unconscious, where multiple wounds were evidenced, and where the murder inflicted but one wound, etc. Any principle of application set forth by one court has been contradicted by the next court or devoured by exceptions and exceptions to exceptions. In Washington v. State, 362 So.2d 658 (Fla. 1978) (per curiam), for example, the court found a murder "heinous, atrocious, or cruel" where the victim was shot and stabbed repeatedly before dying, in the presence of her sister-in-law. The same factor, however, was disallowed in a case where a son was made to witness his father's execution. Riley v. State, 366 So.2d 19 (Fla. 1978) (per curiam)

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[27]Furthermore, the conjunctive language of the statute implies that cruelty is an alternative rather than required feature of the aggravating factor.

The courts indicate that factor (5)(H) applies where pain and suffering accompany the victim's death. In Hargrave v. State, 366 So.2d 211 (Fla. 1979) (per curiam), the third shot fired at a store clerk rendered the murder painful to the victim, invoking factor (5)(H). The court, however, refused to apply the aggravating circumstance in an almost identical case where the defendant fired only twice at the store clerk, holding that there was nothing which set this execution apart from the norm of capital felonies. Menendez v. State, 368 So.2d 1278, 1282 (Fla. 1978). The pain and suffering experienced by the two victims appear indistinguishable, yet the court somehow determined that the Hargrave killing was more wicked than the killing in Menendez.

These cases exemplify the standardlessness involved in the administration of the circumstance. This subjectiveness proves particularly shocking when one realizes that this additional aggravating factor could have easily tipped the balance from life to death for William Kelley. See, Washington v. State, 362 So.2d 658 (Fla. 1978) (dissent).

Mental anguish may or may not affect the imposition of factor (5)(H) depending on the purely subjective determination of the court. In some cases the court will find the aggravating circumstance where the victim is drugged and semi-conscious (Herzog v. State, 439 So.2d 1372 (Fla.1983)), or the court may apply factor (5)(H) because

the victim was beaten and intoxicated (White v. State, 415 So.2d 719 (Fla.1982)).

Execution-style murders have created another area of rampant confusion and inconsistency among Florida courts. Proffitt v. Wainwright, 685 F.2d 1227, 1264 (11th Cir.1982), clearly ruled that "the fact that a murder is premeditated, cold, and calculated, does not render it especially heinous, atrocious or cruel." Nevertheless, many cases apply (5)(H) for precisely that reason. In Alford v. State, 322 So.2d 533 (Fla.1975), the court found the strangulation deaths of three women came within the scope of (5)(H). THe explanation given by the court was not that the strangulation might have involved unnecessary pain, but rather the court stressed that the means used were evidence of a "cold, calculated design to kill," and therefore within the circumstance. One court summed up the current law in direct contradiction with the language in Proffitt v. Wainwright: "It has been said that execution-type killings, evidencing a cold, calculated, design to kill, fall into the category of heinous, atrocious and cruel." Ferguson v. State, 417 So.2d 639, 643 (Fla.1982) ("execution-style murders committed by the defendant have often led to an appropriately imposed sentence of death"); Steinhorst v. State, 412 So.2d 332, 339 (Fla.1982)("These were execution-style slayings requiring cold, brutal, and heartless calculation"); Vaught v. State, 410 So.2d 147, 151 (Fla.1982)("The state correctly points out that the factors

heinous, atrocious or cruel have also been approved based on the fact that a killing was inflicted in a 'cold and calculating' or 'execution-style' fashion.")

The above discussion shows that all murders fall into the definition of heinous, atrocious or cruel, negating the pronouncements of the court of appeals that the statutory language is sufficiently clear and precise. Proffitt v. Florida, 428 U.S. 242, 255 (1976). The aggravating circumstance (5)(H) neither sufficiently narrows the class of death penalty-eligible persons nor does it provide sufficiently objective standards to distinguish those cases where the factor should adhere from cases where the factor is inapplicable.

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

Recent studies conclusively show that Florida Statute §921.141 arbitrarily and discriminatorily applies the death penalty. An exhaustive study conducted by Gross and Mauro of Stanford University found a "remarkably stable and consistent" pattern of racial discrimination in the imposition of the death penalty in Florida and in seven other states that were examined. Gross and Mauro, Patterns of Death: An Analysis of Racial Disparities in Capital Sentencing and Homicide Victimization, October, 1983, p. 111, herein cited as "Study."

Gross and Mauro examined all factors that could have influenced the sentencing decision. Their study concluded

that the data show a clear pattern of racial discrimination in the imposition of the death penalty, based on the race of the victim.[28] The Gross and Mauro study confirm the earlier studies done by Bowers and Pierce, Reidel, Arkin, and others.[29]

Under Furman v. Georgia, 428 U.S. 238 (1972) and Gregg v. Georgia, 428 U.S. 153, 188 (1976)(plurality opinion), any system that imposes the death penalty arbitrarily violates the Eighth Amendment prohibition against cruel and unusual punishment. "No longer can a jury wantonly and freakishly impose a death sentence." Gregg v. Georgia, at 206-207.

The imposition of any criminal sanction is unconstitutional if it is motivated by racial considerations. Yick Wo v. Hopkins, 118 U.S. 356 (1886); Maxwell v. Bishop, 398 F.2d 138, 148 (8th Cir.1968)(dictum) cited in Furman v. Georgia, 428 U.S. 238 at 408 (Powell, J., dissenting). Considering either the race of the perpetrator

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[28] "Our conclusion rests on several different sets of data, from different states, analyzed in different forms; this provides convergent validation of our hypothesis and makes it particularly unlikely that a fortuitous association or a peculiarity of the research design could have misled us." Study, p. 111.

[29] Bowers & Pierce, "Arbitrariness and Discrimination Under Post-Furman Capital Statutes," 26 Crime and Delinquency 563 (1980); Reidel, "Discrimination in the Imposition of the Death Penalty: A Comparison of the Characteristics of Offenders Sentenced Pre-Furman and Post-Furman," 49 Temp. L.Q. 261 (1976); Arkin, Note, "Discrimination & Arbitrariness in Capital Punishment: An Analysis of Post-Furman Murder Cases in Dade County, Florida, 1973-1976, 33 Stan. L. Rev. 75 (1980).

or the race of the victim is totally impermissible and shocking to the conscience in a death penalty case.

H. The Application of a Florida Death Penalty Provision Not in Existence at the Time of The Offense Charged Violates the Constitutional Prohibition Against Ex Post Facto Laws.

Prior to the 1972 United States Supreme Court decision in Furman v. Georgia, no valid death penalty provision existed in Florida for the alleged offense. Subsequently, the Florida Supreme Court in Donaldson v. Sack, 265 So.2d 499 (Fla.1972) invalidated the Florida death penalty statute.

These decisions immediately resulted in the re-sentencing of all Florida death-row prisoners to life imprisonment. Anderson v. Florida, 392 U.S. 22 (1968); In re Baker, 267 So.2d 8 (Fla. 1972); and Adderly v. Wainwright, 58 F.R.D. 389 (M.D. Fla. 1972).

Prior to Furman, any convicted killer sentenced to death would have his sentence changed to life imprisonment. The Florida legislature enacted a new statute to conform with Furman standards, changing the possible punishment from life imprisonment to death. Sentencing the appellant for a crime committed before Furman violates the ex-post-facto laws. As Justice Chase wrote in 1798: "Every law that changes the punishment, and inflicts a greater punishment than the law annexed to the crime, when committed," is considered within the intent of the prohibition. Calder v. Bull, 3 U.S. 386 (1798).

The case law since Calder v. Bull requires a change in the substantive, rather than procedural, law in order to fall under the ex-post-facto rubric. No greater substantive change exists than the transition from life to death.

It would be a gross injustice to sentence Kelley to death simply because Sweet waited 18 years to come forward with his testimony.

I. Death by Electrocution Pursuant to §922.10 Florida Statute (1981) Constitutes Cruel and Unusual Punishment in Violation of the Eighth and Fourteenth Amendments to the Constitution of the United States and in Violation of Article I, §§9,17 of the Constitution of the State of Florida.

The penalty of death violates the basic concept of human dignity underlying the Eighth Amendment (Trop v. Dulles, 356 U.S. 86, 100 (1958)(penalty must accord with the dignity of man). This punishment is unconstitutional because it is "excessive" and involves an unnecessary and wanton infliction of pain. Furman v. Georgia, 408 U.S. 238 (1972). The Supreme Court in Gregg v. Georgia, 428 U.S. 153 (1976), held that a penalty may not be cruelly inhumane or disproportionate to the crime involved. The Eighth Amendment should draw its meaning from the evolving standards of decency that mark the progress of a maturing society. Gregg at 2923-2925.

The Florda electrocution ritual violates this standard; the physical pain and mutilation, coupled with the psychological torture of waiting to die, inflicts unnecessary torture on the defendants. Any stated, or

unstated goal of the criminal system, whether custodial, deterrent, rehabilitative, or punitive, can best be achieved through the infliction of a more humane penalty.

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

The Governor of Florida reviews all capital cases and decides which of the 219 inmates on Death Row to electrocute. The Governor refuses to discuss the criteria used in making those decisions. However, no more than two death warrants are signed at one time, and political considerations are paramount in death warrant decisions. See Kaplan, "In Florida, A Story of Politics and Death, National Law Journal, Vol. 6 (July 1984).

This arbitrary selection of who lives and who dies fails to comport with the dictates of Furman and Gregg. The arbitrary and unguided discretion once vested in a jury now lies in the hands of the Governor. The constitutional infirmity remains the same.

Conclusion

The death penalty has ever been one of humanity's more tragic illusions. Throughout all recorded history, it has been proffered as a most effective deterrent to every crime from high treason to pickpocketing. Despite all evidence to the contrary, including this case itself, many thoughtful people, the world over, panicked by what they perceived to be the seemingly inexorable increase in the violent crime rate, shocked by particularly heinous acts, or frightened by real or imagined threats to their country's national

security, have acquiesced in the initiation, maintenance, restoration or extension of capital punishment. In this nation, after an inspired hiatus of many years, we are now witnessing the wholesale return of the firing squad, the gallows, the gas chamber and the electric chair, to say nothing of such novel methods of taking life as the injection of lethal drugs, in the pathetic and mistaken hope that, somehow, the corpses created by these mechanisms will make the future safe for us all. Nowhere is this phenomenon more apparent than here in the State of Florida which can now sadly boast more than 20% of the nation's condemned inmates on its Death Rows.

Over the centuries, in grasping for this illusory straw, we have authorized our public executioners to draw and quarter, poison, press, crucify, impale, gas, beat, garrotte, burn, drown, guillotine, hang, starve, stone, shoot, bury alive, inject, disembowel, electrocute, and cut the throats of hundreds and thousands of our fellow human beings. In so doing, we have rationalized our resort to officially sanctioned murder by clinging to the earliest hope that the desired end of a relatively safe environment justifies any means taken to attain it. What we always fail to take into consideration, and even strenuously deny, is the existence within ourselves of the unreasoning need for revenge and retribution--the eye for an eye and tooth for a tooth stricture of the Mosaic Code. However psychologically satisfying may be the fulfillment of such a compelling urge,

it does nothing to advance the slow and halting progress of humankind to some dimly viewed, albeit deeply desired and needed, concept of universal morality.

Some of those who favor the death penalty often ask its opponents whether they would feel the same way if the victim was someone dear to them. Surely, ethical standards cannot be dictated by the grief or fury of those most immediately affected by a criminal act. As feeling persons, our hearts must go out for Charles Von Maxcy's survivors and friends, but we simply cannot build the moral edifice of our civilization upon th transient emotions, no matter how heartfelt, of those who may have borne the outlaw's sting.

It has been a long and arduous journey up the mountain since our long forgotten ancenstors first began to walk upright upon the face of the earth. Slowly but surely, as rationality began to replace or temper superstition and mythology, we have managed to put aside the devils and demigods who ruled our fantasy world of cause and effect in favor of analyses based upon the application of logic and reason. Unfortunately, we have not been able to subjugate all of our very real and pressing fears of the unknown and often unseen forces that seem to control or influence our destinies. Periodically, we yield to the compulsion of such terrors and burn our witches or our books until, at long last, our minds overtake our manias. Then, shaken by shame and contrition, we vow that never again will be surrender to

the primordial in our nature, a promise we somehow seem unable to keep for very long.

In this case, however, this Court has a remarkable opportunity to stay the taking of the life of an accused who was prevented from adequately defending himself by a combination of primary circumstances--the antiquity of the crime, the wilful destruction by the State of all the evidence, and the admission of testimony disguised to bolster that of the prosecution's witness-in-chief, a man characterized by the trial judge as "a bad and evil person." No matter how strong may be our feelings of sympathy for both the victim of this crime and his family, we simply cannot let the rule of law degenerate into posse justice. William Harold Kelley did not--and never could--receive a fair trial and this Court should say so in no uncertain terms, whatever the very human feelings of its members about the murdered Charles Von Maxcy or the death penalty itself.

WHEREFORE, defendant respectfully prays that, for all or any of the arguments presented above, the judgment of conviction appealed from be reversed and the within indictment ordered dismissed.

Respectfully submitted,

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*Counsel wish to express their appreciation to Sharon Friedman, a third year student at New York University Law School, and Joan L. Washington, a legal worker, for their invaluable assistance in the drafting and finalization of this brief.

CERTIFICATE OF SERVICE

WILLIAM M. KUNSTLER hereby certifies that on the 25th day of September, 1984, he sent via prepaid, first class, U.S. Postal Service, one copy of the within Brief of Appellant to:

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Chief Deputy Clerk