IN THE SUPREME COURT OF FLORIDA

WILLIAM HAROLD KELLEY

Petitioner,

v. CASE NO.: SC08-____

WALTER A. MCNEIL,
Secretary,
Florida Department of Corrections,

Respondent.
_____/

PETITION FOR WRIT OF HABEAS CORPUS OF WILLIAM HAROLD KELLEY

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INTRODUCTION

Charles Von Maxcy, a wealthy citrus grower and rancher from Sebring, was murdered in 1966. See Kelley v. Singletary, 222 F. Supp. 2d 1357, 1358 (S.D. Fla. 2002). William Harold Kelley ("Kelley") has been on Death Row since 1984 for that murder. Kelley has consistently maintained his actual innocence throughout these proceedings.

As explained in further detail below, Kelley was not indicted until 1981, nearly fifteen (15) years after the crime occurred. In the interim, a man named John Sweet was tried twice for the same murder. "Sweet, involved in an illicit love affair with Irene, the victim's wife, planned the murder so that he and she could live together on the Maxcy's inheritance." Kelley v. State, 486 So. 2d 578, 579 (Fla. 1986). Sweet's first trial ended in a mistrial and his second trial resulted in a conviction that was later reversed. See Kelley v. Singletary, 222 F. Supp. 2d 1357, 1359 (S.D. Fla. 2002); Sweet v. State, 235 So. 2d 40 (Fla. 2d DCA 1970).

Thereafter, Sweet was never prosecuted again for his involvement in the crime. Kelley v. State, 486 So. 2d at 579. Instead, years later, despite his obvious (and admitted) role as mastermind in Maxcy's murder, Sweet received immunity in Florida and received immunity from prosecution for other pending criminal charges in Massachusetts at the same time he agreed to

become the star witness against Kelley in Florida. See Kelley v. Singletary, 222 F. Supp. 2d at 1359; Kelley v. State, 569 So. 2d 754, 758 (Fla. 1990); Kelley v. State, 486 So. 2d at 586 (Overton, J., specially concurring)("I am concerned, however, that our system of justice has allowed Sweet, who instigated, planned, and directed this murder, to receive total immunity from prosecution for this murder.").

Once Kelley was finally prosecuted on the sketchy testimony of Sweet, eighteen (18) years after the actual crime took place, his initial trial in January 1984 resulted in a mistrial. See Kelley v. State, 486 So. 2d at 580. When Kelley then was tried a second time, the jury convicted Kelley only after a nonstandard deadlock instruction was given when the jury announced that it had reached an impasse. See Kelley v. State, 486 So. 2d at 584.

Kelley's federal habeas petition was actually granted, see Kelley v. Singletary, 222 F. Supp. 2d at 1367 (S.D. Fla. 2002), by a federal judge who was "not a foe of capital punishment and [had] granted only three § 2254's in thirty-plus years on the District Court bench." Id. at 1367 n.7. That decision details the twists and turns of this case in detail and underscores, as this Court has recognized from the start, that this is "a highly unusual case" with "unusual issues." Kelley v. State, 486 So. 2d at 579.

Indeed, this Court expressed its own hesitancy to affirm this conviction and sentence on direct appeal in the first instance. Writing for the Court, Justice Adkins noted this Court was “extremely hesitant to condone the state’s behavior here” and cautioned that "[w]e wish to emphasize, however, that if even the slightest hint of prosecutorial misconduct was present in the case the result might well be different." Kelley v. State, 486 So. 2d at 581-82.

Against that backdrop, this petition is filed contemporaneously with Kelley’s initial brief in his appeal from a summary denial of his recent Rule 3.851(e)(2) motion. That appellate brief explains that the State only recently disclosed information to Kelley that leads to the conclusion the physical crime scene evidence did exist at the time of Kelley’s trial and was not disclosed to Kelley. In this petition, we emphasize a tragic error regarding physical crime scene evidence that was made long ago, but that has traveled with this case for years on end. That is, this Court made a statement in its 1990 opinion in Kelley’s case, based on an erroneous application of its 1986 opinion on direct appeal, that all physical crime scene evidence was destroyed prior to Kelley’s trial. The State never corrected that misapprehension. With this petition, we hope to set the record straight and finally secure relief for Kelley.

To be clear: This petition should convince the Court that a manifest injustice occurred in the affirmances of the denial of the Rule 3.850 motion in 1990, and that opinion's application of the direct appeal opinion in 1986. That error occurred when this Court concluded, in the absence of any factual determination by the trial court, that the fruits of the crime scene investigation had been destroyed prior to Kelley's trial.[1]

Simply put, there has never been a factual determination that all fruits of the prosecution's crime scene investigation were destroyed prior to Kelley's trial in 1984. Yet, based upon a misapprehension of the record on appeal (left uncorrected by the State), this Court may have assumed that fact in deciding Kelley's direct appeal, see Kelley v. State, 486 So. 2d 578 (Fla. 1986), and said as much in Kelley v. State, 569 So. 2d 754 (Fla. 1990), which affirmed the denial of Kelley's first motion for post-conviction relief. That assumption is wrong, and the State has never produced any proof over all these years, other than mistaken statements made by Kelley's own attorneys, to show otherwise.

[1] The contemporaneously-filed appeal also raises this error as a backdrop to the Brady v. Maryland, 373 U.S. 83 (1963), claim raised there. Kelley believes the entire injustice could be corrected in the appeal with the grant of a new trial or, at a minimum, an evidentiary hearing as to what happened to that evidence, but Kelley files this petition as a precautionary measure, in the event the Court concludes that the issue raised here is dependent on the factual record provided in the Appendix to this original proceeding.

This is not an esoteric exercise. The difference between the evidence that was destroyed pursuant to a 1976 Order of the trial court and the evidence that has never been accounted for is stark and cannot be ignored. The State appears to hope that this Court will find this issue messy, barred, and better left to the past. Yet, a man's life hangs in the balance.

At bottom, the issue is not messy. It is this simple:

> 1. The State got permission in the mid-1970's to destroy a small amount of physical evidence that was retained by the Clerk of Court and was used in the trial of Sweet years earlier (for the crime that Kelley would ultimately be convicted).
>
> 2. The State never received permission to destroy other physical crime scene evidence that indisputably was collected, examined in Tallahassee, and returned to Highlands County.
>
> 3. Kelley's trial judge understood that only a small amount of evidence was destroyed pursuant to court order. But Kelley's trial judge did not know that 30 to 40 pieces of other evidence were returned to investigating agencies from Tallahassee in 1966 and 1967, nor did Kelley's trial attorneys. When Kelley's trial judge determined that the destroyed evidence did not prejudice Kelley's ability to have a fair trial, he was only referring to the evidence from the Sweet trial that was destroyed pursuant to court order.
>
> 4. In Kelley's direct appeal, Kelley v. State, 486 So. 2d 578 (Fla. 1986), this Court may not have understood that only a small amount of evidence was destroyed pursuant to a court order and the trial judge's ruling as to destroyed evidence referred only to that limited and authorized destruction of evidence, in part because Kelley's appellate attorney made a dreadful mistake in briefing (which he believed

> in good faith at the time was correct) by saying that all evidence had been destroyed. This Court, however, only listed the evidence used in Sweet's trial in its opinion.
>
> 5. In Kelley's Rule 3.850 appeal, Kelley v. State, 569 So. 2d 754 (Fla. 1990), this Court looked back at its 1986 decision on direct appeal and concluded that the Court had already decided that that all crime scene evidence had been destroyed prior to Kelley's trial and there was no error in that. As support for this conclusion, it cited affidavits filed by Kelley's trial attorneys that said all the evidence was destroyed. Those affidavits, too, were dreadful mistakes by Kelley's attorneys (which they believed in good faith at the time were correct based on what the State told (or did not tell) them), as they had no way of knowing that there was other evidence not destroyed.
>
> 6. Based on these circumstances, the courts have since assumed that all physical crime scene evidence was destroyed prior to Kelley's trial, despite the complete absence of a factual determination to that effect and despite the fact the only bases for that conclusion are the dreadful mistakes by Kelley's attorneys. The State has no independent corroboration to support the conclusion that all physical crime scene evidence was destroyed prior to Kelley's trial.

Too, this issue is not barred. A review of the record will show that no factual determination has ever been made that all fruits of the crime scene investigation were destroyed prior to Kelley's trial in 1984. It is only because the facts were misapprehended (due in part to mistakes, now fully explained in affidavits filed with this Petition, in Kelley's supplemental brief on direct appeal and inartfully worded affidavits filed in support of his Rule 3.850 Motion) that this Court said as much.

Due process demands that this manifest injustice be corrected. To the extent the direct appeal turned on the erroneous statement in Kelley's appellate brief, his appellate counsel can be found ineffective. Either way, this petition is the proper procedure for gaining relief for Kelley.

Finally, this should not be ignored, brushed aside, or left in the past. The error identified is material; it is not harmless. To the contrary, Kelley's inability to utilize the crime scene evidence that we must presume did actually exist at trial severely prejudiced his ability to show that Sweet was lying, and therefore to have a fair trial.

It is late in the day, but it is not too late to correct this miscarriage of justice. This Court's Seal bears the words "Sat Cito Si Recte." Loosely translated, that means "soon enough if done rightly," and it emphasizes Florida's commitment to getting the right and just result, even if it takes time. Kelley's death sentence should be vacated and his conviction should be reversed.

STATEMENT OF JURISDICTION

This is an original action under Florida Rule of Appellate Procedure 9.l00(a). See art. I, § 13, Fla. Const. This Court has original jurisdiction pursuant to Florida Rule of Appellate Procedure 9.030(a)(3) and article V, section 3(b)(9) of the Florida Constitution.

Article l, section 13 of the Florida Constitution provides: "The writ of habeas corpus shall be grantable of right, freely and without cost. It shall be returnable without delay, and shall never be suspended unless, in case of rebellion or invasion, suspension is essential to the public safety." Habeas Corpus is the Great Writ. See Baker v. State, 878 So. 2d 1236, 1246 (Fla. 2004)(Anstead, C.J., specially concurring)(noting the unique status held by "the writ of habeas corpus, the Great Writ, which is expressly set out in Florida's Constitution. That writ is enshrined in our Constitution to be used as a means to correct manifest injustices and its availability for use when all other remedies have been exhausted has served our society well over many centuries.").

This Court quoted the following observations with approval in State v. Allen, 89 So. 398, 399 (Fla. 1921):

> Taking some samples of many (under the maxim, ex uno disces omnes), the writ of habeas corpus has been fondly termed by eminent persons who used no words lightly, "The dearest birthright of Britons," "the great bulwark of personal liberty," "the greatest writ of the common law," "the great writ of right." It would be of consequence both deep, wide and pernicious to abate by one jot or tittle the sanctity or power of the ancient office of that writ; for a mere reference thereto brings a proud smile to every student of the history of jurisprudence; and it is seemly for those who attend as priests at the altar of justice to well see to it that the flame of the lamp of personal liberty is kept alive, well trimmed and brightly burning.

(Citation omitted.)

Indeed, as Justice Overton noted in his dissent in Harvard v. Singletary, 733 So. 2d 1020, 1025 (Fla. 1999), the Florida Constitution makes the Great Writ unique in Florida, by placing jurisdiction to grant the writ in the hands of each individual justice, as well as in the Court as a whole: "Habeas corpus jurisdiction is basic to our legal heritage. It is so basic that the authors of our habeas corpus jurisdiction made it unique with regard to this Court because it states that habeas corpus jurisdiction may not only be exercised by the entire Court, but it may also be exercised by a single justice. It is the only jurisdictional provision that gives authority to an individual justice."

If, for any reason, the Court determines that this petition cannot be considered under the authorities cited above, Kelley would ask this Court to treat this as a petition under its All Writs powers. See art. V., § 3(b)(7), Fla. Const. In this way, this petition may serve in aiding the Court in its ultimate jurisdiction over the contemporaneously-filed appeal.

RELIEF SOUGHT

Kelley seeks an order vacating his conviction, setting aside his death sentence, and granting such other relief as the Court deems appropriate.

It is notable that, at the time of Kelley's sentencing, the trial judge's alternative to the death sentence was life in prison with possibility of parole after 25 years. See § 775.082 (1), Fla. Stat. (1983) ("A person who has been convicted of a capital felony shall be punished by life imprisonment and shall be required to serve no less than 25 years before becoming eligible for parole unless the proceeding held to determine sentence according to the procedure set forth in s.921.141 results in findings by the court that such person shall be punished by death, and in the latter event such person shall be punished by death.").

Kelley has been on Death Row for close to 25 years already, and has maintained his actual innocence that whole time. Granting this petition would save a man's life, but in no way would it undermine bedrock principles of this Court's jurisprudence, given the strong inference of intentional prosecutorial misconduct (against this Court's caveat on that very point in 1984), the questionable classification of this case as a death case even in 1984, and the fact this case likely would not be a death case in 2008.

In the alternative, and at a bare minimum, this Court's prior rulings concluding that all physical crime scene evidence had been destroyed prior to Kelley's trial should be vacated and evidentiary determinations should be ordered as to whether all

other evidence in fact had been destroyed and, if so, under what circumstances that destruction took place.

Oral argument is requested.

STATEMENT OF THE CASE[2]

Kelley was convicted in 1984 for the 1966 murder of Maxcy. See Kelley v. State, 486 So. 2d 578, 579-80 (Fla. 1986). Prior to indicting and trying Kelley for that crime, the State tried John Sweet twice for Maxcy's murder. See id. at 579. Sweet's first trial ended in a mistrial and his second trial resulted in a conviction that was later reversed. See Kelley v. Singletary, 222 F. Supp. 2d 1357, 1359 (S.D. Fla. 2002); Sweet v. State, 235 So. 2d 40 (Fla. 2d DCA 1970).

Sweet was never tried again for the murder of Maxcy. See Kelley v. State, 486 So. 2d at 579. Approximately five years later, in April 1976, the State Attorney for Highlands County filed a "Petition for the Disposal of Evidence," requesting that the trial court authorize the destruction of certain specified

[2] The facts and circumstances of the crime itself can be gleaned from the numerous published opinions in Kelley's case. See, e.g., Kelley v. Singletary, 222 F. Supp. 2d 1357 (S.D. Fla. 2002), reversed on non-factual grounds, Kelley v. Sec'y for the Dep't of Corr., 377 F.3d 1317 (11th Cir. 2004). An Appendix is included with this Petition, which contains copies of all sources cited. References to the Appendix are in the form "App. [Tab] at [Page]". All emphasis in quotations is supplied unless otherwise noted.

evidence and exhibits from Sweet's trials that were then in the custody of the Clerk of Court. [App. 5].

The basis for the Petition was that Sweet's case was closed. [App. 5]. There is no reason to believe that the Maxcy case investigation as a whole was closed. It was a murder case of a prominent "a wealthy citrus grower and rancher from Sebring." See Kelley v. Singletary, 222 F. Supp. 2d at 1358. This Court explained the situation after Sweet's conviction was reversed as follows: "At that point, the state felt unable to proceed against Sweet due to the lapse of time and the loss of certain witnesses' testimony. Thus, the case lay dormant for over ten years." See Kelley v. State, 486 So. 2d at 579. This Court did not say that the Maxcy case was closed.

Sweet had always been viewed as the mastermind who hired another person(s) to carry out the crime. Former Highlands County State Attorney Glen Darty testified at the 1984 pre-trial hearing in Kelley's case that Kelley was a suspect in 1966 and, at the time of the 1984 hearing, Darty still believed that Kelley had been involved. [App. 6 at 85]. Darty was the State Attorney who petitioned the trial court for entry of the 1976 Order authorizing the destruction of evidence in the Sweet trial. [App. 6 at 83]. The trial court acknowledged at this same hearing that murder is subject to no statute of limitations. [App. 6 at 78]. Kelley's arrest and prosecution

years later confirms that the Maxcy murder case was not closed in 1976 or at any time prior to Kelley's arrest and prosecution.

But because Sweet's case was closed, on April 30, 1976, the Court granted the petition and ordered that evidence destroyed. [App. 5]. This evidence consisted of a small amount of physical evidence recovered from the crime scene and a number of original documentary exhibits, including: (1) a bloody sheet with several rips in it; (2) a section of Mr. Maxcy's shirt; (3) a bullet recovered from the crime scene; (4) a tire belonging to Mr. Maxcy's car that had been slashed several weeks before the murder; (5) car rental agreements; (6) motel records; (7) telephone records; and (8) bank records. [App. 5]; Kelley v. Singletary, 222 F. Supp. 2d at 1359.

The 1976 Order authorizing the destruction of evidence from Sweet's trial makes it clear that only evidence from that trial was addressed. [App. 5]. In that Order, the Highlands County Circuit Court authorizes and directs the Clerk to "dispose of evidence in the above styled cause [State of Florida v. Sweet, Case No. 3002]." [App. 5]. The State has not suggested, nor could it, that all fruits of the crime investigation were destroyed pursuant to that Order.

Before Kelley's 1984 trial, the State never argued or proved that all fruits of the prosecution's investigation of the crime scene had been destroyed. In 1992, the State stipulated

in the federal habeas corpus proceedings that the "physical evidence that was to have been maintained by the Florida Department of Law Enforcement was never presented at Kelley's trials and has not been accounted for." [App. 3 at 14 ¶ 98]. In 2006, the State said that it could not "prove" that all the evidence was destroyed and that, frankly, it did not know what happened to all of the evidence. [App. 4 at 333-34].

In 2006, the State also confirmed that the Clerk of Court in Highlands County would not have maintained evidence that was not introduced in Sweet's trials. That evidence would have been maintained by other agencies. [App. 4 at 291].

It is undisputed that 30-40 pieces of physical evidence that are known to have been returned to various agencies in Highland County in 1966 were never introduced as evidence in Sweet's trials. Because those items indisputably were not used as evidence in the Sweet trial, the 1976 Order, on its face, did not authorize the destruction of those items. [See App. 5].

The argument of Assistant State Attorney Hardy Pickard, in January 1984 and prior to Kelley's first trial, confirms that the amount of evidence destroyed pursuant to the 1976 Order was minimal. Mr. Pickard expressly limited the scope of the evidence that was destroyed pursuant to the 1976 Order:

> What actually happened is the only evidence that was destroyed was the State's exhibits that were introduced into evidence [at Sweet's trial].

> There were some defense exhibits introduced into evidence in Mr. Sweet's trial which were not destroyed and are still in the Clerk's Office. There is a list of all the State's exhibits that were destroyed. I have a copy of it because I got it from the Clerk. It's in Mr. Sweet's file, it would not be in Mr. Kelley's file, the one that does exist.
>
> . . . .
>
> We do know what the evidence is. There is a complete list of the evidence in the Sweet file. The transcript of Mr. Sweet's trial reflects specifically what the items of evidence are. What we're talking about is ninety percent of it is documentary evidence; copies of checks, copies of rental car agreements, copies of motel registrations. There is very little actual physical evidence.

[App. 6 at 47-48, 68-69]. The pre-trial transcript shows that Judge E. Randolph Bentley understood the destroyed evidence was limited to that introduced in the Sweet trial. [App. 6 at 56, 57]. That understanding necessarily informed his ruling that "the destruction of the particular evidence here in question did not prejudice [Kelley's] case, or create an otherwise non-existent reasonable doubt." Kelley v. State, 486 So. 2d at 582; see App. 6 at 80.

There was no mention at that pre-trial hearing case that other physical evidence, not introduced at the Sweet trial, was also destroyed. The State never mentioned that other physical evidence existed. Mr. Kunstler was candid that he was confused about even the destroyed evidence from the Sweet trial and gave

no indication at all that he knew any other physical crime scene evidence existed or had been destroyed. [See App. 6 at 74 ("I also think that I haven't seen any lists of what was destroyed in this situation. I don't know what was destroyed.")]. The transcript shows that Judge Bentley did not make a finding that the other physical evidence from the crime scene investigation was destroyed. [See App. 6 at 56-57 ("We're talking about the exhibits that were admitted into evidence in the [Sweet] trial that were destroyed. . . . it's essentially the Court's exhibits that were offered and entered into evidence.")].

After that pre-trial hearing, the conviction against Kelley was returned in his second trial on that charge, as Kelley's initial trial in January 1984 resulted in a hung jury and mistrial. See Kelley v. Sec'y for the Dep't of Corr., 377 F.3d 1317, 1327 (11th Cir. 2004). In the second trial, the jury reached an impasse and was given a nonstandard instruction:

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

> Therefore, I would ask that you retire at this time and consider whether you wish to consider the matter further.
>
> It has taken us a week to get this far, and I would ask that you retire and consider the case further.

Kelley v. State, 486 So. 2d at 584. After hearing this non-standard deadlock instruction, the jury found Kelley guilty of first degree murder, and recommended that he receive the death penalty by a 8-3 jury recommendation. See Kelley v. Singletary, 222 F. Supp. 2d at 1360. On April 2, 1984, Judge Bentley sentenced Kelley to death. See Kelley v. Singletary, 222 F. Supp. 2d at 1360.

Kelley took a direct appeal. In the midst of that appeal, trial counsel Kunstler withdrew and Barry Haight filed a Supplemental Brief. See Florida Supreme Court Docket in Kelley v. State, Case No. 65134 (Withdrawal allowed 11/29/1984; Supplemental Brief filed 1/21/1985). In support of Kelley's argument that the State's destruction of the real evidence over five years before his indictment deprived him of due process of law and frustrated the preparation of his defense, Mr. Haight wrote in the supplemental brief that all evidence had been destroyed. Mr. Haight now explains in his May 16, 2008 Affidavit that the statement was a mistake, based upon his understanding of the facts and the State's failure to disclose the existence of other physical evidence. [App. 1].

This Court affirmed. See Kelley v. State, 486 So. 2d 578 (Fla. 1986). As to the destruction of evidence point, this Court stated: "The destroyed evidence which appellant claims may have had particular exculpatory value was real evidence, principally taken from the scene of the crime -- a bullet, a bloody bedsheet purportedly used to subdue the victim during repeated stabbings, and a shred of the victim's shirt. Also destroyed were two handwritten statements by Sweet, which appellant urges would have been useful in impeachment." Id. at 580. That list of items refers only to evidence at Sweet's trial that was destroyed with authorization of the trial court. It does not make any reference to other physical crime scene evidence.

On November 20, 1987, Kelley filed a motion to vacate judgment and sentence in his case pursuant to Florida Rule of Criminal Procedure 3.850. Portions of the motion were denied by the trial court on May 27, 1988. The trial court held hearings on July 18-19, 1988 with respect to the remainder of Kelley's claims. The court then denied those remaining claims on August 11, 1988, and this Court affirmed. See Kelley v. State, 569 So. 2d 754 (Fla. 1990).

This Court again addressed Kelley's claim that the State's destruction of material evidence prior to his trial deprived him of his constitutional rights. As to that issue, this Court ruled

that its opinion on direct appeal resolved the destruction of all physical crime scene evidence, albeit *sub silentio*:

> Kelley now argues that certain crime scene evidence was destroyed which was not encompassed within this Court's earlier ruling. However, it appears that many of the items characterized as "additional evidence" were discussed in a supplemental brief in Kelley's original appeal. Thus, while our opinion did not specifically discuss such additional evidence, it is clear that the issue was decided adversely to Kelley.

Kelley v. State, 569 So. 2d at 756. This Court also noted that "in affidavits submitted in support of the motion for postconviction relief, Kelley's trial counsel admitted knowing that the fruits of the police investigation had been destroyed." Id. Barry Wilson was Kelley's post-conviction counsel at that time, and the attorney who prepared those affidavits for trial counsel to execute. In his June 4, 2008 Affidavit, Wilson explains that those Rule 3.850 affidavits were mistaken, due to the failure of the State to disclose to Kelley that other evidence, apart from the evidence introduced at Sweet's trial, even existed. [App. 2].

In the years that followed, this Court denied state habeas relief (not based on any issues raised here). See Kelley v. Dugger, 597 So. 2d 262 (Fla. 1992). And the District Court for the Southern District of Florida granted Kelley's petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254, finding prosecutorial misconduct. Kelley v. Singletary, 222 F. Supp. 2d

at 1363 ("This case presents many incidences of prosecutorial misconduct. Hardy Pickard, Assistant State Attorney, has a habit of failing to turn over exculpatory and impeachment evidence.").

On January 28, 2003, the State of Florida filed an appeal to the Eleventh Circuit Court of Appeals. Kelley v. Sec'y for the Dep't of Corr., 377 F.3d at 1333. On July 23, 2004, the Eleventh Circuit reversed the lower federal court's grant of habeas relief and reinstated Kelley's conviction. Id. at 1369. In doing so, the Eleventh Circuit did not specifically negate the factual findings of prosecutorial misconduct, instead determining that no evidentiary hearing was warranted in the first instance and that the prosecutorial misconduct did not cause prejudice. See id. at 1354-69.

On January 17, 2006, Kelley petitioned, pursuant to Florida Rule of Criminal Procedure 3.853, for post-conviction DNA testing of physical evidence collected by law enforcement. That motion affirmatively requested, among other things, pre-hearing discovery to locate the DNA evidence that should be tested. Kelley's Motion for DNA Testing was denied on June 29, 2006. This Court affirmed. Kelley v. State, 974 So. 2d 1047 (Fla. 2007).

In May 2007, Kelley filed a successive Rule 3.851(e)(2) motion for postconviction relief, based upon an alleged Brady v.

Maryland, 373 U.S. 83 (1963), violation that only came to Kelley's attention in May 2006, during the litigation of the Rule 3.853 DNA proceeding. [App. 15].

On December 20, 2007, the Rule 3.851 motion was denied. [App. 17]. In its Order denying relief, the trial court cited this Court's determination in 1990, see Kelley v. State, 569 So. 2d 754 (Fla. 1990), that evidence beyond that introduced in Sweet's trial was in fact destroyed before Kelley's trial in 1984.[3] [App. 17 at 4-5]. The appeal of that Order is being briefed at the same time this habeas petition is filed.

REASONS FOR GRANTING RELIEF

1. A Manifest Injustice Has Occurred.

A manifest injustice has occurred. And that injustice has perpetuated itself for years as Kelley has sought relief for the crime that he consistently has maintained he did not commit. The error is simply stated: Although there never has been an evidentiary finding that physical crime scene evidence other than that introduced in Sweet's trial was in fact destroyed prior to Kelley's trial, this Court stated that was so in 1990. See Kelley v. State, 569 So. 2d 754 (Fla. 1990) (applying a *sub silentio* conclusion in the direct appeal opinion).

[3] The trial court also noted its prior determination, in the Rule 3.853 DNA proceeding, that all evidence was destroyed by the time that Rule 3.853 motion was denied. Although Kelley disagrees with that conclusion, that conclusion is inapposite to a determination as to the status of that evidence in 1984.

In reaching that unsupported conclusion, this Court pointed to nothing in the record other than mistaken statements by Kelley's then attorneys. The affidavits filed with this petition make clear that those statements were erroneous and incompetent. [See App. 1 & 2]. Moreover, the affidavits make clear that Kelley's attorneys did not have personal knowledge of what actually happened to the crime scene evidence, but rather they only had knowledge of what Kelley was told (or not told) by the State. The statements were the direct result of the State failing to disclose that there were in fact many fruits of the crime scene investigation that were collected, examined, and returned to Highlands County investigating agencies other than the evidence used in Sweet's trial. [App. 1 & 2].

The State has never offered any evidentiary support for this Court's statement (and did not correct then or since). Indeed, to add insult to injury, the State routinely points to the mistaken statements by Kelley's attorneys as its only support for this Court's legal conclusion (not based on a factual finding by a trial court) that all physical crime scene evidence was destroyed prior to Kelley's trial.

To be clear: There is no dispute that the crime scene investigation generated more physical evidence than was introduced at Sweet's trial. There is no dispute that many pieces of physical evidence (about 30 to 40 items) were sent to

Tallahassee for testing and then were returned to local investigating agencies in Highlands County in 1966 and 1967. There is no dispute that the Clerk of Court only maintains the actual pieces of evidence that are introduced in a trial. Indeed, the State itself made this point in the Rule 3.853 DNA proceeding when it asserted that all evidence not introduced at trial is maintained by the local investigative agencies, not the Clerk of Court. [App. 4 at 291]. And there is no dispute that the 1976 Order authorized only the destruction of evidence introduced at Sweet's trial. [See App. 5].

To be sure, the State now has taken a position as to the destruction of the other evidence (the evidence not introduced at Sweet's trial) by the time of Kelley's trial in 1984. The State argued, for the first time, in responding to Kelley's Rule 3.851 motion in 2007, as follows: "let the record be clear that it is the State's position that this evidence was destroyed prior to Kelley's 1984 trial." [App. 16 at 15]. That representation means that the State now asserts that the evidence was not lost, not misplaced, not unaccounted for, but "destroyed." Other than pointing to Kelley's supplemental brief on direct appeal and the two affidavits his attorneys filed in support of his original Rule 3.850 motion, however, the State has never presented any proof that this is so, or of the

circumstances surrounding the supposed destruction of that critical evidence.

Rather, the State has been hither and yon over the years on this issue. Before Kelley's trial in 1984, the State never argued or proved that all fruits of the prosecution's investigation of the crime scene had been destroyed. In 1992, the State stipulated in the federal habeas corpus proceedings that the "physical evidence that was to have been maintained by the Florida Department of Law Enforcement was never presented at Kelley's trials and has not been accounted for." [App. 3 at 14, ¶ 98]. In 2006, the State argued that it could not "prove" that all the evidence was destroyed and that, frankly, it did not know what happened to all of the evidence. [App. 4 at 333-34].

In contrast, we do know that the existence (or destruction) of this other evidence was never revealed to Kelley's attorneys or the trial court at the pre-trial hearing on the effect of the destruction of evidence in 1984. [See App. 6 at 47-105]. Kelley urges the Court to read the entire transcript of that hearing. [See App. 6]. It is obvious from that transcript that the State purposefully sought to limit the discussion of destroyed evidence to the "very little actual physical evidence" that was admitted at Sweet's trial. [App. 6 at 68-69]. The trial court

also acknowledged that only the physical evidence admitted at Sweet's trial was at issue. [App. 6 at 56, 57].

What is more striking about the pre-trial transcript, however, is the fact that Kunstler, Kelley's trial attorney, (i) makes clear that he is confused about the evidence in general, (ii) gives no indication that he knows anything about physical crime scene evidence that was not used in the Sweet trial, and (iii) says in fact he has never seen a list of the evidence destroyed from the Sweet trial. [See App. 6 at 74].

It is equally clear that the trial court does not know that there is other physical evidence from the crime scene investigation that was not admitted at Sweet's trial. Not only does the transcript reveal this understanding, but the trial court's later Allen charge verifies it when the trial court tells the jury that "[t]here is no reason to believe there is any more evidence or clearer evidence could be produced on either side." Throughout the 1984 hearing, the State kept silent about the other fruits of the crime scene investigation and the State again stayed silent when this jury charge was read.

The trial court's pre-trial ruling that Kelley was not prejudiced by the destruction of the evidence was obviously limited to the evidence that was introduced at Sweet's trial and thereafter destroyed pursuant to the 1976 Order. In fact, based

only on the text of its 1986 opinion, this Court believed that same limited amount of evidence was at issue on direct appeal when Kelley challenged the destruction of evidence. Indeed, this Court expressly listed the evidence it was addressing, and everything listed was evidence introduced at Sweet's trial:

> The destroyed evidence which appellant claims may have had particular exculpatory value was real evidence, principally taken from the scene of the crime--a bullet, a bloody bedsheet purportedly used to subdue the victim during repeated stabbings, and a shred of the victim's shirt. Also destroyed were two handwritten statements by Sweet, which appellant urges would have been useful in impeachment.

Kelley v. State, 486 So. 2d 578, 580 (Fla. 1986). This Court did not mention the other 30 to 40 pieces of evidence that were collected during the crime scene investigation.

Yet, in 1990, when this Court addressed Kelley's argument that other evidence was destroyed, the Court read its earlier opinion as encompassing, *sub silentio*, all of that additional evidence, as well:

> Kelley now argues that certain crime scene evidence was destroyed which was not encompassed within this Court's earlier ruling. However, it appears that many of the items characterized as "additional evidence" were discussed in a supplemental brief in Kelley's original appeal. Thus, while our opinion did not specifically discuss such additional evidence, it is clear that the issue was decided adversely to Kelley. Further, in affidavits submitted in support of the motion for postconviction relief, Kelley's trial counsel admitted knowing that the fruits of the police investigation had been destroyed.

Kelley, 569 So. 2d at 756.

That is a manifest injustice. The statement in Kelley's supplemental brief was a mistake, as verified by Haight's Affidavit. [App. 1]. Specifically, Haight explains the following:

> In preparing for proceedings before the Supreme Court, I communicated with William Kunstler, Mr. Kelley's lead trial attorney, who informed me he had been repeatedly advised by prosecutors that all physical evidence, exhibits and crime scene evidence, related to the murder of Charles von Maxcy, had been destroyed prior to Mr. Kelley's trial by court order.

[App. 1 at ¶3]. The State did not correct this misapprehension by Kelley's appellate attorneys in 1986 or 1990 (or ever). See Boca Burger, Inc. v. Forum, 912 So. 2d 561, 571 (Fla. 2005) ("Appellate courts, too, must manage heavy caseloads. They depend on counsel to accurately state both the facts and the applicable law. Therefore, regardless of trial counsel's conduct or representations, appellate counsel (who often is separate from trial counsel) has an independent ethical obligation to present both the facts and the applicable law accurately and forthrightly.").

The Wilson Affidavit establishes that the statements in the Rule 3.850 affidavits were also mistaken. [App. 2]. In particular, he explains why he drafted affidavits for Kunstler and Edmund to execute with absolutist language in them:

> I understand that my statements were subsequently interpreted to mean that every bit of evidence in the case had been destroyed. Kunstler, Edmund, and I would not have personal knowledge that all the evidence was destroyed. We knew only what we were told (or not told) by the prosecution. Although prepared in good faith and to the best of my knowledge at the time, the affidavits and reply brief were mistaken to the extent they indicated personal knowledge that all fruits of the crime scene investigation were destroyed prior to Mr. Kelley's 1984 trial.

[App. 2 at 1-2 ¶5]. Of course, there is a difference between personal knowledge of what a person has been told (or not told) and personal knowledge of the actual underlying factual basis. The Rule 3.850 affidavits may have been inartful in their wording. But inartful wording cannot be the crux of a capital case, especially when only the State could have that knowledge and it did not disclose it to Kelley's attorneys, leading them to believe that all physical crime scene evidence had been destroyed prior to Kelley's trial.

There is no way Kelley's trial attorneys could have known that all evidence was destroyed, especially when the State did nothing to correct that misapprehension. In sum, there has never been an evidentiary finding that all physical crime scene evidence was destroyed prior to Kelley's trial, and the State has never put forth any proof of such destruction, other than by pointing to these statements by Kelley's own attorneys.

In fact, there is no dispute that the other physical

evidence collected in the crime scene investigation was returned to local Highlands County authorities in 1966 and 1967 by the Florida Sheriff's Bureau Crime Laboratory in Tallahassee. A presumption of regularity attaches under Florida law to establish that the evidence existed in 1984, unless the State can account for it and prove otherwise.

Simply put, it must be presumed that the evidence was maintained by the officers of the submitting authorities when it was returned to them by the Florida Sheriff's Bureau Crime Laboratory in 1966 and 1967. There was no court order in place then (or ever) allowing for the destruction of that other evidence. Absent proof to the contrary, and there is none, the presumption must be conclusive that the evidence still existed in the hands of the submitting authorities at the time of Kelley's trial. See Robinson v. State, 325 So. 2d 427, 429 (Fla. 1st DCA 1976)("[W]here no evidence indicating otherwise is produced, the presumption of regularity supports the official acts of public officers, and the courts presume that they have properly discharged their official duties.").

Finally, the manifest injustice caused by the misapprehension that all other evidence was destroyed prior to the 1984 trial led to that error being compounded. Specifically, based upon a misapprehension of the record in 1990, this Court concluded as follows:

> The destruction of evidence in this case did not deprive Kelley of due process of law. See Arizona v. Youngblood, 488 U.S. 51, 109 S. Ct. 333, 102 L. Ed. 2d 281 (1988)(unless defendant shows bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process).

Kelley, 569 So. 2d at 756. Of course, this ruling assumes that (i) all other evidence was in fact destroyed; and (ii) if destroyed, that all evidence was destroyed pursuant to the 1976 Court Order. There has never been an evidentiary determination as to the first assumption, as explained above, and the second assumption is indisputably wrong.

Kelley believes there is enough record support for this Court to infer that the State intentionally suppressed this other evidence (and any information about the other evidence) or, in the alternative, intentionally destroyed it. First, at Kelley's pre-trial hearing in 1984 on the destruction of evidence, the State did not volunteer that there was other physical crime scene evidence retrieved from the Maxcy crime scene and sent to Tallahassee for testing in 1966.

Second, a handwritten State witness list for the Kelley trial lists Broward Coker, Robert McCoy [sic], and Roma Trulock as potential witnesses in Kelley's trial. [App. 7]. This list indicates actual knowledge by the State Attorney of the specific individuals to whom the other evidence was returned in 1966 and

1967.[4] [Compare App. 7 with App. 15 at Record Pages 063-067].

Third, in granting federal habeas relief, Judge C. Roettger, Jr. has reviewed this record and concluded that "[t]his case presents many incidences of prosecutorial misconduct." Kelley v. Singletary, 222 F. Supp. 2d at 1363. Judge Roettger specifically found that "Hardy Pickard, Assistant State Attorney, has a habit of failing to turn over exculpatory and impeachment evidence." Id. He noted that "[i]n another capital murder case, Circuit Judge Barbara Fleischer, sitting by designation by the Florida Supreme Court as a temporary judge of the Tenth Circuit, ordered a new trial for a defendant because Assistant State Attorney Hardy Pickard withheld impeachment materials from the defense. State of Florida v. Melendez, No: CF-84-1016A2-XX (Tenth Judicial Circuit of Florida), slip op., filed December 5, 2001." Id. at 1363 n.3 (a 2001 Order setting aside a 1984 conviction).[5] These findings, which the Court did not have in 1986 or 1990, shed new light on the Court's conclusion as to whether "even the slightest hint of prosecutorial misconduct was present in the case." Kelley v.

[4] Undersigned counsel believes in good faith that this document was obtained by Kelley's then attorneys in earlier stages of post-conviction discovery in this case from the pre-trial files of the State Attorney's Office.

[5] Although the District Court's ultimate rulings in Kelley's case were reversed by the Eleventh Circuit, see Kelley v. Sec'y for the Dep't of Corr., 377 F.3d 1317 (11th Cir. 2004), these particular factual findings were never specifically negated.

State, 486 So. 2d at 582.

At the very least, however, this Court's prior rulings should be vacated and evidentiary determinations should be ordered as to whether all other evidence in fact has been destroyed and, if so, under what circumstances that destruction took place.

2. The Law Allows this Court to Rectify a Manifest Injustice.

This Court should use this opportunity to correct this manifest injustice. See State v. Owen, 696 So. 2d 715, 720 (Fla. 1997) (holding that the State Supreme Court may displace an erroneous ruling when reliance on the previous decision would result in manifest injustice); Strazzulla v. Hendrick, 177 So. 2d 1, 4 (Fla. 1965) (holding that an exception to the general binding rule of "law of the case" should always be made if strict adherence to the rule would result in "manifest injustice"); see also Mills v. Moore, 786 So. 2d 532, 541 (Fla. 2001)(Anstead, J., dissenting)("In the past this Court has been quick to accept responsibility for its mistakes, especially if blind adherence to a flawed decision will result in a manifest injustice and the taking of a human life."); Lago v. State, 975 So. 2d 613 (Fla. 3d DCA 2008) (habeas corpus granted where manifest injustice has occurred); Ross v. State, 901 So. 2d 252 (Fla. 4th DCA 2005)(habeas corpus relief granted, despite law of the case doctrine, where manifest injustice had occurred).

Kelley's due process rights are at stake. See U.S. Const. amend. XIV; art. I, § 9, Fla. Const.

Moreover, the relief could also be framed in terms of ineffective assistance of appellate counsel. See Marshall v. Crosby, 911 So. 2d 1129, 1131 (Fla. 2005) ("The issue of appellate counsel's ineffectiveness is appropriately raised in a petition for writ of habeas corpus."). To the extent this Court's 1990 opinion relied upon the mistaken statement in the supplemental brief filed by Kelley's counsel on direct appeal, that mistake would satisfy the elements for habeas relief for ineffective assistance of appellate counsel, which are: "whether the alleged omissions are of such magnitude as to constitute a serious error or substantial deficiency falling measurably outside the range of professionally acceptable performance and, second, whether the deficiency in performance compromised the appellate process to such a degree as to undermine confidence in the correctness of the result." Id.

3. The Suppressed or Destroyed Evidence is Material.

This petition raises a material issue. The manifest injustice identified cannot be deemed harmless. Indeed, it is difficult to imagine any more important evidence to a defendant claiming actual innocence than the location and disposition of the actual physical evidence collected by the State from the crime scene and related locations. That is what is at issue

here. The State had 30-40 pieces of physical evidence sent to the Florida Sheriff's Bureau Crime Laboratory in Tallahassee and returned to Highlands County, but it suppressed or destroyed that evidence.

Kelley's defense team would have shown the jury the sharp contrast between (i) the very bloody objects obtained at the crime scene, including Maxcy's clothes, Maxcy's handkerchief, bloodied carpets and hallways runners and (ii) the absence of blood evidence connecting Kelley to the crime.

This is critically important. Sweet claimed the killers left the crime scene in the victim's car [App. 18 at 593-94]. Therefore, all evidence taken from the car, scrapings from the outside left car door, brake pedal, floor mat, car keys, metal door sill, left door window channel, tire and steering wheel should have yielded fingerprints, footprints, blood specimens or other specimens. Deputy Murdock testified, however, that no blood whatever was found in Maxcy's car despite the absence of any evidence that the killer(s) had washed off blood before leaving Maxcy's house. [App. 18 at 496, 497].

In the light of Deputy Murdock's testimony, the evidence would have provided a tangible, palpable way to impeach Sweet about his self-serving version of events. It would have been absolutely clear from even a cursory look at the evidence at issue that Sweet's version of events was a lie and that Kelley

could not have engaged in a violent, bloody murder and then driven away in a spotless car. Kelley's defense attorneys would not have been reduced to making a semblance of this argument with a few lines uttered in closing argument.

CONCLUSION

This has always been a "highly unusual" case with "unusual issues." The admitted mastermind of the crime had his conviction reversed and received immunity from prosecution in Massachusetts for various crimes at the same time he agreed to be the star witness against Kelley. The first trial against Kelley was mistried. The second jury was charged with an Allen charge that is now known to be improper. The jury ultimately recommended the death sentence with only a 8-3 vote. This Court affirmed the death sentence with hesitation, noting that it was "extremely hesitant to condone the state's behavior here" and emphasizing that "if even the slightest hint of prosecutorial misconduct was present in the case the result might well be different." Kelley v. State, 486 So. 2d at 581-82).

Kelley seeks an order vacating his conviction, setting aside his death sentence, and granting such other relief as the Court deems appropriate.

Dated: June 9, 2008

Respectfully submitted,

CARLTON FIELDS, P.A.

_____

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Petition for Writ of Habeas Corpus and accompanying two-volume Appendix has been furnished by Federal Express to the following persons on this 9th day of June 2008.

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_____
Sylvia H. Walbolt

CERTIFICATE OF COMPLIANCE

I HEREBY FURTHER CERTIFY that the type size and style used throughout this Petition is 12-point Courier New, and that this Petition fully complies with the requirements of Florida Rules of Appellate Procedure 9.142 and 9.210.

_____
Sylvia H. Walbolt