IN THE SUPREME COURT OF FLORIDA

WILLIAM HAROLD KELLEY,

Petitioner,

v. CASE NO.: SC08-1083

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

Respondent.
_____/

REPLY IN SUPPORT OF PETITION FOR WRIT OF HABEAS CORPUS OF WILLIAM HAROLD KELLEY

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REPLY ARGUMENT

A manifest injustice has occurred in this case. Only this Court can rectify this injustice.

In the petition, the following simple basis for Petitioner William Harold Kelley's ("Kelley") claim for relief was set forth:

> 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.

Petition at 5-6.

A careful reading of what the State says (and fails to say) in its Response reveals this is largely uncontested. A close reading of the Response shows the following, tracking the order in the outline above.

First, the State acknowledges that the 1976 Court Order only authorized the destruction of exhibits that were introduced in the trial of John Sweet. See Response at 7. The State also admits that "a number of items of physical evidence were

collected as part of the police investigation into Maxcy's murder in 1966 which were not admitted into evidence at John Sweet's trials, and therefore were not encompassed in the court order authorizing the destruction of the Sweet exhibits." Response at 7. The State never asserts that this other physical evidence was destroyed with authorization of a court.

Second, the State never disagrees that Judge Randolph Bentley's ruling on Kelley's motion to dismiss the indictment in 1984 was based only on the evidence that was destroyed pursuant to the 1976 Court Order. In particular, the State never disagrees that, when Judge Bentley made a factual finding that the destroyed evidence did not prejudice Kelley's ability to have a fair trial, he was referring only to the evidence from the Sweet trial that was destroyed pursuant to the 1976 Court Order.

The State never argues that Judge Bentley even knew of the other fruits of the crime scene investigation at the 1984 hearing. Likewise, it never argues that Kelley's attorneys knew of the other fruits of the crime scene investigation at the 1984 hearing, during Kelley's trials, or at any time prior to the direct appeal. The State never asserts that there has ever been a factual finding by a trial court that the other fruits of the crime scene investigation were actually destroyed prior to

Kelley's trial or, if they were, that such destruction was not prejudicial to Kelley.

Third, the State never disputes that this Court appears to have misapprehended the scope of Judge Bentley's pre-trial Order, in both 1986 and 1990. See Kelley v. State, 486 So. 2d 578 (Fla. 1986); Kelley v. State, 569 So. 2d 754 (Fla. 1990). In the direct appeal, Kelley's appellate attorney did make a dreadful mistake in briefing (which he believed in good faith at the time was correct) by saying that all evidence had been destroyed. But that is not what Judge Bentley ever found. In fact, it is unclear what fruits of the crime scene investigation this Court actually considered in 1986, as it only listed the evidence used in Sweet's trial in its opinion.

Whatever it considered, 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.

Fourth, as to this Court's 1990 opinion on Kelley's Rule 3.850 motion, the State never disputes that this Court looked back at its 1986 opinion and determined that it, *sub silentio*, encompassed all fruits of the crime scene investigation:

> 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. Indeed, the State never disagrees with Kelley's premise that 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. This Court could not have made such a determination in the first instance in 1986, or later in 1990. Nevertheless, when the Court made its ruling in 1990, the State did nothing to bring this lack of evidentiary support to the Court's attention.

Instead, the State attempts to shield itself with the affidavits filed by Kelley's two trial attorneys in support of his Rule 3.850 motion for the proposition that all evidence was destroyed prior to Kelley's 1984 trial. The State never explains how that evidence was allegedly destroyed, why it was allegedly destroyed, or under what authority it was allegedly destroyed. Indeed, its sole support for saying that it was actually destroyed is the word of Kelley's attorneys. That is circular, as Kelley's attorneys would have learned of any such destruction of evidence from the State, which was the custodian

of the evidence returned from the crime laboratory in Tallahassee to specific individuals in 1966 and 1967.

In this respect, it is critical to note that the State points to nothing to show that Kelley's attorneys even knew during Kelley's two trials that other crime scene evidence, apart from the evidence destroyed under the 1976 Court Order, even existed. The State says that Kelley's attorneys knew of that other evidence "[a]t least by the time his direct appeal was pending," Response at 9, but never points to anything to show that Kelley's attorneys had that information during Kelley's trials.

The transcript of the 1984 pre-trial hearing is very instructive in this regard. At that hearing on a motion to dismiss the indictment due to destruction of evidence, Kelley's attorney William Kunstler is obviously confused about what physical evidence ever existed and what physical evidence was destroyed. The State did nothing to explain that other fruits of the crime scene investigation existed apart from the Sweet trial evidence. Instead, Assistant State Attorney Hardy Pickard stayed silent on that crucial point.

At the hearing, Kunstler made the following revealing comments, which did not prompt Pickard to explain that other physical evidence was collected, examined, and returned to specific individuals in Highlands County:

(a) Kunstler explained his view of what the State had done: “We’ll destroy all the evidence, every statement we have, all but the defense exhibits.” [App. 6 at 54].

(b) “It would be a travesty of justice if Mr. Kelley had to go to trial without the material that might totally exculpate him. I can’t get it. I don’t know what’s in there.” [App. 6 at 55].

(c) “I’m not even sure what remains of the State Attorney’s file. I have no evidence of that whatsoever, whether they have all the statements they took at the time, whether they have been destroyed or not.” [App. 6 at 57].

(d) “We don’t know what the evidence was. We can just guess.” [App. 6 at 61].

(e) “Certainly you can’t say that there’s nothing that would help him, because none of us have seen it.” [App. 6 at 66].

(f) “I think this is a rather unique case. I never had an experience like this in my practice. I’m not sure the Court has ever had this kind of experience where you have a late prosecution of a murder case so widely spread in time, and secondly, where the evidence has been destroyed.” [App. 6 at 73].

(g) “I also think that I haven’t seen any lists of what was destroyed in this situation. I don’t know what was destroyed.” [App. 6 at 74].

Kunstler was surely confused. Yet Pickard refused to volunteer information about the other crime scene evidence at the hearing. He had tactical reasons to stay silent, of course, as telling Kunstler of the other physical evidence could have

led to either (i) Kunstler tracking down that evidence from the specific individuals to whom it was returned, for use at trial; or (ii) Kunstler asking Judge Bentley to determine whether all physical evidence was actually destroyed and whether that magnitude of destroying evidence (far greater than what Judge Bentley did rule on) was prejudicial to Kelley's case.[1] Kelley was deprived of both opportunities because Pickard stayed silent. In these circumstances, an inference of intentionality is appropriate.[2]

The affidavits later filed by Kelley's trial attorneys in support of his motion for post-conviction relief (and relied upon by the State and this Court) only underscore the confusion those attorneys faced because of what the State did (and did not) tell them. The affidavits are incompetent to serve as the

[1] It strains credulity to assume, as the State certainly does, that Kunstler knew about the other physical evidence in 1984, knew that it had all been destroyed without any court authorization, and yet chose to move to dismiss the indictment based only upon the authorized destruction of the evidence from the Sweet trial. That just doesn't make any sense.

[2] Of course, this Court's previous analysis under Arizona v. Youngblood, 488 U.S. 51 (1988), must be revisited, as that determination was made without any factual finding that all evidence was indeed destroyed or, if it was, the circumstances of that destruction. See Kelley v. State, 569 So. 2d at 756. Apart from any destruction of evidence issue, Pickard's apparent misconduct at the 1984 pre-trial hearing also implicates the Brady v. Maryland, 373 U.S. 83 (1963), violation at issue in the accompanying appeal of Kelley's Rule 3.851 motion. See Kelley v. State, Case No. SC08-608.

only evidentiary support for a determination that all evidence was destroyed prior to Kelley's trial.

All of the foregoing demonstrates that the State does not confront the simple premises that support Kelley's claim for relief in its Response. We now turn to the arguments the State does make.

Kelley's Petition Is Timely And Proper

The State says the petition is filed "nearly nineteen years too late" and is successive. Response at 3. Not true. The rule the State cites for requiring the simultaneous filing of the habeas corpus petition and the initial motion for post-conviction relief was not even in existence at the time Kelley filed his Rule 3.850 motion two decades ago. By the time the rule the State cites was enacted, Kelley was already beyond the point in time that he could have complied with it. The State's argument amounts to an unconstitutional abrogation of "the Great Writ."

Moreover, this petition is timely filed in conjunction with the initial brief in Kelley's Rule 3.851 appeal. See Kelley v. State, Case No. SC08-608. As explained there, the suppression of evidence disposition receipts until May 2006 allowed this entire case to proceed on the wrong assumption that all physical crime scene evidence was destroyed prior to Kelley's trial in 1984. Now it is clear that other physical crime scene evidence

was returned to specific individuals in Highlands County prior to Kelley's trial in 1984 and that the presumption of regularity, see Robinson v. State, 325 So. 2d 427 (Fla. 1st DCA 1976), attaches to establish that such physical evidence still existed at the time of trial. In these circumstances, this petition could not have been filed any earlier.

Thus, this petition is filed to demonstrate to the Court that a manifest injustice occurred in the affirmance 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. Only this Court can correct its own decisions. Accordingly, this original proceeding is proper.[3]

The Ineffective Assistance Of Counsel Claim Is Not Barred

The State also argues that Kelley's assertion of ineffective assistance of counsel is barred because such a claim has been previously adjudicated. Response at 6. Of course, the grounds presented in this petition have never been adjudicated

[3] The State never addresses Kelley's alternative basis for jurisdiction, the All-Writs jurisdiction provided by the Florida Constitution, and that is an independent basis for the Court to entertain this petition, to aid the Court in its ultimate jurisdiction over the contemporaneously-filed appeal. See Petition at 9.

and Kelley raises ineffective assistance of counsel here simply as an alternative way to frame the issue presented (not the sole basis for the petition). See Petition at 33. And the bar the State relies upon is not absolute. See Ragan v. State, 643 So. 2d 1175, 1176 (Fla. 3d DCA 1994) (citing Christopher v. State, 489 So. 2d 22, 24 (Fla. 1986); see also Sanders v. State, 689 So. 2d 410, 412 (Fla. 5th DCA 1997) (stating that the "procedural bar [to successive claims of ineffective counsel] we have discussed above might give way if this court were to conclude, after re-reviewing these files, that appellant had been the victim of a manifest injustice").

The Affidavits In The Appendix Are Proper

The State avers that the two affidavits included in the Appendix are improper. The State is wrong. This is an original proceeding. Only this Court can correct the manifest injustice that occurred in the affirmance of the denial of the Rule 3.850 motion in 1990, and that opinion's application of the direct appeal opinion in 1986. There is nothing a trial court could do to rectify this particular manifest injustice. The State's objection that these affidavits have never been "subjected to adversarial testing," Response at 5, simply highlights the fact that no factual determination has ever been made that all

physical crime scene evidence was destroyed prior to Kelley's trial and, if it was, the circumstances of such destruction.[4]

These affidavits show that the State's sole basis for asserting that such destruction occurred is suspect at best. The State cannot have it both ways: it cannot say that this Court's earlier determinations (based not on a factual determination by a trial court but rather on affidavits from Kelley's attorneys now shown to be erroneous) should stand and yet object that these new affidavits are untested.

The Presumption Of Regularity Applies In These Circumstances

The State challenges the presumption of regularity relied upon by Kelley. It says that Kelley has offered no authority for the proposition that public officials had a duty between 1966 and 1984 to preserve physical crime scene evidence. The State's premise seems to be that there was no such requirement[5] and that public officials were free to destroy such physical evidence without court authorization, even when the murder remained unsolved. The State's own course of action in the Sweet case belies that premise.

[4] Kelley requested an evidentiary hearing on his accompanying Rule 3.851 motion and it was denied.

[5] We assume the State would not make this argument if it knew of express authority that Kelley's attorneys did not find, which clearly established the duty during that time period.

In the Sweet case, the State petitioned the Court for permission to destroy the limited amount of physical evidence that was introduced. Common sense dictates that court approval would not be sought for the small amount of Sweet evidence if the State believed it could simply destroy the larger amount of remaining physical evidence without a court's authorization.

In questioning the presumption of regularity, the State also makes the argument that the recent finding made in Kelley's Rule 3.853 DNA motion proceedings, see Kelley v. State, 974 So. 2d 1047 (Fla. 2007), that the other physical crime scene evidence did not still exist in 2006 implicates the presumption's validity. Simply put, the State argues that, if the presumption of regularity applies to establish that the evidence still existed in 1984, it should also apply to establish that the evidence existed in 2006. There is a difference, however, between presuming that public officers would not have destroyed evidence when a murder case was still open and later determining, for purposes of DNA testing over 20 years after a conviction has been secured and the murder case closed, that the evidence does not exist to test.

It bears note that the 2006 determination did not establish when the evidence was destroyed or the circumstances under which the evidence was destroyed. That determination has never been made by a trial court. Judge Bentley was not given an

opportunity to make that determination in 1984 because Pickard remained silent when it was obvious that the trial court and Kunstler were oblivious that other physical evidence (apart from the evidence in the Sweet trial) even existed and, according to the State now, had been destroyed.

The Other Physical Evidence Has Not Been Ruled To Be Immaterial

In a truly remarkable argument, the State says that "even if Kelley could establish that the other fruits of the police investigation still existed in 1984, this Court has already ruled this evidence to be immaterial, precluding any suggestion of manifest injustice." Response at 15. This argument is startling because this Court's ruling on prejudice in 1986 was expressly based on Judge Bentley's 1984 pre-trial ruling.

Without dispute, that ruling was limited to the evidence introduced at Sweet's trial. Indeed, there is not even a suggestion that Judge Bentley knew that other evidence was returned to specific individuals in Highlands County or that the other evidence was allegedly destroyed before Kelley's trial. The State does not even contend that Judge Bentley ruled on the other physical evidence.

Specifically, this Court wrote in 1986:

> In applying the second prong of the analysis, we find that the state has met its burden of establishing lack of prejudice to the appellant's case. Phrased alternatively, we find that appellant has failed to establish a

> sufficient degree of prejudice to justify a reversal of his conviction.
>
> In resolution of this necessarily speculative analysis, appellate courts have tended to defer to the findings of the trial court on the matter. The trial court below specifically found that the destruction of the particular evidence here in question did not prejudice appellant's case, or create an otherwise non-existent reasonable doubt. In light of the centrality of testimony rather than real evidence in the case, we cannot disagree. We therefore find the denial of appellant's motion to dismiss the indictment proper.

Kelley v. State, 486 So. 2d at 582. The opinion simply affirmed Judge Bentley's ruling that the destruction of the evidence introduced in the Sweet trial did not prejudice Kelley's case. That is all Judge Bentley ever decided on this matter. And even so, this Court was reluctant to affirm in 1986: "[I]f 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. By including this argument in its Response, the State reveals the lengths to which it will go to maintain Kelley's conviction, which was on the thinnest of reeds to start with.

CONCLUSION

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

Dated: September 2, 2008

Respectfully submitted,

CARLTON FIELDS, P.A.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Reply in Support of Petition for Writ of Habeas Corpus has been furnished by Federal Express to the following persons on this **Second** day of **September,** 2008.

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CERTIFICATE OF COMPLIANCE

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

_____
Joseph H. Lang, Jr.