IN THE SUPREME COURT OF FLORIDA

WILLIAM HAROLD KELLEY,

Appellant,

v. Case Number 65,134

STATE OF FLORIDA,

Appellee,

_____/

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

SUPPLEMENTAL BRIEF OF APPELLANT

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POINTS ON APPEAL

I.

THE APPELLANT WAS DEPRIVED OF DUE PROCESS OF LAW AND A FAIR TRIAL BY THE STATE'S DESTRUCTION OF EVIDENCE IN VIOLATION OF THE FIFTH AND FOURTEENTH AMENDMENTS, FLORIDA LAW, AND NOTIONS OF BASIC FAIRNESS.

A. Appellant was denied a meaningful opportunity to present a complete defense.

The appellant was convicted in 1984 of first degree murder in the death of Charles Von Maxcy and was sentenced to death. The murder is alleged to have occurred on October 3, 1966. In the late 1960's, one John J. Sweet was tried twice for the same murder. In Sweet's first trial, the jury was unable to reach a verdict. At the second trial, Sweet was convicted. The conviction was overturned on appeal. Sweet v. State, 235 So.2d 40 (Fla. 2d DCA 1970)(The decision is relevant and material issues raised herein). At both trials, the prosecution alleged that Sweet had planned the murder but had "hired" the appellant, William Kelley, and one Andrew Von Etter to do the actual killing. Although Kelley has been considered a suspect in the alleged murder since the late 1960's, an indictment wasn't returned against him until December 16, 1981, some fifteen years later. By that time, Andrew Von Etter had died.

On or about April 23, 1976 Glen Darty, the then prosecutor for Highland County, Florida, filed with the Circuit Court of

the Tenth Judicial Circuit a "Petition for the Disposal of Evidence" in the case against John J. Sweet. In the petition, State Attorney Darty stated that because "this case has been disposed of . . . the evidence in the hands of the clerk . . . should now be disposed of." Said evidence included at least twenty-two exhibits and perhaps as many as forty, which had been submitted to the Florida Sheriffs Bureau Crime Laboratory for examination, including such evidence as hair samples, fingernail scrapings, blood samples and scrapings, carpet sections, a brake pedal and floor mat from the victim's car, the victim's clothing, a blood stained sheet alleged to have covered the victim, bullets, and other items. (R-46). The State Attorney's "Petition For Disposal of Evidence" was allowed by a Circuit Judge on April 30, 1976. Id., and said evidence was thereafter destroyed.

The appellant submits that the State's intentional, deliberate and bad faith destruction of the above cited evidence violated his right to due process as guaranteed by the United States Constitution, the Florida Constitution and Brady v. Maryland, 373, U.S. 83,82 S.Ct. 1194, 10 L.Ed.2d 215 (1963), violated Florida Rule of Criminal Procedure 3.220 (a)(2) regarding discovery disclosure and also violated established notions of basic fairness in dealing with criminal accusations. The Supreme Court recently summarized these underlying notions of fairness in California v. Trombetta, _____ U.S._____, 104 S.Ct. 2528 (1984), stating:

> Under the Due Process Clause of the Fourteenth

> Amendment, criminal prosecutions must comport with prevailing notions of fundamental fairness. We have long interpreted this standard of fairness to require that criminal defendants be afforded a meaningful opportunity to present a complete defense. To safeguard that right, the court has developed "what might loosely be called the area of constitutionally guaranteed access to evidence" (citation ommitted). Taken together, this group of constitutional privileges delivers exculpatory evidence into the hands of the accused, thereby protecting the innocent from erroneous conviction and ensuring the integrity of our criminal justice system. Id., 104 S.Ct. at 2532.

Florida courts have followed federal constitutional mandates regarding State violations of an appellant's fundamental right of due process and are "equally concerned" with "breaches of the Florida Rules of Criminal Procedure and basic fairness." Stipp v. State, 371 So.2d 712, 714 (Fla. 4th DCA 1979). Florida case law regarding the area of "constitutionally guaranteed access to evidence," Trombetta, supra, 104 S.Ct. at 2532, is based on the holding of Brady v. Maryland, supra. See James v. State, 453 So.2d 786, 789 (Fla. 1984); State v. Sobel, 363 So.2d 324, 326 (Fla. 1978).

Brady provides that a defendant has a due process privilege to request and obtain from the prosecution favorable evidence that is material either to the guilt of the defendant or to the punishment imposed. Brady, supra, 373 U.S. at 87, cited in Trombetta, supra, 104 S.Ct. at 2532. The issue of destruction of evidence was fully set forth in the appellant's numerous pre-trial motions and the hearings held thereon. See R-1034,

R-1218, and R-46-105. Counsel again orally moved to dismiss the indictment on this ground at trial.(R-153).

The prosecution in a criminal trial has a so-called "duty of disclosure" with a two-fold purpose: (1) to correct an imbalance of advantage so that the prosecution will not surprise the defense at trial with new evidence; and, (2) "to make the trial a search for truth informed by all the relevant material, much of which, because of the imbalance in investigative resources, will be exclusively in the hands of the Government." Budman v. State, 362 So.2d 1022, 1025 (Fla. 3rd DCA 1978), citing United States v. Bryant, 439 F.2d 642, 648 (D.C. Cir. 1971). The "duty of disclosure" is mandated as an obligation of the prosecution by Florida Rule of Criminal Procedure 3.220 (a)(2), which provides that the state shall disclose "any material information within the State's possession or control which tends to negate the guilt of the accused as to the offense charged." James v. State, 453 So.2d 786, 789 (Fla. 1984).

The Budman court noted that, consistent with the purpose of safeguard of due process, another duty exists, the so called "duty of preservation":

> (A) duty of preservation attaches in some form once the state has first gathered and taken possession of any discoverable matter. Otherwise, disclosure might be avoided by destroying vital matter before a defendant learns of its existence. We feel strongly

> that the duty of disclosure is operative only as a duty of preservation; only then, may meaningful discovery be possible later on. Budman, supra, at 1026.

"The safeguard of a fair trial is an extemely important one, but it may be undercut at the pre-trial period by bureaucratic procedures or discoverable material." Budman, supra, at 1024. Such a violation of the State's duty of preservation occurred here, via the deliberate destruction, by motion of the State Attorney, of evidence held by the court in an unresolved murder case. The government cannot be required to produce that which it does not control or which it never possessed or inspected. Morgan v. Salamack, 735 F.2d 354, 358 (2d. Cir. 1984). In this case, however, the State did possess, analyze and utilize the evidence material to the alleged murder of Charles Von Maxcy at not just one, but two previous trials. The state was under a continuing duty to preserve this evidence while the murder of Charles Von Maxcy remained as a pending case. Section 775.15 of the Florida Statutes, which sets time limitations on the commencement of cases for certain crimes, states in subsection (1) that "A prosecution for a capital or life felony may be commenced at any time."(empahsis added).

Section 918.13 of the Florida Statutes on Criminal Procedure is a codification of the "duty of preservation." The statute entitled Tampering with or Fabricating "Physical Evidence" states:

> (1) No person, knowing that a criminal trial or proceeding or an investigation by a duly constituted prosecuting authority, law enforcement agency, . . . is pending . . . shall:
>
> (a) Alter, destroy, conceal or remove any record, document or thing with the purpose to impair its verity or availability in such proceeding or investigation . . . .

Because murder prosecutions are pending investigations until the murder is solved, under Florida Statutes, section 775.15, the actions of the State Attorney in knowingly petitioning the court to destroy the evidence in connection with the Von Maxcy murder investigation clearly violates the mandate of Section 918.13. Obviously, once such evidence has been destroyed it is forever unavailable. As such, the destruction of vital evidence held in the Von Maxcy murder investigation violated not only Constitutional imperatives but also the express requirements of Florida law. The Constitution imposes on the State a duty to preserve "evidence that might be expected to play a significant role in the suspect's defense." Trombetta, supra, 104 S.Ct. at 2534. Because the appellant was tried for the same murder as was John Sweet, the same evidence concerning the murder would clearly play a significant role in his defense. "[T]o reiterate a critical point, the prosecutor will not have violated his constitutional duty of disclosure unless his omission or suppression of evidence is of sufficient significance to the result in the denial of the defendant's right to a fair trial." James v. State, supra at 789,

citing United States v. Agurs, supra, 427 U.S. at 108.

Where the evidence was used at a prior trial of the same crime for which the appellant has been convicted, "sufficient significance" is indisputable, and a clear constitutional breach of duty has occurred. "Whenever the state is unable to produce physical evidence which has been in possession of the state, a serious constituional issue is presented." Adams v. State, 367 So.2d 635, 639 (Fla. 2d DCA 1979).

The Supreme Court has articulated three criteria for measuring when the Brady disclosure rule has been violated:

> (a) suppression of evidence by the prosecution after a request by the defense,
>
> (b) the evidence's favorable character for the defense, and
>
> (c) the materiality of the evidence.

Moore v. Illinois, 407 U.S. 786, 794 (1972); United States v. Barshov, 733 F.2d 842, 848 (11th Cir. 1984); Salvatore v. State, 366 So.2d 745, 750-51 (Fla. 1979).

Starting with the first criteria in the case at bar, the evidence was "suppressed" by having been intentionally destroyed prior not only to trial but even prior to the appellant's indictment. Compare Strahorn v. State, 436 So.2d 447 (Fla. 2d DCA 1983) (state destroyed windshield containg evidence prior to trial); Krantz v. State, 405

So.2d 211 (Fla. 2d DCA 1981) (knife without bloodstains, alleged as murder weapon, ordered destroyed by police); Budman, supra, (intentional destruction of tape recordings by police before trial). No matter how promptly the defense may have requested the evidence be produced for the appellant's trial, the intentional and deliberate prior destruction of the evidence by the prosecution in 1976 made the production of the evidence in 1981 impossible.

"A court must examine the circumstances of the loss or destruction to determine whether there has been a violation of the duty of the state to preserve evidence, a duty which clearly arises during the investigatory phase of a case." Adams v. State, supra at 640. If the State's duty to preserve evidence arose "during the investigatory phase" of the murder of Charles Von Maxcy, it arose during the year 1966. The prosecution knew or should have known that any material evidence collected and preserved in relation to the case was required to be preserved, notwithstanding the dismissal of the indictment against Sweet. The justification for destruction given in the State Attorney's "Petition for Disposal of Evidence" was that "this cause has been disposed of . . ." No further reasons for disposal were given. In 1976, the State's case against Sweet may have been "disposed of", but "the cause," that is, the unresolved murder of Von Maxcy, was still very much alive and the appellant was very much a suspect. This intentional and unwarranted act of

destruction by the State Attorney - - by an officer of the Court who ignored the fact that the "cause" was an unresolved murder with unindicted suspects; that the time limitation statute allowed a murder case to commence "at any time;" that the Florida Rules of Criminal Procedure mandated discovery of material evidence; and that the state had a constitional duty not to inhibit a suspect's right to a fair trial - - this act constitutes "a flagrant and deliberate act done in bad faith with the intention of prejudicing the defense," and was an act done "in total disregard for the rights of the accused." Adams v. State, supra at 640. Such an act "alone would be sufficient to vitiate a conviction." Id.

In the Adams case, the court found the destruction of alleged dynamite to have been done by a police officer in good faith in the belief that he should promptly render the dynamite safe. However, the court added that "[n]othing we say here . . . should be interpreted as condoning the deliberate destruction of material evidence. Such action, in our view, could rarely be justified." Adams, supra at 640. Here, adequate justification for the destruction of material and relevant evidence held by the state never existed.

Part (a) of the Moore v. Illinois criteria, as discussed above, requires a look at the facts surrounding

the suppression or destruction of evidence. Florida courts have adopted a variation on parts (b) and (c) of the Moore v. Illinois test, those parts dealing with whether the evidence was favorable to the defendant and whether it was material. Florida uses a "variable standard" to weigh whether to vitiate a conviction and obtain a new trial where vital evidence has been destroyed. Salvatore v. State, 366 So.2d 745, 751 (Fla. 1978). It is the duty of the reviewing court to consider the trial record as a whole and inquire whether any claimed error is harmless beyond a reasonable doubt. United States v. Hasting, ____U.S.____, 103 S.Ct. 1974, 1981 (1983). The Florida variation on this "harmless error" standard assesses the harm caused by lost or destroyed material by balancing the reasons underlying the State's failure to furnish the discovery against the importance of the missing evidence to the defendant. State v. Sobel, supra. See generally, State v. DelGuadio, 445 So.2d 605, 610-11, n.7 (Fla. 3rd DCA 1984), and cases cited therein (where discovery cannot be made, balance the extent of the prejudice to the defendant against the reason why the evidence is gone). In Florida, the "standard of prejudice which must be met by the defendant in order to obtain a new trial varies inversely with the degree to which the conduct of the trial violated fundamental notions of fairness." Salvatore v. State, supra at 751.

"Under such a variable standard, more deliberate or flagrant conduct by the prosecution in suppressing evidence requires less of a showing of prejudice to the defendant, while more excusable conduct on the part of the prosecutor - - such as mere negligence - - calls for a greater showing of prejudice to the defendant before relief will be granted." Id. In Salvatore, the court found "mere negligence" and harmless error in the unintentional loss of a tape recording of a co-participant's statement to a detective in a first degree murder case, because defense counsel had access to the tapes before they were destroyed. Id. Contrast the finding of reversible error in Farrell v. State, 317 So.2d 142 (Fla. 1st DCA 1975), where the parties had stipulated that unintentionally erased tape recordings of a drug transaction would have benefited the defendant, so that the tapes' destruction resulted in prejudice. In the case at bar, the destroyed evidence unquestionably contained items material and relevant to the alleged murder, this evidence having been used in two previous trials for the same crime. The appellant maintains that the missing evidence would have benefited him and was crucial to his defense. "Whenever potentially exculpatory evidence is permanently lost, courts face the treacherous task of divining the import of the material whose content is unkown and very often disputed."

Trombetta, supra, 104 S.Ct. at 2533. The problems inherent in considering destroyed evidence were analyzed in United States v. Bryant, 439 F.2d 642, 648 (D.C. Cir. 1971), cited in Budman, supra at 1025, in the court's discussion of the prejudicial effect of a destroyed taped recording:

> For all we know, the tape would have corroborated (the witness') story perfectly; or, for all we know, it might have completely undercut the government's case. There is not simply "substantial room for doubt", but room for nothing except doubt as to the effect of disclosure. What we do know is that the conversations recorded on the tape were absolutely crucial to the question of appellants' guilt or innocence. That fact, coupled with the unavoidable possibility that the tape might have been significantly "favorable" to the accused, is enough to bring these cases within the constitutional concern.

The evidence destroyed by the State in this case was also "absolutely crucial" to the question of the appellant's guilt or innocence. As in Bryant, the evidence destroyed could have either corroborated the testimony of Sweet, the prosecution's key witness against the appellant, or completely exonerated the appellant from blame. Because of the issues raised by Sweet's uncertain credibility and his undeniably questionable motives in testifying against the appellant after having been tried twice for the same crime himself, there is an "unavoidable possibility" that the destroyed evidence might have been "significantly favorable" to the defendant. That the evidence could easily have been

"absolutely crucial" cannot be lightly disregarded in assessing reversible error.

The proper test for constitutional error where evidence has been destroyed is whether "the omitted evidence creates a reasonable doubt that did not otherwise exist . . ." Smith v. State, 400 So.2d 956, 964 (Fla. 1981); Budman, supra, at 1025. See also Madruga v. State, 434 So.2d 331-32 (Fla. 3rd DCA 1983), and cases cited therein, holding that if the defendants could show a reasonable doubt that the omitted evidence would disclose exculpatory facts, then the destruction and unavailability of the evidence would be prejudicial. It has been held that the reasonable doubt test "is to be applied generously to the defendant when there is substantial room for doubt as to what effect disclosure might have had." Budman, supra at 1025. This deference to the defendant is required because the burden is on the state to demonstrate the absence of both prejudice and materiality of the destroyed evidence. Krantz v. State, 405 So.2d 211, 213 (Fla. 3rd DCA 1981); State v. Sobel, supra (emphasis added).

It is obvious that in this case the appellant would never be able to obtain "comparable evidence" to that originally taken from the scene of the crime. The blood samples, hair samples, scrapings, and other potentially exculpatory evidence that were destroyed cannot now be resurrected and examined or tested by the appellant to

establish his innocence. Courts have noted that because of the chances of the destroyed evidence being exculpatory, the availability of alternative means of demonstrating innocence and what, if any, quantity of evidence is still available for testing, are factors to be considered in weighing the prejudice caused by destruction. See Trombetta and State v. Cooper, 391 So.2d 332, 333-34, (Fla. 3rd DCA 1981). Contrast Colon v. State, 453 So.2d 880 (Fla. 3rd DCA 1984) cited in 9 Fla.L.W. 1729 (August 7, 1984), finding prejudice where due to police negligence, drugs were destroyed which formed the entire basis for the charges against the defendant, thus depriving the accused of an opportunity to perform his own potentially exculpatory analysis. Also, in Stipp v. State, 371 So.2d 712 (Fla. 4th DCA 1979), the court reversed a conviction where the state intentionally but unnecessarily destroyed the entire amount of a seized substance in a case for possession of cocaine, in spite of the fact that a substantial part of the substance could have been saved for exculpatory testing by the defendant.

Applying the factors considered in the above cases to the case at bar, the appellant Kelley has clearly suffered prejudice because he was deprived of the chance to perform potentially exculpatory testing on the destroyed evidence. The destruction of the evidence was intentional but not necessary, for testing purposes or otherwise; the evidence

itself, and not simply test results, was potentially exculpatory; none of the physical evidence was saved by the State; and no "comparable evidence" was available. Based on the rulings of the above cited cases, the appellant must be adjudged to have suffered prejudice by the loss of irreplaceable evidence.

Significantly, it should be noted that in the majority of the cases cited herein, only one item or one type of item of evidence was destroyed. See Trombetta, supra (breath sample); Cooper, supra (blood sample); Colon, supra (drugs); Stipp, supra (drugs). The sheer number of material and relevant items which were destroyed by the State in this instance - - at least twenty-two according to the list submitted to the police laboratory and perhaps as many as forty - - weights very heavily in favor of a finding of prejudice. Here, the large number of evidentiary items that were destroyed clearly in and of itself raises a reasonable doubt that error may have been committed. The State cannot logically argue that not one of the multitude of items destroyed would have been potentially favorable to the defense.

The verdict in this case was not the result of examining tangible evidence, but resulted mainly from the unverifiable testimony of John Sweet, a person with questionable motives, who was previously tried twice for the same crime. In addition, the record shows that after a lengthy deliberation,

the jury returned and informed the trial judge that they were "at an impasse," had "voted three times" without reaching a unanimous vote, and then stated "we do not see how to overcome this impasse." (R-923). The trial judge further instructed the jury and very shortly thereafter the verdict was announced. (See jury instruction issue). "[I]f the verdict is already of questionable validity, additional evidence of relatively minor importance might be sufficient to create a reasonable doubt." Smith v. State, supra at 964, citing United States v. Agurs, 427 U.S. at 112-113, 96 S.Ct. at 2402. At the very least, such a reasonable doubt surfaces here.

In addition, and of particular evidentiary importance, the room where the murder was allegedly committed was covered with blood when discovered by the police. At trial, the prosecution maintained that a bloody sheet found at the scene, with knife holes in it, had been thrown over the victim before he was stabbed. (R-869). The use of the sheet was offered by the prosecution as an explanation of why the appellant Kelley had no blood on him after allegedly committing the crime. The sheet itself had been destroyed prior to trial, and was not available to either support or controvert the State's possessive contention. By analyzing the sheet, the appellant could have elicited exculpatory testimony to show that the prosecution's unfounded conclusion was incorrect.

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

Also, certain blood and hair samples found at the scene were potentially exculpatory, along with fingernail scrapings, wall scrapings, projectiles and latent prints. Any one of these items could have been indicative of either

the guilt or innocence of the appellant. All were destroyed.

As indicated above, where the verdict is already of questionable validity, even evidence of minor importance can create the necessary reasonable doubt to amount to constitutional error. Simth v. State, supra at 964. In the "context of the entire record," id., it is clear that the value of the evidence held in the custody of the State in 1976 was apparent before it was destroyed, leaving the appellant facing substantial prejudice with no alternative method of obtaining comparable evidence. This constitutes clear error.

Under Florida's "variable standard" test, the State has the burden of proving to show that "the lost evidence would not have been beneficial to the accused, thus demonstrating a lack of prejudice." State v. Snell, 391 So.2d 299, 301 (Fla. 5th DCA 1980). This burden cannot be met where, as here, the loss of vital evidence showing the presence or absence of blood could support the position that the murder was committed by someone other than appellant. Cf. Krantz v. State, 405 So.2d 211, 212 (Fla. 3rd DCA 1981), where in an analogous situation which was destroyed by police order, the destruction of the knife was found to be prejudicial, because the accused could not "exploit the possibilities" inherent in the missing evidence in his defense.

In sum, under the Florida "variable standard" test,

the conduct of the prosecutor is to be weighed against any showing of prejudice to the accused. Here, the intentional, flagrant and deliberate conduct of the State Attorney in obtaining an order to destroy material evidence in a pending murder case means that the appellant need proffer only a lesser showing of prejudice to obtain a new trial. Salvatore v. State, supra at 751. However, in this case, the appellant clearly suffered substantial prejudice, because in the circumstances of this case, the State cannot carry its burden that the lost evidence would not have been beneficial to the accused.

> It is wrong for the state to unnessarily destroy the most critical inculpatory evidence in its case against the accused and then be allowed to introduce essentially irrefutable testimony of the most damaging nature against the accused. It is wrong because it violates the most fundamental right of due process constitutionally mandated in Florida and in the United States. Stipp v. State, 371 So.2d 712, 713 (Fla. 4th DCA 1979).

Because the state unnecessarily and intentionally destroyed relevant, material and at the very least potentially exculpatory evidence in its case against William Kelley, clear error has occurred in violation of the appellant's constitutional rights, state law guarantees and guarantees of fundamental fairness. Therefore, his conviction must be reversed.

II.

THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN GIVING AN ENLARGED, ALTERED AND PROHIBITED VERSION OF FLORIDA'S STANDARD JURY INSTRUCTION 3.06.

A. The "Allen" charge given by the trial court went far beyond permissible language and was coercive and prejudicial, constituting fundamental error and a violation of due process.

The trial judge denied the appellant a fair trial by delivering an "Allen" charge beyond the scope of Fla. Std. Jury Instr. 3.06.

The case at bar is the second time the appellant has been tried for the murder of Charles Von Maxcy. Both trials were presided over by the same judge, the Honorable E. Randolph Bentley, Judge of the Circuit Court, Tenth Judicial Circuit. The first trial (1983) ended in a hung jury where no verdict could be reached, even after the judge gave what appeared to be Florida Standard Jury Instruction 3.06 to the jury. Defense counsel in the first trial had previously moved on the record that the 3.06 charge not be given.

In the instant case, which was the appellant's second trial for the Von Maxcy murder, a 3.06 charge was given by the judge, after the jury returned to the courtroom stating that they had voted three times, had not reached a unanimous vote, and did not see how to overcome the impasse. (R-923).

Without allowing any comment by counsel and after the foreman of the jury indicated the jury's position, the trial court launched immediately into what initially appeared to be Florida Standard Jury Instruction 3.06, which instruction he had also given at the first trial. See Florida Standard Jury Instruction 3.06 (Jury Deadlock) 1981 Edition. This instruction was approved by the Florida Supreme Court in 1981, and superceded the prior instructions, Fla. Stand. Jury Inst. 2.21, formerly 2.19, which were based on the traditional "dynamite" charge given in Allen v. United States, 164 U.S. 492 (1869). In the instant case, after completing the recitation of the current instruction 3.06 (R-923-24), the judge immediately added the following comments of his own in regard to the case, which in substance were taken from the outlawed versions of the "Allen Charge." (Compare prior Fla. Jury Instr. 2.21 and 2.19):

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

> In the future a jury would be selected in the same manner that you were.
>
> Therefore, I would ask that you retire at this time and consider whether you wish to consider the matter further.
>
> It has taken us a week to get this far, and I would ask that you retire and consider the case further (R-924-25).

It is mandated by the Florida State Constitution (Art. V, sec. 3) that the standard jury instruction, as promulgated by the Florida Supreme Court, be used where appropriate. Rigot v. Bucci, 245 So.2d 51 (Fla. 1971). The trial judge chose to go beyond the mandated instruction 3.06, which resulted in a prohibited charge which very closely resembled the outlawed version of the "Allen Charge." See prior instructions 2.21 and 2.19. Any variation of the standard 3.06 instruction should not "differ materially" from the court approved language. Bryant, supra at 483. Even a "semantic deviation" from the approved 3.06 instruction can require reversal. United States v. Prentiss, 446 F.2d 923 (5th Cir. 1971); Powell v. United States, 297 F.2d 318, 322 (5th Cir. 1962).

In the instant case, after reciting what appeared to be the standard 3.06 Florida instruction, the trial judge went further and added a number of prohibited and coercive comments. Where Article V, sec. 3 of the Florida Constitution states that Florida law is mandated by the Florida Supreme

Court, the trial judge was in error in extending his charge to the jury beyond the scope of instruction 3.06. In Miller v. State, 403 So.2d 1014 (Fla. 5th DCA 1981), no error occurred where the judge gave the approved jury instruction and did not make any additional comments implying that the jury must reach a verdict or any statements found to be misleading. Contrast the instant case, where the judge made additional comments that were not only misleading and violative of the defendant's rights, but also coercive. Combined statements similar to those made by the appellant's trial judge, that the case had been exhaustively tried, that the clearest possible evidence had been submitted, and that the present jury was fully as qualified to decide the issues as any which could be selected, were held to be prejudicial error in Clemens v. Chicago, R.I. & P. Ry.Co., 163 Ia. 499, 144 N.W. 354 (1913). See generally Annot., 38 A.L.R. 3d 1281, 1318-19 (1971), entitled "Verdict Urging Instructions In Civil Case Stressing Desirability and Importance of Agreement," and cases cited therein.

Any judicial communication with the jury during the course of a trial "must be carefully considered and properly circumscribed." Kozakoff v. State, 323 So.2d 28, 29 (Fla. 4th DCA 1975).

> Informal instructions to the jury afford a great opportunity for chance comment either to misstate the applicable law or to leave room for possible misunderstanding

> by the jury. It was at least partially for this reason that the standard jury instructions were developed and promulgated by our Supreme Court. Id.

As the Kozakoff court suggested in regard to formulating premiliminary jury instructions, "a trial judge could greatly reduce the risk of error by utilizing these approved standard instructions, at the very least, as a guideline for formulating any . . . instructions to the jury." Id. What occurred in Kozakoff also occurred here - - by ignoring the guidelines and overstepping the boundaries of the standard jury instructions, the trial judge became misleading and coercive in his remarks, and so deprived the appellant of his right to a fair trial. Id. at 29-30.

Significantly, several of the judge's remarks were drawn almost directly from the charge in Commonwealth v. Tuey, 62 Mass. (8 Cush.) 1 (1851), a case which formed the basis for the original Allen charge. See Annot., 38 A.L.R. 3d at 1289; United States v. Bailey, 468 F.2d (5th Cir. 1972). Compare the language in Tuey with the additional language of the trial judge in the case at bar:

> You should consider . . . that you are selected in the same manner, and from the same source, from which any future jury must be; and there is no reason to suppose that the case will ever be submitted to twelve men more intelligent,

> more impartial, or more competent to decide it, or that more or clearer evidence will be produced on one side or the other . . . Tuey, supra, cited in Annot., 38 A.L.R. 3d at 1289, n.7.

This language is almost identical to that given to the jury immediately after the 3.06 charge at the appellant's second trial.

Where the Florida Standard Jury Instruction for deadlocked juries has been found to be "fair, unbiased and has been specifically approved by this Court," Spaziano v. State, 393 So.2d at 1119, 1122 (Fla. 1981), the standard language should not be significantly altered or enlarged. After the jury commences deliberations, the trial judge should "closely adhere" to the wording of the mandated instruction. Pinder v. State, 31 Md. App. Ct. 126, 133, 355 A.2d 489 (1976). If the trial court does not adhere closely, on appeal the language will be subjected to a careful scrutiny "to determine whether the province of the jury has been invaded and the verdict unduly coerced." Id. Because the additional comments in the appellant's case were given after deliberations started, such careful scrutiny should be applied here. In the recent Florida case of Nelson v. State, 438 So.2d 1060 (Fla. 4th DCA 1983), which directed itself to the use of Fla. Stand. Jury Inst. 3.06, the court stated that:

> Florida's current standard deadlock charge avoids the pitfalls of the traditional Allen charge, which tended to convey to the minority on a jury that they should accede to the will of the majority. . .

> The added remarks of the trial court in the instant case applied much the same kind of pressure the recast standard deadlock charge sought to eliminate. (emphasis added) Id. at 1062

In Nelson, as at the appellant's second trial, the trial court gave a 3.06 charge but then continued on with what the court found to be misleading and coercive comments. Id. at 1061. The additional language in Nelson echoes almost eerily the additional language used in the case at bar:

> I don't think that anybody here would be served by you all not arriving at a verdict. It would be wasting your time for whatever period of time which I guess seven days. Nobody can repeat this testimony and exhibits placed before you. If you all cannot arrive at a verdict then something is wrong . . . you just don't understand what happens if we have to retry this case. . . it is going through this whole reppetoire (sic) again for you or someone else when it is not really necessary. You have heard all the law. That is all evidence there is. That is as far as what presented here before you.
>
> We look to you for the resolution of this case. . . I can't see that it would be impossible when we have such a fine jury here. Id. at 1061.

The Nelson court found the additional comments which were given beyond the scope of the 3.06 instruction to be "coercive in effect" and reversed the defendant's conviction for first degree murder. Id. at 1060. In Nelson, as in the case at bar, the trial judge "made it appear that unless

a verdict was reached great waste would occur and the court's confidence in the jury's common sense would somehow have been betrayed." Id. at 1063. By using additional, coercive comments beyond the permissible scope of the Florida Standard Jury Instructions, the trial judge committed clear error, so that the appellant's conviction, like that of the defendant in Nelson, must be reversed.

B. The Allen charge instructions given by the trial court were coercive both individually and cumulatively under the circumstances of the case.

1. The particular instructions given beyond the scope of the standard 3.06 instruction were coercive.

The test of an Allen charge is whether the particular language employed, in the context and under the curcumstances of the case, coerced the jurors into reaching a verdict. Jenkins v. United States, 380 U.S. 445 (1965). See generally Annot., 97 A.L.R. 3d 96 (1980), "Instructions Urging Dissenting Jururs in State Criminal Case to Give Due Consideration to Opinion of Majority (Allen Charge) - Modern Cases;" 76 Am. Jur.2d Trial, sections 1060-1062. A defendant has a right to a hung jury. Bell v. State, 311 So.2d 136, 139 (Fla. 1st DCA 1975); Lee v. State, 239 So.2d 136, 139 (Fla. 1st DCA 1970). "Nothing should be said by the trial court to the jury that would or could likely influence the decision of a single juror to abandon his conscientious belief as to the correctness of his position." Lee, supra, at 139; Lewis v. State, 369 So.2d 667, 669 (Fla. 2nd DCA 1979).

Individual instructions given by the trial court can each be coercive elements and constitute error in and of themselves. See Annot., 38 A.L.R. 3d at 1287. In this case, for example, the court stated that "if you fail to reach a verdict, there is no reason to believe the

case can be tried again any better or more exhaustively than it has been," and "in the future a jury would be selected much in the same manner as you." (R-924-25). Compare this language with the instructions:"if you fail to agree upon a verdict, the case will be tried before another jury," found to be coercive in People v. Barraza, 23 Cal. 3d 675, 153 Cal. Rptr. 459, 591 P.2d 947 (1979). The Barraza court found this instruction to be patent error in that such a statement is clearly untrue, since the prosecutor, when confronted with a hung jury and a mistrial, retains the authority to request a dismissal of the action. Id. In the case at bar, the trial judge also stated that "there is no reason to believe there is any more evidence or clearer evidence could be produced on either side. And there is no reason to believe that the case could be submitted to twelve more intelligent and impartial people than you are." (R-924-25). Compare Nelson, supra, at 1061 ("nobody can repeat this testimony and exhibits placed before you. If you all cannot arrive at a verdict, then something is wrong . . . That is all the evidence there is."). Similar additional instructions emphasizing that "on retrial the case will have to be submitted to another jury which will hear the same evidence and be no better qualified to decide the case than this jury. . ." have been criticized by the courts. See State v. Marsh, 490 P.2d 491, 496 (Ore. 1971), and

cases cited in note 17. See also Note, Instructions Deadlocked Juries, 78 Yale L. J. 100, 138 (1968).

Further, the trial court's statement at the appellant's trial that "it has taken us a week to get this far" itself constitutes coercive conduct and reversible error where it reasonably implies that all trials are expensive and that therefore the jury should reach a verdict soon. It must be noted that after the jury reported on "impasse" and after the coercive "Allen" charge was given, the jury retired and within a very short period of time returned a verdict. Compare United States v. Betancourt, 427 F.2d 851 (5th Cir. 1970). "The legitimate desire . . . to save the State the time and expense involved in a retrial is understandable - - but this should be retained in the bosom of the court and not imparted to a deadlocked jury. Such factors are wholly foreign to the primary responsibility of the jury to determine whether the accused is guilty as charged . . . ." Pinder v. State, supra, 31 Md. App.Ct. 134-35, citing In re Winship, 397 U.S. 358 (1970). When a judge improperly coerces a hasty verdict, thereby preventing "fair and thoughtful deliberation by the jury," this requires the verdict to be set aside. Lucas v. American Manufacturing Co., 630 F.2d 291, 293 (5th Cir. 1980) (due to approaching hurricane, judge informed jury that they must reach a verdict in fifteen minutes or return later). The Lucas court found

that even "concern for the juror's well-being" does not excuse efforts so coerce a verdict. Id.

Finally, the additional instructions were inconsistent with each other. First the judge asked that the jurors retire "and consider whether you wish to consider the matter further." (R-925). Almost immediately following this statement, the judge then asked the jury to retire "and consider the case further." Just what the jury was to be considering is most unclear. Instructions must be weighed as to whether the law was fairly presented and whether the jury may have been mailed. Diez v. State, 359 So.2d 55 (Fla. 3rd DCA 1978); Lee v. State, supra, at 139. Here, the misleading directions and potential for jury confusion cannot be denied.

Each individual comment, in and of itself, which went beyond the scope of Fla. Stand. Jury Inst. 3.06 had undoubtable coercive effects so as to improperly coerce a verdict.

2. The cumulative effect of the instructions given was coercive.

Even if one assumes arguendo that the additional comments when viewed individually were not coercive, the comments viewed as a whole created the "effect of coercion." See Nelson, supra at 1060. The additional comments in Nelson were held to be error because the effect of the particular comments was determined to be cumulative.

Where the cumulative effect of instructions is to hurry and coerce a jury into a verdict without adequate consideration of issues pertinent to the defense, coercive error occurrs. United States v. Diamond, 430 F.2d 688 (5th Cir.1970). The trial court's instructions are to be taken as a whole. Stanley v. State, 347 So.2d 1031 (Fla. 3rd DCA 1978). In the case at bar, the remarks of the trial judge when taken together, pressed the jury to agree on a verdict because "the instruction must be taken as a unit." Eikmeier v. Bennett, 143 Kan. 888, 57 P.2d 87 (1936), cited in Annot. 38 A.L.R. 3d 1218, 1318-19. And, where as here, each additional comment individually was coercive, the cumulative effect of the sum of these comments is so overwhelming as to leave no room for doubt that sufficient coercion occurred to be fatal to the verdict.

3. The instructions lacked proper admonitions regarding the jurors conscientious convictions.

An instruction to deadlocked juries should stress that the verdict to which a juror agrees must be his own verdict based on his own convictions. See State v. Bryan, 290 So.2d 482 (Fla. 1974) where the judge specifically stated that "no juror was to abandon his consciencious convictions." However, no such language appears anywhere in the 3.06 instruction or in the additional comments made by the court at either of the appellant's trials. In Lincoln v. State, 364 So.2d

117 (Fla. 1st DCA 1978), the judge told a deadlocked jury "ya'll go in and listen to each other and get back in there and arrive at a verdict." The court found that such a charge "was at least subject to being intimidating to the jurors to return a verdict," and reversed the conviction. Id. at 117-18. Contrast the recommended American Bar Association Language, which states "do not surrender your honest conviction as to the weight or effect of evidence solely because of the opinion of your fellow jurors, or for the mere purpose of returning a verdict." Annot., 97 A.L.R. 3d at 102, citing Mathes, "Jury Instructions and Forms for Federal Criminal Cases, Instruction 8.11," 27 F.R.D. 39, 97-08 (1969). The question is whether the charge was "balanced," i.e., in that it emphasized the honest, conscientious, individual vote. State v. Marsh, supra at 500. A balanced charge urges neither acquittal nor conviction. State v. Bryan, supra at 484. This aspect of the court's instrucitons at the appellant's trial was not emphasized, and was overpowered by thecoercive effect of the court's additional comments. As such, the jury could have been under a mistaken understanding that it was their duty to comply with the wishes of the court as expressed in its charge. Lee v. State, supra at 139. The charge was coercive in this aspect as well.

4. Comparison with the 3.06 instruction and additional comments in the appellant's first trial indicates coercion in the appellant's second trial.

An inference of coercion can be "strengthened by the fact that a prior jury could not return a verdict in a trial of the same cause, even after the jury had received a somewhat 'milder' Allen charge." United States v. Bailey, 468 F.2d 652, 665 (5th Cir. 1972). The Bailey court found this argument to be "very pursuasive." One reason for this situation is the small number of deadlocked juries and the likelihood that most failures to reach a verdict stem from genuine and reasonable differences over facts. See Note, Due Process, Judicial Economy and the Hung Jury: A Re-examination of the Allen Charge, 53 Va.L.R.123, 146-49 (1967). A Bailey situation occurred in the case at bar. The appellant's first trial (1983) on the same charges ended in a hung jury. A 3.06 instruction had been given in that case followed by additional comments which were much milder and less coercive than the additional comments given at the second trial. In the first trial, after the standard 3.06 language, the court added:

> I would further ask, because of the hour, if you are unable to reach a verdict in light of this instruction, it would be helpful if you do choose to follow my first request, whether you feel it would be helpful to recess for the evening or whether you wish to follow through and see if you can reach

> a verdict this evening, or after your discussion, if you ask to quit for the evening and come back tomorrow we will do that. If you say you want to continue on and come back and tell me you cannot reach a verdict, whatever the decision is. But I hope the instruction I have given to you and the two requests I have given you, the one, state your own weakness, and second, decide if you want to continue this evening or not.

The same judge presided over both trials, and he knew the potential problems the jury faced in returning a verdict. The judge has a duty of refraining from any intimidation or coercion of the jury. Boyett v. United States, 48 F.2d 482 (5th Cir. 1931). One cannot avoid the obvious conclusion when comparing the additional comments made by the court in the appellant's first trial with the added comments made at the second trial, that the court knew what was mandated by rule 3.06. The added comments at both trials were violative of the appellant's Constitutional rights. Even the somewhat "milder" additional comments at the first trial which appear not to qualify as an "Allen Charge," go beyond the mandate of Article V. But clearly, and beyond question, the additional comments at the appellant's second trial not only violated Article V of the Florida Constitution, but were in essence the prohibited "Allen Charge." Thus, the added comments at the second trial violated the appellant's Constitutional rights because they deviated from the mandate of rule 3.06; because,

in essence, they were an "Allen Charge;" and because the court knew or certainly should have known that the jury was being coerced.

5. The Allen Charge itself is so violative of a defendant's right to a fair trial and due process as to be unconstitutional.

Many jurisdictions have banned the use of the Allen charge altogether because of its tendency to coerce verdicts. Kozakoff v. State, supra, 323 So.2d at 30, and cases cited. See particularly the discussion in United States v. Bailey, 468 F.2d 652, 667-68 (5th Cir. 1972) outlining the states and federal circuits where the Allen charge has been abolished. "The indisputable modern trend is to abandon Allen." Id. at 668. It has been said that "The Allen charge causes more trouble in the administration of justice than it is worth. It's timesaving merits in the district court are more than nullified by the complication it causes on appeal." Andrews v. United States, 309 F.2d 127, 129 (5th Cir. 1962) (Wisdom, J., dissenting).

It should be noted herein that Florida abolished the Allen Charge in 1981 and in its place subsituted 3.06. Thus, the Allen Charge is outlawed in Florida. If a supplemental charge is necessary to a deadlocked jury, the specific language of rule 3.06 is mandated. In the instant case, Judge Bentley resurrected the outlawed Allen Charge when, by choice, he added further coercive comments to the mandated 3.06 instruction.

6. The charge given by the trial court constituted fundamental error.

For an error in an instruction to be so fundamental that it may first be raised an appeal, the error must amount to a denial of due process and of an essentially fair trial. Pratt v. State, 429 So.2d 366 (Fla. 1st DCA 1983); Ray v. State, 403 So.2d 956 (Fla. 1981); Fla. R. Crim. P. 3.390 (d). Fundamental error occurs when, due to the error, the defendant has suffered significant harm which could not be cured by a cautionary instruction to cure the prejudice. United States v. Gainsville, 716, F.2d 819, 821 (11th Cir. 1983). Because the significant harm in the instant case was caused by an instruction given by the judge after the jury had retired, deliberated, and then returned to the courtroom, no further instruction could have cured the harm done. Id. Moreover, the unconstitutional Allen charge given by the judge in this case was not simply a brief, isolated aspect of the trial, Id., but was the keystone of the proceedings because it coerced the jury into returning a verdict of guilty.

Courts have found that a coercive Allen-type charge constitutes fundamental error so as to overcome a lack of objection at trial. See Pinder v. State, supra at 137, citing Fletcher v. State, 8 Md.App. Ct. 153, 258 A.2d 781 (1969), holding that erroneous Allen-type instructions amounted to plain error, and so did not require an objection

below. "[W]e cannot say that there was no coercive or compelling influence upon the jury" from the judge's charge. Fletcher, supra at 785. See also State v. Marsh, supra, holding that where a defendant could sustain his contention that his constitutional rights to a fair trial and due process of law were violated by an instruction, the court might well reverse and remand, despite the lack of exceptions by the defendant. Id. at 501.

As further grounds for a finding of fundamental error, under Florida Criminal Procedure, defendant's counsel is entitled to notification prior to the trial court's giving an instruction. Rose v. State, 425 So.2d 521 (Fla. 1982); Rule 3.390 (d). No such notification was given here. (R-923-25). Because he was never notified of the giving of the instruction, trial counsel did not invite error by failing to object nor did he acquiesce to the giving of the instruction due to neglect or inattention. Invited error occurs only if counsel expresses a deliberate tactical purpose in resisting or submitting to a particular instruction. Annot., 97 A.L.R. 3d 96 (1980). See Ray v. State, 403 So.2d at 961 (in most cases, failure to object has been coupled with affirmative acts by counsel either seeking or acquiescing in the erroneous instructions). See also Nova v. State, 439 So.2d 255, 262 (Fla. 3rd DCA 1983) (under the due process clause, waiver of a constitutional right must be an intentional relinquishment of a

known right). Because the trial judge never notified trial counsel that an instruction was to be given, counsel could not have committed a deliberate act in failing to object to the giving of a charge of which he was unaware. Therefore, the lack of an objection by trial counsel in this case cannot be deemed a waiver of the appellant's right to object.

Because the improper Allen charge given at the appellant's second trial was misleading, prejudicial and coercive, caused significant harm, was not correctable by another instruction, and was given without prior notice to counsel, it constituted a violation of the appellant's constitutional right to a fair trial and due process of law. The charge, as given, was therefore fundamental error, and provides grounds for the hearing of this issue on appeal.

III.

THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT REFUSED TO ANSWER THE JURY'S QUESTION AS TO WHETHER JOHN SWEET, A CRUCIAL STATE WITNESS, HAD RECEIVED A GRANT OF IMMUNITY PRIOR TO TESTIFYING AGAINST APPELLANT.

A. Factual Background

After the case was put to the jury for deliberation, the jury announced that it was deadlocked and could not reach a verdict. (R-923). The jury announced that ". . . we do not see how to overcome this impasse." (R-923). The trial judge immediately administered an "Allen" type charge (R-923-925), and the jury again retired to resume deliberations. Shortly thereafter, the panel sent a note to the trial judge inquiring about John Sweet's immunity in Florida (R-925-1230). Specifically, the jury asked "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." Id.

This one question asked by the jury pinpointed the most crucial and germane portions of the entire trial; the credibility of the main witness, John Sweet. After two trials with two different jury panels, John Sweet's believability was the linchpin of the State's case. Indeed, the trial judge noted that this request ". . . be treated as a request for testimony." (R-927). Further, the Court stated the glaring fact that "that is an interesting

thought. The testimony was, he was given immunity by Florida." (R-926). The Court, however, did not answer the question following vociferous objection by the State Attorney. This objection was voiced in spite of the following testimony ellicited from John Sweet by the defense counsel:

> Q. (By Mr. Edmund) Mr. Sweet, you received immunity for first degree murder in Florida, didn't you, sir ? This is the killing of Von Maxcy; right ? Is that a fair statement ?
>
> A. Yes, sir.
>
> Q. You received immunity from the perjury that you committed in your two trials in Florida, didn't you, sir ?
>
> A. Yes, sir. (R-614-615).

Instead of answering the question, the trial court advised the jurors that "I regret to advise you I cannot answer your question." (R-935). The judge advised the jury that they had the right to request portions of the testimony to be read back, however, the judge conditioned this by stating that the testimony could only be read back only "if you clearly identify the portions of the testimony you want . . ." (emphasis added). (R-936). Further, the judge told the jury that they could "request testimony be read back if it's not too lengthy." (emphasis added). Id.

The chilling effect which the Court's response placed upon the jury's request is evident. It is difficult to

understand why the trial judge would have responded this way when Sweet's testimony was so unequivocally clear. There can be no question but that the ultimate effect of the Court's refusal to answer a crucial question was to ignore a well-founded concern for the credibility of John Sweet. As will be seen infra, the trial court's handling of the jury question was an abuse of discretion.

B. Argument

There can be no question but that the jury's question must be considered an implicit request to have the testimony of John Sweet read back. Indeed, this was the trial court's own conclusion. (See, R-925); (". . .[A]t most this might be treated as a request for testimony.") However, the trial court's refusal to answer the jury's specific request coupled with its conditional and half-hearted offer to permit the re-reading of Sweet's testimony had the cumulative effect of a refusal to answer the specific question.

It is axiomatic in this jurisdiction that the trial court has broad discretion in responding to a jury request. United States v. Quesada-Rosadal, 685 F.2d 1281 (11th Cir. 1983), and cased cited therein. However, a trial judge's discretion is not an unregulated power. Matire v. State, 232 So.2d 209 (Fla. 4th DCA 1970). A trial court's discretion is guarded by the legal and moral conventions that mold the acceptable concept of right and justice. Matire, supra, citing, Albert v. Miami Transit Company, 17 So.2d 89 (Fla.

1944). A trial court, when exercising its discretion, must consider each case upon its individual facts and circumstances. Matire, supra, at 211.

Given the circumstances of the case sub judice, it is apparent that the ultimate consideration was at issue: a capital case where a man's very life was at stake. Accordingly, it was incumbent upon the trial court to respond specifically and accurately and the refusal to do so was tantamount to an abuse of its discretion. A jury has the inherent power to make inquiries of the Court and to phrase them as it pleases, but once they are made it is for the trial Judge to construe them and determine the content and form of the answer to be returned. United States v. De La Torre, 605 F.2d 154 (5th Cir. 1979). The parameters of judicial discretion, in responding to jury questions cannot be better described than by the following words of Justice Cardozo:

> "The judge, even when he is free, is still not wholly free. He is not to innovate at pleasure. He is not a knight errant roaming at will in pursuit of his ideal of beauty or of goodness. He is to draw his inspiration from concentrate to the principal. He is not to yield to spasmodic sentiment, to vague and unregulated benevolence. He is to exercise a discretion informed by tradition, methodized by analogy, disciplined by system, and subordinated to the primordial necessity of order in the social life. Wide enough in all conscience is this field of discretion that remains."

Cardozo, The Nature of the Judicial Process, Yale University Press, 1921. In the case at bar it is apparent that the trial Court "innovated" at its "own pleasure" in refusing to answer the jury's question which bore upon a significant and material issue; one which could have been readily resolved by simply reading Sweet's testimony to them or the relevant portion. See, La Monte v. State, 145 So.2d 889 (Fla. 2d DCA 1962) (trial court found to have committed reversible error in refusing to answer a jury question relating to a material issue).

Assuming, arguendo, that the jury's question was confusing in so far that it did not explicitly ask for a "read back" of Sweet's entire testimony, it was nevertheless construed as such by the trial court. See, eg, De Castro v. State, 360 So. 2d 474 (Fla. 3rd DCA 1978). (Where Court of Appeals determines that the jury's request in essence was that of having testimony read back). As such it was properly within the jury's role, as fact finder, to request the information that it did.

In Furr v. State, 9 So.2d 802 (Fla. 1942), this court addressed a strikingly similar problem. In Furr, the jury announced to the trial court that it disagreed about part of the testimony. The court, in response thereto, "refused to discuss the testimony" with the jury. On appeal, this Court found that the trial court had erred

to the prejudice of the defendant/appellant:

> It was the duty of the trial court when the jury returned into court room after having deliberated in the jury room for several hours and made the announcement to the trial court, "A question came up; some contend that part of the testimony was one thing and some contend another thing", to then ascertain which witness it was whose testimony was the subject of disagreement and, if that witness had any material testimony, to then have the testimony of such witness read to the jury. If all testimony of such witness was irrelevant and immaterial, then the court should have so advised the jury and that they might disregard the same at 803.

Furr has significant parallels and application to the case at bar. Firstly, the jury in Furr, as in the case at bar, did not actually ask for testimony to be read back. However, it was construed as such by this Court in Furr and the trial court in the case instanter. Secondly, the trial court in Furr merely refused to discuss the testimony with the jury, a fairly incomplete and ambivalent answer. In the case at bar, the trial court also failed to give a complete answer to the jury. Indeed, the response by the Court amounted to not only a rejection of their inquiry, but a discouragement to any further inquiries by the petit panel. Appellant respectfully submits that an accused standing trial in a capital murder case in entitled to much more effort by a trial judge, especially when viewed in the light of less than overwhelming evidence and the dubious credibility of John Sweet. This

issue alone should result in the reversal of Kelley's conviction and remand for a new trial.

IV.

THE APPELLANT, WILLIAM KELLEY, WAS DENIED HIS SIXTH AMENDMENT RIGHT TO THE ASSISTANCE OF COUNSEL FOR HIS DEFENSE THROUGH THE NEGLIGENT AND THEREFORE INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL.

A. The appellant was deprived of a fair trial due to the deficient performance by trial counsel.

1. Jurisdiction

Historically, a post conviction claim by a defendant-appellant that he was not benefited with effective assistance of trial counsel could not be raised for the first time on direct appeal. State v. Barber, 301 So.2d 7 (Fla. 1974); Kampff v. State, 443 So.2d 401 (Fla. 4th DCA 1984); United States v. Lopez, 728 F.2d 1359 (11th Cir. 1984). Post-conviction relief under Rule 3.850 of the Florida Rules of Criminal Procedure has been the remedial vehicle pursued when ineffectiveness of counsel is raised and supported by the record of the proceedings. Recently however, this Court held that claims regarding whether a Defendant received ineffective assistance of counsel could be raised, for the first time, on direct appeal. Adams v. State, 456 So. 2d 888, 890 (Fla. 1984). In Adams, the defendant-appellant had filed a Motion to Vacate his conviction and sentence of first degree murder and sentence of death before the trial court. The Circuit Court, Marion County, William F. Edwards, J., denied the Motion and the defendant appealed. The defendant also

filed a Motion for Stay of Execution and Motion for a Writ of Habeas Corpus. This Honorable Court, Adkins, J., held that "these are all matters which could have been raised under direct appeal and which as the trial judge correctly held, were not properly entertained in a 3.850 motion." Adams, supra, citing, MaCrae v. State, 437 So.2d 1388 (Fla. 1983). Although this Court upheld the denial of said motion and thus affirmed the trial court's decision, the jurisdictional issue and precedent set by Adams is ostensibly viable and therefore applicable to the case sub judice.

2. Facts

The Pre-trial Motions in the trial below were to be heard and argued at 11:00 a.m. on January 11, 1984, before Honorable Judge Bentley, Highlands County, Florida. (R-5). William Kuntsler, trial counsel for Kelley, was not present at the designated hour. The transcripts of the proceedings below reflect that Mr. Kuntsler's explanation was that he was "snowed in" at La Guardia Airport in New York City, New York. Id. The trial judge stated on the record that trial counsel had represented to him the day before, via telephone, that his young daughter was ill with a temperature, that there was no one to take care of her, that he could not attend unless a doctor "said there was nothing to it." (R-6). Further, Mr. Kuntsler had arranged

to have Mr. Gombiner, a Florida attorney, to argue in his stead. Mr. Gombiner, as with Mr. Kuntsler, failed to show. Ultimately, the task of arguing the numerous crucial and potentially determinative Pre-trial Motions was entrusted to an attorney by the name of Mr. Schommer. (R-8). The records demonstrate, however, that Mr. Schommer appeared without the intention of arguing any Pre-trial Motions. (R-8). In fact, Mr. Schommer stated to the trial court that he was not prepared to argue the many and complex Pre-trial Motions because he was not familiar with the facts of the case or any research forming the legal basis for these motions. Id.

The trial court announced, prior to Mr. Schommer's statement regarding his unfamiliarity with the facts and preparation, that it was inclined to hold a hearing for the purpose of imposing sanctions against Mr. Kuntsler. (R-7-8). The trial judge was of the opinion that Mr. Kuntsler never intended to appear for the Pre-trial Motions as per the trial court's Pre-trial Order. (R-8).

Finally, the trial judge was notified that Mr. Kuntsler would be content with having an individual by the name of Harvey Brower to argue the motions. As it turned out, however, Mr. Brower was a disbarred Massachusetts lawyer who pupportedly assisted in the research and preparation of the Pre-trial Motions. (R-9):

THE COURT: Mr. Kuntsler, according to a message I received that he had secured a paralegal in Tampa, Florida, who was, I assume, in his view, capable of making these arguments . . . As I understand the message, not directly, he was content for him to handle the matter, except I indicated someone who was not a lawyer was not going to act as a lawyer in this Court. (R-9).

THE COURT: . . . "Is Mr. Kuntsler willing to let the paralegal handle the matters ? Is that correct ?

MR. SCHOMMER: That's true. (R-10).

The judge appropriately refused to allow a disbarred lawyer to argue the Pre-trial Motions, but did permit Brower to assist at counsel table. In desperation, the trial judge inquired as to Schommer's ability to proceed and was promptly advised by Schommer that he was "incapable of handling" the Pre-trial motions. (R-10). [Appellant Kelley, however, promptly objected to Schommer even making an attempt at argument as Kuntsler was his chosen lawyer to present his defense in a case in which the state was seeking the death penalty. (R-11)] It is important to note the discontent of the trial judge with Kelley's counsel and the court's comment concerning the "extreme coincidence of an ill child and a snow storm that affected one flight, one airline only . . .," and that it appeared that trial counsel "isn't on the way down here . . ." and "nobody wants do do anything on these motions." (R-12).

3. The "Allen" charge and failure to object to erroneous instruction.

Following the trial on the merits, the jury began deliberations. Shortly thereafter, the jury announced to the court that they had reached an impass, and in response thereto, the trial court issued a "dynamite" or Allen charge. (R-923-925). Although the Allen charge given by the court did not conform with Florida Standard Jury Instructions and was coercive in nature, trial counsel, for reasons not strategic or tactically apparent, choose not to object. (See point on appeal which addresses the erroneous charge given by the trial court).

4. The jury question.

Following the Allen charge, the jury resumed deliberations. Shortly thereafter, the jury issued a question to the trial court inquiring whether John Sweet had "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). The trial court, without more, refused to answer the jury's question. (R-935). Important to note here is that trial counsel again failed to object to the court's decision not to respond to the crucial inquiry by the jury. Incredible as it may seem, defense counsel took no position and voiced no objection once the trial court responded to the jury question.

As argued previously, the jury retired without examining any testimony and shortly thereafter returned a verdict of guilty.

> "Of all the rights that an accused person has, the right to be represented by counsel is by far the most precious, for it affects its ability to assert any other right he might have."

United States v. Cronic, U.S. 104 S.Ct. 2039, 2044 (1984), citing, Schafer, Federalism and State Criminal Procedure, 70 Harv. L. Rev. 1, 8 (1956). This special value of the right to assistance of counsel explains why "[It] has long been recognized that the right to counsel is the right to the effective assistance of counsel." (empahsis added). Cronic, supra, citing, McMann v. Richardson, 397 U.S. 759, 771, n.14, 90 S.Ct. 1441, 1449, 25 L.Ed.2d 763 (1970). However, the right to the effective assistance of counsel is recognized not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial. 104 S.Ct. at 2046. Generally, only where the challenged conduct has had some effect on the reliability of the trial process will the Sixth Amendment guarantee be implicated. See, United States v. Valenzuela-Bernal, 458 U.S. 858, 867-869, 102 S.Ct. 3440, 3446-3447, 73 L.Ed.2d 1193 (1982).

The conduct of trial counsel in the case at bar had a definite effect on the reliability of the trial process. In several crucial instances, at significant phases of the

trial, defense counsel's conduct was grossly negligent and was of such a nature that it had a significant effect on the integrity of the actual truth-finding process. Although singularly the incidents would not be sufficient grounds to support a claim of ineffective assistance of counsel, the compound affect of the several acts and omissions of trial counsel cannot be said to have had anything but a meaningful and substantial effect on appellant's essential and fundamental right to a fair trial.

The Supreme Court of the United States in a recent opinion by Justice O'Connor has set forth guidelines[1] relating specifically to the challenge of a death sentence on the grounds of ineffective assistance of counsel. Strickland v. Washington, U.S. 104 S.Ct. 252 (1984). Fundamentally, Washington sets forth two components which must necessarily be shown in order to require reversal of a death sentence: "First, the defendant must show that counsel's performance was deficient." Second, the defendant must show that the deficient performance prejudiced the defense." Id.; See, also, Knight v. State, 394 So.2d 997 (Fla. 1981). The

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1/ The court was explicit in noting that its decision did not purport to set absolute standards but only guidelines. 104 S.Ct. at 0269.

Court also stated that "[The] benchmark for judging any claim of ineffectiveness must be the reason why Counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result. 104 S.Ct. at 0269.

It cannot be gainsaid that trial counsel's failure to appear for the purpose of arguing Pre-trial Motions was anything but deficient. Moreover, the record on appeal reflects that trial counsel felt confident in, and was willing to allow, a paralegal who was a disbarred attorney to present argument on numerous Pre-trial Motions. This conduct, by any reasonable and objective standard, would be considered to be deficient and negligent and, at most, deliberate and outrageous. When one considers the proper preservation of error at the trial level and the duty of trial counsel to "protect the record," the inactions of defense counsel in crucial situations (Allen charge, jury question, etc.) clearly result in prejudice to appellant. Put simply: the failure to object creates fears of "waiver." Moreover, as presented in the section under "destruction of evidence," counsel's failure to properly present legal argument denied Kelley of important pre-trial vehicles. It is apparent and clear that trial counsel's conduct from the outset, "so

undermined the adversarial process that the trial could not be relied on as having produced a just result." 104. S.Ct. at 2064.

This court has recently adopted the decision in Washington. See, Clark v. State, slip opinion 64,012 at 1108 (Fla. 1984). In Clark, this court noted that "there has been recent proliferation of ineffectiveness of counsel challenges," Id., and rightfully held that "[a] claim of ineffective assistance of counsel is extraordinary and should be made only when the facts warrant it." Id. Appellant would not urge reversal under Washington and Clark, supra, as well as Knight v. State, supra, if trial counsel's efficiency and ability at Pre-trial Motions were the sole challenged conduct. However, as outlined in the facts set forth above, there exist further facts and circumstances upon which appellant's claim must be upheld as required by Washington and Clark, supra.

In judging attorney performance, the proper standard is that of "reasonably effective assistance, considering all the circumstances." 104 S.Ct. at 2064. Further, the appellant must "show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different." (emphasis added) 104 S.Ct. at 2068. However, the appellant "need

not show that counsel's deficient conduct more likely than not altered the outcome in the case." (emphasis added) Id. Most significantly, this Court "need not decide whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies." 104 S.Ct. at 2069-70. The prejudice suffered by appellant in the case instanter is not merely clear and apparent, but stark and glaring even if regarded by peripheral scrutiny.

It is not apparent that had trial counsel been present at the first day of Pre-trial Motions a different outcome would have resulted. It is further unclear whether trial counsel's improper preparation of the Pre-trial Motions[2] alone would have affected the outcome of the pre-trial hearings. However, had trial counsel properly prepared[3] the motions for this, a Florida State case, (as opposed to a Federal Criminal matter) and been present to argue,

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2/ See, (R-25):

> "Mr. Pickard: Judge I think a lot of these motions are probably motions that are filed in Federal Court."
>
> "The Court: It sounds like it to me. I feel like I'm practicing in another jurisdiction. I just don't understand these motions."

3/ Appellant does not attempt to challenge trial counsel's actions on grounds of improper shategy or even counsel's choice of matters to be argued pre-trial.

the result of the pre-trial proceedings could very well have disposed of the matter prior to the trial on the merits.[4]

Following the trial on the merits the jury began deliberations and issued a note that it had reached an impasse. (R-923). The trial court then issued an "Allen" charge that did not conform with Standard Florida Jury Instructions. (R-923-925). As argued elsewhere in this brief, the "Allen" charge given was coercive and suggestive. Most important, however, is the fact that defense counsel failed to object to the clearly prejudicial instruction given by the court which ultimately coerced the guilty verdict. For reasons known only to them, defense counsel chose not to voice even a perfunctory objection which de minimis could properly perserve the issue for appeal.

Again, appellant does not challenge counsel's action on strategy bases. See, 104 S.Ct. at 2070. Trial counsel's failure to object can only be viewed as negligence and failure to fully advocate a defedant's cause.

When deciding an actual ineffectiveness claim a court must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct. 104 S.Ct. at 2066. At the same time, the court should recognize that counsel is strongly presumed to have rendered adequate assistance and made all

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4/ See the point on appeal, supra, setting forth the case law concerning destruction of evidence by the State, most of which clearly appears to be in Kelley's favor based upon the facts.

significant decisions in the exercise of reasonable professional judgment. Id. Even working under this strong presumption and applying prevailing professional norms, trial counsel's conduct, that which is described above as well as below, fall far below the reasonable standard of conduct generally expected from criminal defense counsel at the particular stages and proceedings herein discussed. See, e.g., A.B.A. Standards for Criminal Justice 4-1.1 to 4-8.6, The Defense Function, (2d Ed. 1980).

Counsel has a duty to use such knowledge and skill as will result in the trial providing a reliable adversarial testing process. See, Powell v. Alabama, 287 U.S. 45 at 68-69, 53 S.Ct. 55 at 63-64 (1932).

But there is more. Trial counsel is responsible for yet another negligent ommission. Following the "Allen" charge the jury returned with a question: whether "John 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). As set forth in the facts above the trial court refused to answer the jury's question. The trial court would only allow the jury to have portions of the testimony read back and only if those portions could be "clearly identified" and if they were "not too lengthy." (R-936

For reasons known only to them, trial counsel did not object to the trial court's action.[5]

Counsel's failure to object at this juncture in the trial can only be painfully viewed as gross negligence. The trial court's actions must be viewed from counsel's point of view at the time of the challenged action. See, Washington, supra, at 2064. Counsel was acting for the defense. Thus his actions must also be viewed in that regard. Id. But for trial counsel's inaction and omissions it is reasonable to assert that the jury would not have returned a guilty verdict.

Further, it is clear that the jury was confused regarding Sweet's many and varied immunities. This is clear by merely examining the portion of the record containing Sweet's cross-examination. (R-611-678). This confusion was compounded by the court's restrictive and conditional response to the jury's request as evidenced by the jury's failure to request the reading of any testimony. See, (R-936-937).

When determining whether defendant was denied effective assistance of counsel in a capital case, the court must consider the totality of the evidence before the judge or jury. 104 S.Ct. at 2069. Here, the jury was suffering under the infirmity of working with a dearth of evidence.

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5 / The law and authority relating to the trial courts error in refusing to answer the jury's question is contained elsewhere in this brief.

The great weight of the state's case was anchored by Sweet's testimony. It is apparent that the jury had very serious doubts concerning the veracity of Sweet's testimony. Thus, the jury rightfully inquired about the incentives and motivations for Sweet's testimony at such an attenuated time.

No trial can be more important or emotional, than that based upon a charge of first degree murder where the state is seeking the death penalty. It is inconceivable that a defense lawyer would, as in this instance, fail to perform at such crucial points in the trial as outlined above. No rational trial strategy whatsoever can explain why defense counsel failed to object to the prejudicial jury instruction in issue and the manner in which the trial court responded to the jury's question concerning immunities given to John Sweet. As such, this Honorable Court is urged to revise the conviction of William Harold Kelley based upon the ineffective representation be received at the trial level.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the Supplemental Brief of Appellant was mailed on this 19th day of January, 1985 to: BARRY HAIGHT, ESQ., 480 Adams Street, Milton, Mass., 02186; KARLA J. STAKER, Assistant Attorney General, 1313 Tampa Street, Suite # 804, Park Traminell Building, Tampa, Florida 33602.

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