IN THE SUPREME COURT OF FLORIDA

CASE NO. 77708

WILLIAM H. KELLEY,

Petitioner,

v.

RICHARD DUGGER [HARRY SINGLETARY],
Secretary, Department of Corrections,
State of Florida,

Respondent.

REPLY IN SUPPORT OF PETITION FOR WRIT OF HABEAS CORPUS

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PRELIMINARY STATEMENT

This reply is being filed in support of Mr. Kelley's petition for writ of habeas corpus. The State has filed a response, pursuant to the Court's Order to Show Cause, and Mr. Kelley replies to the State's contentions herein. The citations employed in this reply follow the same format as that employed in Mr. Kelley's Petition for Writ of Habeas Corpus.

RENEWED REQUEST FOR ORAL ARGUMENT

Petitioner has requested that the Court allow oral argument (see Petition, pp. 5-6). Petitioner respectfully renews that request herein. This case involves significant factual and legal issues, and the opportunity to fully present the issues through oral argument shall aid the Court in reaching a fair and appropriate disposition in this cause.

INTRODUCTION

Mr. Kelley has asserted, and reasserts herein, that the claims presented in this action involve fundamental constitutional error. As this Court's precedents have established, and as the introductory portions of Mr. Kelley's petition relate, fundamental error can be corrected by the Court at any stage of the proceedings. The errors, had they been raised on appeal, could have been corrected then. The errors can be corrected now, and Mr. Kelley respectfully urges that this Court redress the errors in this proceeding.

Mr. Kelley noted in his 3.850 proceedings before the trial court and then on appeal of the denial of Rule 3.850 relief before this Court that a number of the claims now presented

herein could not have been raised on direct appeal since the facts demonstrating the unconstitutionality were withheld by the State and not disclosed until they came to light during the Rule 3.850 proceedings, pursuant to a Public Records Act request.

This Court, however, in the Rule 3.850 appeal proceedings ruled that the claims "should have been raised on direct appeal." Kelley v. State, 569 So.2d 764, 756 (Fla. 1990). This Court, in so ruling, must have considered that there was a duty on appellate counsel to raise the claims, and Petitioner has relied in part on this Court's ruling in presenting the claims in his habeas corpus petition. To now decline to rule on the claims, as the State asks the Court to do, would be to place Mr. Kelley in a procedural trap which would foreclose his being heard before this Court. This Court's interest in fundamental fairness does not countenance the State's argument.

ARGUMENT IN REPLY

(A)

WILLIAM KELLEY WAS DENIED DUE PROCESS AND THE PROTECTIONS GUARANTEED UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO FEDERAL CONSTITUTION AND ARTICLE ONE, SECTION NINE OF THE FLORIDA CONSTITUTION WHEN THE PROSECUTOR SUPPRESSED EVIDENCE FAVORABLE TO THE ACCUSED AND THEN UTILIZED THE WITHHELD INFORMATION TO MISLEAD THE JURY IN CLOSING ARGUMENT

This Court ruled that this claim should have been raised on appeal. Kelley, 569 So.2d at 756. Mr. Kelley continues to maintain that he could not have raised the claim on appeal because he was not aware of the underlying facts until disclosure pursuant to the Florida Public Records Act, prior to the filing of the 3.850 motion, had been obtained. Given this Court's

holding in the 3.850 appeal, Mr. Kelley has submitted the claim in this action, requesting that the Court allow review. It would be unbefitting for this Honorable Court to decline to review the claim -- such a holding would allow the prosecutor who violated Mr. Kelley's rights by withholding information to profit twice from his misconduct.

A. The Prosecutor Suppressed The March 18, 1967, Police Report Involving Kaye Carter And Then Used This Lack of Knowledge By The Defense To Mislead The Jury.

The prosecutor succeeded in suppressing evidence favorable to the accused. In particular, he suppressed the police report of March 18, 1967, wherein the statement of witness Kaye Carter was reported as indicating that the picture that she was shown "looks something like him although she is sure that he was older than the 26 years of his description." Mr. Kelley was born on December 12, 1942, and was thus no older than 23 years old at the time of the offense.

The prosecutor then turned around in his closing, after Ms. Carter had not identified William Kelley at trial (see trial transcript, pp. 679-86) and told the jury:

> First of all, Mrs. Carter hardly knew William Kelley to begin with. She only saw him between October 2nd and October 4th for a short period of time. I think it's very difficult to expect someone who doesn't know a person, who sees them only briefly over a two-day period of time to come into court seventeen and a half years later after that person has changed his appearance and identify him. It's extremely difficult to ask somebody to do that.

(Tr. pg. 866). He went on to say:

> At the time Mrs. Carter and Mrs. Abrams had contact with Mr. Kelley, they didn't know they were going to be required seventeen years later to come in to court to

> identify him. Maybe if they knew that at the time, if somebody back in '66 had come up to them and said, make sure you know what this guy looks like because in 1984 you are going to have to go to court and identify him, maybe they would have made a greater effort to remember him. But they didn't know this was going to come up seventeen years later and they would need to identify him.

(T. 867).

A comparison of what the prosecutor turned over to the defense (see Exhibit A, introduced during 3.850 hearing) and what he withheld (see Exhibit B, also introduced during 3.850 hearing), shows that the withholding of the statement concerning the person in the picture being older than the age in his description was important. Further, Ms. Carter did not make an identification from the picture but only stated "the picture of William Kelley looks something like him, although ...."

The withholding of this critical document allowed the prosecutor to present a misleading argument to the jury, while important evidence which the defense could have used to show that the presentation was untrue, and to formulate an objection, was withheld. Indeed, the 3.850 trial judge held that this document had not been turned over to the defense at trial.

The trial prosecutor had knowledge of the withheld document. He nevertheless utilized evidence and argument which the withheld information demonstrated to be false. The defense was not allowed, because of the withholding, to object to the State's argument or present evidence and argument demonstrating that Ms. Carter was not able to actually identify the picture of William Kelley as the person at the Daytona Inn in October of 1966. The Brady violation was thus used to the State's

advantage. And an error such as this, in a case such as this -- one involving two jury trials before conviction, with the first jury ending up deadlocked and the second jury being provided with an "Allen charge" before convicting -- cannot be deemed harmless.

Exhibit B plainly shows that Ms. Carter did not make an identification of Mr. Kelley from the picture. The State's argument was based on its violation of Brady and its progeny. The actions of the prosecutor in the withholding and subsequent remarks in his closing argument warrant relief.

B. The Prosecutor Suppressed His Knowledge Of The Newspaper Articles In Mr. Kelley's Hometown And Then Utilized The Suppression To Mislead The Jury.

In the 3.850 proceeding Mr. Kelley established that newspaper articles concerning the indictment of Mr. Kelley for the Von Maxcy homicide were published in Massachusetts, in the Brockton Enterprise (see Exhibit D). Materials obtained from the State pursuant to Public Records Act requests during the litigation of the 3.850 motion and after this court originally affirmed the conviction also demonstrated that the trial prosecutor talked to the newspaper reporter for the Brockton Enterprise on the day the indictment was returned (see Exhibit E). This was further corroborated by the testimony of James Harrington at the evidentiary hearing on the 3.850 motion (see 3.850 transcript, July 18, 1988, pp. 180-186). Finally, two lawyers from Boston and one from Florida corroborated that they talked to Mr. Kelley during the time the articles were being published as Mr. Kelley contacted them after he had read the articles (see 3.850 transcript, July 18, 1988, pp. 171-180, 188-

193, and 195-199).

Despite the personal knowledge of the trial prosecutor that there were in fact newspaper articles in Mr. Kelley's hometown newspaper (see Exhibit EE), and the prosecutor's having spoken with Mr. Harrington, and Mr. Harrington's having sent the newspaper articles to the trial prosecutor, and thus the prosecutor's knowing what he would say in his closing to be false, in his closing he told the jury:

> Mr. Kunstler wants you to believe that Mr. Kelley was giving out this information based on things he read in the newspaper. But remember, this was not 1967, this was 1983 in Tampa, Florida. Anything that came out in Boston would have come out 17 or 18 years older. [sic]

(Tr. 877).

The comments were purportedly prompted by the testimony of Special Agent Ross Davis, the agent who arrested Mr. Kelley on June 16, 1983, in Tampa, Florida. What occurred on the night of June 16, 1983, was included as Exhibit L in the 3.850 proceedings. In particular, the exhibit indicates that the knowledge was obtained from the Brockton Enterprise (see also Exhibit D).

Mr. Kelley had read about the charges in his hometown newspaper. The testimony from Special Agent Davis at trial was as follows:

> Q. Did you have any conversation with him about his having read newspapers from his hometown? You recall his conversation of his having read newspapers from his hometown, don't you Mr. Davis?
>
> A. I don't recall right now. It may have been brought up, yes, sir.

(See Exhibit H). The trial prosecutor, with personal knowledge

of the newspaper articles, chose to mislead the jury. The remarks of Mr. Kelley referred to what had been in the newspaper and discussed the main players in the actual offense, John Sweet and Walter Bennett. This simple statement, learned from the press, should not have had any significance and should not have been harmful to Mr. Kelley, if the jury had known the truth, as the prosecutor did. The impropriety warrants relief.

C. The Trial Prosecutor Was Intricately Involved In Mr. Sweet's Obtaining Immunity In Massachusetts And In Florida, But He Misled The Jury Concerning This Issue.

The trial prosecutor also presented a false argument to the jury about the immunity concerning John Sweet. On page 863 of the trial transcript, the prosecutor, in his closing argument, said:

> John Sweet. Mr. Kunstler said, and I wrote this down at the time, that Mr. Sweet had to have or had to give them Kelley in order to get immunity. Well, that's not true. John Sweet did not have to give the police Kelley to get immunity. John Sweet got immunity from Massachusetts on a long list of things. It has nothing to do with the Maxcy case or giving them Kelley on the Florida cases.
>
> He already had his immunity from Massachusetts on loan sharking, whatever that long list of things were. He didn't have to give them Kelley to get immunity. That came up later after he went to Massachusetts and thirty investigators or however many he said were questioning him about all sorts of crimes in Massachusetts.

(See Exhibit L).

The prosecutor knew that this was not true. Nevertheless, he withheld from the defense a Florida Department of Law Enforcement Investigative Report (see Exhibit K) that was plainly Brady material and which demonstrated his argument to be

inaccurate. The report indicated that the prosecutor met with the following people at the State Attorney's Office in Bartow, Florida on March 6, 1981:

1. Robert Kane - District Attorney, Bristol County, Massachusetts
2. Bruce T. Gordon - Trooper, Massachusetts State Police
3. Paul A. Cataldo - Lawyer, Franklin, Massachusetts, representing Sweet in the immunity for the State of Massachusetts cases.
4. Mr. Glen Dardy - Retired State Attorney, Bartow, Florida, tried the defendants in the Von Maxcy case in 1967
5. Roma Trulock - Retired Special Agent, Florida Department of Law Enforcement, case agent in the Von Maxcy investigation.
6. State Attorney Quillian Yancey - Bartow State Attorney's Office
7. Hardy Pickard - Assistant State Attorney, Bartow State Attorney's Office
8. SA Joe Mitchell - Florida Department of Law Enforcement, Tallahassee, Florida

As a result of this meeting, it was agreed the parties would proceed to Boston to interview John Sweet concerning the Von Maxcy homicide (see p. 57, Exhibit K). The meeting took place in the office of the District Attorney, New Bedford, Massachusetts (Id.).

At that time, Mr. Sweet told the authorities about the Von Maxcy murder but upon the advice of his lawyer, he was not interviewed under oath nor was the interview tape recorded.

This interview and meeting occurred on March 12, 1981. Then, on March 13, Mr. Sweet was given immunity by the Commonwealth of Massachusetts (see Exhibit K). Obviously, Mr. Sweet did have to "give" the authorities Mr. Kelley to get immunity. Otherwise, how does one explain the meetings, the discussion of the Von Maxcy case, and then the immunity in Massachusetts. Clearly, the trial prosecutor, who was an

integral player in this entire proceeding, knew this. Mr. Sweet did not have immunity from Massachusetts prior to giving them Mr. Kelley, and it did not come up later, it came up before. Mr. Sweet received immunity from Florida on December 15, 1981 (see Exhibit J). Again, the prosecutor withheld material information and then utilized the withholding to mislead the jury.

Exhibit K was not obtained by the defense until Public Records Request disclosure was allowed, after this Court had affirmed Mr. Kelley's conviction. Without such evidence, the defense could not object or seek to correct the misleading presentation.

The impact of the above remarks in the State's closing argument was devastating. The facts that the defense had relied on to show the jury the character of John Sweet and the explanation of why he inculpated William Kelley were negated in the closing remarks of the prosecutor. The State effectively conveyed to the jury that Sweet had nothing to gain by giving them Mr. Kelley, that Massachusetts had nothing to do with Florida, and that the only motivation for Mr. Sweet to tell this story about William Kelley was his conscience. All this was untrue, as the undisclosed records demonstrated. The impact of these remarks was overwhelming and negated the thrust of the defense against the only evidence that was introduced against Mr. Kelley that actually connected him to the crime.

Without Mr. Sweet there was no case. Both juries had problems with Sweet's credibility. The prosecutor's statement, not utilized in the first trial, allowed the jury to be misled

into believing that Sweet told his story only because his conscience bothered him. The error was prejudicial and relief is appropriate.

(B)

MR. KELLEY WAS DENIED HIS FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS WHEN, AT A RECESS DURING THE DEFENSE CROSS-EXAMINATION, THE PROSECUTOR IMPROPERLY SHOWED TO AND DISCUSSED WITH AN IMPORTANT WITNESS RECORDS WHICH THE DEFENSE WAS USING TO IMPEACH THAT WITNESS

This Court ruled that this claim also should have been raised on direct appeal, since "[t]he basis for Kelley's claim was contained in the trial record." Kelley, 569 So.2d at 756. As that record demonstrates, and notwithstanding the arguments presented in the State's response, trial counsel did assert this error before the trial court. Review of and relief on this claim are appropriate.

The prosecution, in order to bolster Sweet's testimony, called Abe Namia, a private investigator for Mr. Sweet's original lawyer when he was tried for this murder case. Mr. Namia testified that Sweet told him about the Von Maxcy murder and how it had gone down (trial transcript pp. 766-782). However, during cross-examination defense counsel Kunstler tried to impeach Namia by using the files concerning the Sweet trial and the Namia investigation. He had obtained these records from the son of Sweet's attorney. What was clear was that Namia had been testifying inaccurately and, in fact, perjuring himself during his direct examination. He continued in this initially during the cross. However, a recess was obtained, and over the objection of defense counsel, the trial prosecutor and Mr. Namia

conferred with the documents in their possession. Although preparation of one's witness during the other party's cross-examination is improper, Namia was prepared, and covered the impeachment which the defense was prepared to present on the basis of his earlier inaccuracies (trial transcript, pp. 798-99; Exhibit N).

The testimony of Namia was the only corroboration of Sweet. Interestingly, Sweet in his own trial testimony had indicated that he did not know Namia and that he had never admitted to Namia that he had hired someone to kill Von Maxcy (trial transcript, pp. 671-72; Exhibit M). The purpose of the defense's examination was not to prove Sweet was a liar in his trial testimony concerning Namia. The purpose was to use the documents to impeach him. The impeachment was lost when the prosecutor and Namia conferred during the break, Namia reviewed the documents, and Namia prepared to cover his earlier inaccuracies. That Namia was making this whole thing up would have been clearly established, but for Namia's meeting with the prosecutor. Relief is appropriate.

(C)

OTHER CLAIMS

Petitioner relies on the presentation in his Petition.

CONCLUSION

Based on the foregoing and on his Petition for Writ of Habeas Corpus, Petitioner respectfully urges that the Court grant habeas corpus relief and all other and further relief which the Court deems just and proper.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by United States Mail, first class, postage prepaid, to Robert Krauss, Assistant Attorney General, Westwood Building, Seventh Floor, 2002 North Lois Avenue, Tampa, Florida, 33607 this 5th day of August, 1991.

Barry Wilson BW
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